THE SUPREME COURT

Clarke C.J.
McMenamin J.
Dunne J.
O'Malley J.
Irvine J.

BETWEEN

DUNNES STORES

PLAINTIFF/APPELLANT

AND

PAUL MCCANN, STEPHEN TENNANT AND POINT VILLAGE DEVELOPMENT LIMITED

DEFENDANTS/RESPONDENTS

Judgment of Ms. Justice Dunne delivered the 22nd day of January 2020

1. This case gives rise to an issue which has not previously been determined in this jurisdiction as to the relevant principles to be applied in circumstances where the parties to a contract agreed that in the event of a dispute the parties would refer the dispute to an independent expert for resolution. In essence, the case focuses on the extent to which an expert can decide questions of law or whether a court can be asked in advance to determine questions of law which may arise in the course of the resolution of the dispute.

2. A second issue arises in this case as to the order made by the Court of Appeal in this case. The proceedings commenced by Dunnes Stores were the subject of an application for a stay in the High Court. The stay was sought to prevent the plaintiff from taking any further step in the proceedings pending the determination by the independent architect of the dispute between the parties. The High Court in its judgment of the 2nd day of June 2016 and order of the 28th day of June 2016, refused the application for a stay. The Court of Appeal (Peart J., Hogan J. and Whelan J.) in a judgment delivered by Hogan J. on the 23rd day of July 2018 allowed the appeal of the defendants/respondents and went on to dismiss the proceedings as an abuse of process. This was somewhat unusual in that the application originally before the Court was simply for a stay and it is argued by the plaintiff/appellant (hereinafter referred to as Dunnes) that the question of a dismissal of the proceedings never arose before the Court of Appeal. Thus, in giving its determination in this case this Court considered it appropriate to grant leave to appeal as to the question of whether it was appropriate for the Court of Appeal to also dismiss the proceedings in the context of an appeal against a stay application.

Background

3. A contract was entered into on the 27th February, 2008 between Dunnes and the third named respondent, Point Village Development Limited (hereinafter referred to as Point Village) at North Wall Quay, Dublin 1. The overall development was intended to include retail, leisure and residential facilities and Dunnes was to be the anchor tenant in the retail centre of the development which was to be constructed together with an outdoor public area known as Point Square. Dunnes was to pay Point Village a sum of €46m in

return for the construction of the anchor unit in the retail centre. That sum was payable in stages in accordance with the terms of the original Development Agreement.

4. Unfortunately, the development of Point Village did not proceed as planned and as a result, a dispute arose between Dunnes and Point Village. The dispute resulted in litigation between the parties and that litigation was compromised with the result that certain terms of the original Development Agreement were amended by terms of settlement dated the 27th July, 2010 and also by supplemental terms of settlement dated the 1st November, 2010. As a result of that settlement the contract sum payable by Dunnes to Point Village was reduced from €46m to €31m which was to be paid into a nominated account. This agreement will, in the course of this judgment, be referred to as the Settlement Agreement. At the heart of the dispute between the parties now are the circumstances in which a sum of €3m was said to be due by Dunnes to the developer. This payment arose from the terms of Clause 11(d) of the Settlement Agreement which is in the following terms:

> "The sum of €3,000,000.00 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes of a certificate by PVDL's architect (or in the event of a dispute, the independent architect within the meaning of the Development Agreement) confirming that the Point Square has been completed in accordance with the Development Agreement."

5. It is not in dispute between the parties that on the 15th March, 2013 Point Village's architect, Scott Tallon Walker, produced a certificate pursuant to Clause 11(d) of the terms of settlement which certified that "the Point Square has been completed in accordance with the Development Agreement." The certificate was then sent to Dunnes, together with a letter from Point Village's solicitors dated the 19th March, 2013, demanding that the sum of €3m be released from the nominated account in accordance with the provisions of the Settlement Agreement.

6. Dunnes did not release the sum of €3m from the nominated account as requested. Dunnes' solicitors wrote to Point Village's solicitors by letter of the 28th March, 2013 stating that Dunnes refused to consent to the release of its monies because "no supporting documentation or verification whatsoever has been supplied to either our client or to Dunnes' representatives . . . to vouch the contents of the certificate or to provide evidence that Point Square has been completed . . ." Hogan J. in his judgment observed at paragraph 18 that there was no requirement in Clause 11(d) for the production of any such "documentation or verification". However, in the letter of the 28th March, 2013 it was noted that Clause 4.14 of the Development Agreement contained a covenant to *inter alia*, "...provide Dunnes' representative with such plans, information, papers and explanations so that Dunnes' representative may reasonably satisfy itself that the developer is complying fully with its obligations under [the Development Agreement] or which Dunnes representative may otherwise reasonably request".

7. As a result of correspondence between the parties a fresh certificate was issued on the 11th August, 2014 to the effect that Point Square had been completed in accordance with

the Development Agreement. This further certificate was sent to Dunnes on the 11th August, 2014 and on foot of that certificate, Point Village demanded the release of the sum of €3m. Further correspondence ensued between the parties without agreement being reached and, ultimately, given that it appeared from the fact that Dunnes had refused to release the sum of €3m from the nominated account, it was clear that they did not accept the validity of the further certificate and accordingly the solicitors for Point Village by reference to Clause 11(d) of the Settlement Agreement nominated two individuals to fulfil the role of independent architect to determine the dispute. Dunnes was given until the 19th September, 2014 to accept either of the nominees and it was pointed out that if there was further default in this regard, Point Village would write to the President of the Royal Institute of Architects of Ireland (RIAI) to appoint an independent architect in accordance with Clause 15.1 of the Development Agreement. Eventually, Mr. Anthony Reddy was nominated by the President of the RIAI "to determine whether the Point Square has been completed in accordance with the Development Agreement" and he wrote to the parties informing them of this fact by letter dated the 21st of October 2014.

8. In response to his letter advising of his appointment, both parties made formal submissions to Mr. Reddy. At the heart of the dispute was Clause 7.7.2 of the Development Agreement which provided that:

> "The design and specification for Point Square shall be to a first class standard appropriate to a prestigious shopping centre commensurate with the newly re-developed Eyre Square in Galway and Grand Canal Square Dublin and the Civic Plaza, Dundrum Town Centre."

9. The centre of the dispute between the parties was focused on whether or not the completed Point Square met the requirement that its design and specification was to a first class standard appropriate to a prestigious shopping centre. At this stage, it would be useful to set out the description of the key points of dispute between the parties as described in the judgment of the Court of Appeal commencing at paragraph 23:

> "In their first submission of the 28th October 2014, Dunnes disputed this contention and stated that:
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> > 'the certificate [under clause 11(d) of the Terms of Settlement] needs to be confirmation that *all* works have been completed so that the design and specification for Point Square is of a first class standard appropriate to a prestigious shopping centre…' [emphasis in the original].
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> 24. On 30th October 2014 Point Village reiterated its position by stating that the issue for adjudication was whether:
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> > 'Whether Point Square is complete in accordance with the terms of the Development Agreement must be adjudicated by reference to the descriptions and specifications set out in Schedule 1, Parts 2 & 3, and Clause

> 7.7.2 of the Development Agreement and the current physical condition of the Point Square.'

25. Dunnes also made clear in a letter dated the 4th November 2014 that it accepted that any determination as to whether clause 7.7.2 of the Development Agreement had been complied with was a matter to be decided by the independent architect as expert:

> 'You are to determine if Point Square has been completed in accordance with clause 7.7.2 of the Development Agreement because that is the contractual obligation.'

26. This letter was supported by a report dated the 31st October 2014 from DMOD Architects ("DMOD") which set out Dunnes' case to the independent architect that the Point Square had not been completed in accordance with the requirements of the Development Agreement. Under the heading 'introduction', DMOD summarised their position:

> 'The design and specification of Point Square shall be to first class standard appropriate to a prestigious shopping centre commensurate with the newly redeveloped Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza at Dundrum Town Centre. These provisions are set out clause 7.7.1 and 7.7.2 respectively of the Development Agreement. We have been instructed to prepare this report to express our opinion as to whether or not Point Square as constructed satisfies the contractual obligation of being to a first class standard appropriate to a prestigious shopping centre, and commensurate with the newly redeveloped Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza at Dundrum Town Centre. For the reasons set out below it is our opinion that Point Square, as currently laid out, bears no resemblance either in urban design terms or in the quality of overall specification to that which the developer was contractually obliged to provide pursuant to the provisions clause 7.7.1 and 7.7.2. '"

10. As observed in the judgment, it was hard to see that submission as being anything other than the view of Dunnes, as expressed to the independent architect, that he should not conclude that Point Square had been completed in accordance with the Development Agreement because it did not meet the standards provided for therein. The judgment continued at paragraph 28 as follows:

> "On the 5th November 2014, Scott Tallon Walker set out the case that Point Village had complied with all of the provisions of the Development Agreement and not just simply clause 7.7.2. So far as clause 7.7.2 was concerned, Scott Tallon Walker made the following submission as to how the independent architect should compare Point Square with the other developments mentioned in that provision:
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> > 'The intention of this clause was to determine the quality and type of materials to be used these being natural stone, good quality lighting and soft

landscaping, benches bollards and urban furniture. Notwithstanding that, these are four entirely different spaces with different design criteria. Attempting to compare the designs of these spaces with the design of Point Square is completely subjective and impossible to determine post fact.'"

11. The Court of Appeal then observed at paragraph 29 of the judgment:

> "It is this submission, however, which has triggered the present dispute because at that point Dunnes argued that the independent expert is not competent to rule upon this question. This point was encapsulated in the first affidavit of Tom Sheridan (the company secretary of Dunnes) of the 16th January 2015 where he stated that the Scott Tallon Walker submission sought 'to place an interpretation and/or construction on Clause 7.7.2 of the Development Agreement that fails to accord with the true and proper meaning of that provision as agreed between the parties to the Development Agreement'. At paragraph 32 of his affidavit, Mr. Sheridan characterised this aspect of the dispute between the parties as "a dispute as to the true construction and interpretation of Clause 7.7.2 of the Development Agreement."

12. Given the respective submissions being made at that stage to the proposed independent architect, it is not surprising that proceedings ensued with a plenary summons being issued on behalf of Dunnes on the 27th November, 2014. In that plenary summons, Dunnes sought *inter alia* a declaration that the area known as Point Square did not comply with the defendants' obligations under Clause 7.7.2 of the Development Agreement and a declaration that Clause 7.7.2 of the Development Agreement and the design and specification and requirements therein were to be "interpreted, applied and implemented in accordance with the factual matrix as of the date of execution of the Development Agreement". It was said that that should include all representations made by action, by conduct and orally and by reference to various plans appended to the Development Agreement and terms, sections, elevational drawings, perspective images and marketing material together with comparators set out in Clause 7.7.2 that illustrated the overall design, specification, quality and completion of the Point Square and the manner in which it was to ultimately present.

13. Within a relatively short period of time from the service of the proceedings, a Notice of Motion of the 12th December, 2014 was issued on behalf of the defendants seeking the stay referred to previously in the following terms:

> "Order pursuant to the inherent and/or equitable jurisdiction of this Honourable Court staying the plaintiff from taking any further step in the within proceedings pending the determination by the independent architect, Anthony Reddy, of the dispute between the parties concerning Clause 11(d) of the terms of settlement of 7 July 2010 entered into between the Plaintiff, the Third Named Defendant and Henry A. Crosbie."

14. Following the hearing of that application, Binchy J. delivered judgment refusing the application for a stay as previously mentioned.

The judgments of the High Court and the Court of Appeal

15. In the course of his judgment, Binchy J. in the High Court outlined some of the arguments to be found in the correspondence exchanged between the parties prior to the issue of these proceedings in paragraph 12 of his judgment as follows:

> "(i) The Point Square as constructed omits a number of features to which the developer agreed and which are necessary to ensure that the Point Square is completed to a design and standard appropriate to a prestigious shopping centre;
>
> (ii) That clause 7.7.2 of the Development Agreement is to be interpreted in accordance with the factual matrix pertaining at the time of the negotiations and execution of the Development Agreement. So, for example, its design should be consistent with the marketing material given by the developer to the plaintiff at that time, and this is not the case;
>
> (iii) That the construction of the Square is not of the same quality as the comparator squares referred to in the Development Agreement i.e. Eyre Square, Grand Canal Square and Dundrum Town Centre."

16. He went on to say at paragraph 13:

> "All of this is disputed by the Developer, through its architects, Messrs Scott Tallon Walker. They argue that at least some of the features that the plaintiff claims are contractual commitments, were not contractual commitments. They further argue that documents used in the iterative design process or in the original marketing of the development do not form part of the agreement between the plaintiff and the Developer. In relation to the comparator squares, they argue that the intention of the comparators was to determine the quality and type of materials to be used i.e. natural stone; good quality lighting; soft landscaping; benches; bollards; and urban furniture, but that is as far as the comparisons go because, in their submission, it is not otherwise possible to compare four completely different squares. The Developer's architects submitted to the Expert that the design of the Square, as delivered, is in principal the same design as indicated on the original Development Agreement drawings, with minor amendments required to meet the requirements of the planning authorities and the omission of the watch tower (and other parts of the original design)."

17. Binchy J. noted the differences of interpretation between the parties as to what was required by the Development Agreement and the Settlement Agreement. The solicitors for the plaintiff contended that there was a fundamental issue between the parties over the interpretation of the Development Agreement and that the expert was not entitled to rule on that question of interpretation. It was contended on behalf of Dunnes that "points of interpretation of this nature are points of legal interpretation and will require a judge to

determine how the contract is to be interpreted". The solicitors on behalf of the defendants took issue with this approach to the question of contractual interpretation and further correspondence ensued between the parties – leading to issue of the proceedings, as mentioned previously. In the meantime the expert engaged, who was aware of the issues between the parties following the issue of the proceedings, agreed to stay the expert determination process pending the outcome of the proceedings.

18. In the course of his judgment, Binchy J. set out a number of authorities cited to him by the parties in relation to the role of an expert. These included *Norwich Union Life Insurance Society v. P&O Property Holdings Ltd.* [1993] 1 E.G.L.R. 164 (hereinafter "*Norwich Union Life Insurance*") and *Nikko Hotels (UK) Ltd. v. MEPC Plc.* [1991] 2 E.G.L.R. 103 (hereinafter "*Nikko Hotels*"), *Mercury Communications Ltd. v. Director General of Telecommunications* [1996] 1 W.L.R. 48 (hereinafter "*Mercury Communications*") and *Barclays Bank Plc. v. Nylon Capital LLP* [2011] EWCA Civ 826 (hereinafter "*Barclays Bank*"), amongst others. Having reviewed the authorities, Binchy J. observed at paragraph 49 onwards:

"49. The English authorities referred to above make it clear that the starting point for consideration of an application such as this is to construe the mandate conferred upon the expert. That is only common sense; an expert can have no more jurisdiction than that which the parties agree to confer upon him, and his remit is defined by the agreement between the parties giving rise to his appointment. Clause 15.1 of the Development Agreement simply provides that where it is stated in the Development Agreement that a dispute or difference shall be determined by expert determination, than (*sic*) either party may refer the dispute for such determination and the decision of the expert shall be final and binding on the parties. However, there is no provision in the Development Agreement itself to refer any dispute regarding compliance with clause 7.7.2 of the Development Agreement to an expert. The provision relied upon and agreed by the parties as being the provision whereby the dispute between the parties as regards the completion of Point Square may be referred to an expert is clause 11(d) of the Settlement Agreement. That clause relates to the release of €3 million by the plaintiff to the defendants upon the issue of a certificate by the third named defendants' architects confirming that the Point Square has been completed in accordance with the Development Agreement. In the event of there being a dispute regarding the issue of that certificate, that dispute is the dispute to be referred to the expert, and so therefore it is clear that the mandate conferred in the expert is to determine whether or not the Point Square has been completed in accordance with the terms of the Development Agreement.

50. That is the extent of the expert's mandate as conferred by the agreements. He is given no guidance as to the factors that he might take into account in arriving at any determination of the issues referred to him and, importantly, the agreements do not confer upon him an express jurisdiction regarding the interpretation of any provision of the agreement as was the case in *Barclays*. This [is] not altogether

surprising; a dispute regarding whether or not a building or a development has been completed in accordance with an agreement is ordinarily decided by reference to the contract documents and this is a question of fact and not of law. In conducting the exercise, an arbitrator or expert must inevitably interpret the contract documentation and to hold that he cannot do so on the basis that interpretation of the contract documents is a matter of law might well defeat the purpose of the dispute resolution clause. Interpretation of the contract documentation in this 'trivial sense' (to adopt the phrase used by Lord Hoffmann in *Mercury Communications*, albeit in a different context) is inevitably part of the task assigned to the expert."

He went on say at paragraph 51 as follows:

> "However, when a dispute of any substance erupts as to what was agreed between the parties, the resolution of that dispute is a matter of law. In this case the dispute is complicated by the fact that there was no detailed design or specification for the Point Square in the Development Agreement. To be sure, there was a requirement that the square should be completed in accordance with planning permissions and 'requisite consents', and schedule 1, part II, and schedule 1 part III of the Development Agreement set out specifications for finishes to the Point Square. But clause 7.7.2 requires the design and specification of the square to be to a standard commensurate with three other named squares. If the parties were in agreement that the expert should determine whether or not that is so on the basis of those words alone then I have little doubt but that that question would be within the expert's mandate. That is a conceptual issue most appropriately dealt with by the expert, and not the court."

19. He noted that the parties were in disagreement as to the meaning of the obligations imposed by the clause. He came to the conclusion that there were significant disagreements between the parties as to how that clause should be interpreted and he was of the view that this was a very significant difference of interpretation of the agreement (see paragraph 52). He then stated at paragraph 53:

> "...I agree fully with the sentiments expressed by both Thomas LJ and Lord Neuberger M.R. in *Barclays* to the effect that it is highly unlikely that, in providing for the referral of a specific dispute for resolution by an appropriate expert, parties intend that issues of general interpretation of an agreement should also be determined by that expert, in the absence of any specific provision to this effect, even though the determination of such issues may have a substantial effect upon the rights and obligations of the parties. The interpretation of an agreement is a matter of pure law, and involves a consideration of what the parties meant by the terms in dispute, which is a separate exercise from deciding whether or not parties are in compliance with the agreement."

20. He therefore concluded that it was abundantly clear in this case that the parties did not intend the disagreement that had arisen, which he noted at paragraph 54 was

"substantive and not trivial or vexatious in nature", be resolved by the expert. For these reasons, he concluded that the application to stay the proceedings should be refused.

21. It is clear from the above account of the judgment of the High Court that Binchy J. gave careful consideration to the issues that arose on the application before the Court, namely to stay the proceedings, and further, gave consideration to a considerable volume of case law from elsewhere in circumstances where the point at issue had never previously come before the courts in this jurisdiction.

22. I have already referred to some passages from the judgment of the Court of Appeal in relation to the issues in dispute between the parties. Commenting on the use of experts to determine commercial disputes, Hogan J. at paragraph 2 of his judgment observed:

> "Another alternative is the system of determination by expert. As a leading British arbitrator, Professor John Uff Q.C., stated in a Foreword to Kendall's, *Expert Determination* (London, 1996):
>
>> 'Expert determination has existed in the shadows for well over two centuries, rubbing shoulders uneasily with the law of arbitration and certification. Like some forms of commodity arbitration it seems to owe its survival to the simple fact that it works and is found commercially useful – A and B agree to abide by the decision of C. The system is infinitely flexible, there need not be a dispute, no writing is necessary and any form of procedure can be adopted.'"

Hogan J. continued at paragraph 3 onwards:

> "3. Determination by expert can thus be regarded as a 'simple, informal, cost-effective, confidential and final form of dispute resolution': see Brown and Marriott, *ADR Principles and Practice* (London, 3rd ed.) at 141. The circumstances, moreover, by which such an adjudication by an expert can be challenged are very limited, so that in practice 'only fraud or excess of jurisdiction will cause the expert's decision to be set aside': see Brown and Marriott, *op. cit.*, at 144.
>
> 4. While adjudication by expert is quite common in the context of commercial adjudication in this jurisdiction – and, indeed, has been common for some time - what is, perhaps, surprising is that this would appear to be the first occasion in which the scope of this jurisdiction has been explored in any reserved judgment by any Irish appellate court. It is perhaps idle to consider why this is so, but it possibly reflects a traditional understanding as to the finality of the slightly rough and ready character of the adjudication by expert jurisdiction and the general futility of any legal challenge to the outcome of any such adjudication. That general understanding is, however, plainly not shared by the plaintiff to these proceedings, Dunnes Stores ("Dunnes"), as it has challenged the jurisdiction of the duly appointed expert independent architect in these proceedings even before that expert has proceeded to any adjudication in the matter."

23. The general observations in those passages in relation to the resolution of business disputes by reference to an expert cannot be argued with. Indeed, one might observe that resolution of what could be described as technical disputes by an expert is a valuable alternative to court proceedings. It is not the same as other methods of dispute resolution and it is useful in that regard to refer once more to Brown and Marriott at page 146 where they noted some of the differences between expert determination and arbitration as follows:

> "Expert determination is not subject to the rules and statutory regime of arbitration and the Arbitration Act is commonly excluded in terms.
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> Expert determination is not a judicial or quasi-judicial process, nor is it judicial in character, and may be conducted according to the expert's discretion.
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> The expert makes its final determination, and the right to challenge it is more limited than in arbitration; and there is no power, as in arbitration, to state a case to the court on a point of law.
>
> The principles of natural justice do not apply, as they do in arbitration.
>
> An arbitration award has an enforcement regime that is internationally recognised which does not apply in relation to expert determination."

24. It would now be helpful to consider in more detail the views of the Court of Appeal on the substantive issues raised in the appeal before that Court. It is interesting to note in that context what was said at paragraph 36 of the judgment:

> "Although in the form expressed to be an application for a stay, Point Village's application is in substance one which seeks to have the proceedings struck out pursuant to the inherent jurisdiction of the Court as disclosing no sustainable cause of action. I propose accordingly to treat this application on this basis."

Having said that the Court then proceeded to consider the nature of the contractual arrangements between the parties. This approach of the Court of Appeal will be considered further in the course of this judgment.

25. In considering the core issue in the case before the Court, namely, whether or not to stay the proceedings to allow the expert to adjudicate on the dispute between the parties in accordance with the provisions of Clause 15.1 of the Development Agreement, it was observed at paragraph 38 of the judgment, having referred to an observation of Lord Mustill in *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd.* [1993] A.C. 334, 352 to the effect that this was not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from access to the court as might be found in a standard printed form of contract, as follows:

> "Nothing of the kind arises here: this is rather a case where major commercial entities expressly agreed to independent adjudication by expert, conscious – it

must be assumed – of what I have already described as the rough and ready nature of that jurisdiction, designed as it is to achieve a speedy and final resolution of a complex and troubling dispute."

26. The Court of Appeal went on to note that there were circumstances in which a court might intervene, the most obvious of which would be if there was fraud in some way in part of the adjudication. It was accepted that it may be appropriate for a court to intervene in circumstances where the expert engaged in something approaching manifest error as to his or her jurisdiction in a significant and material fashion, thus bringing about a breach of the contractual arrangement between the parties. However, the Court observed, short of that it would be difficult to envisage circumstances where the Court could or should intervene.

27. The Court of Appeal in its judgment then went on to refer to a number of U.K. decisions, namely the *Norwich Union Life Insurance*, *Nikko Hotels* and finally *Premier Telecom Communications Group Limited v Webb* [2014] EWCA Civ. 994 (hereinafter "*Premier Telecom*"). The Court of Appeal found support from those judgments for the proposition set out in paragraph 40 onwards of the judgment as follows:

> "There is, in any event, clear U.K. authority for the proposition that where the parties have agreed to adjudication by expert, that expert is authorised, and is indeed obliged, to decide all issues which require to be decided in order to determine the dispute between the parties. This authority includes the right to consider questions of law and to interpret the meaning of contractual clauses."

The Court of Appeal went on to point out that the entire object of adjudication by expert is to achieve a speedy and final resolution of the dispute, even if the ultimate conclusions and the reasoning contained in the expert's adjudication is not always perfect or completely justified on the evidence. The Court then observed at paragraph 44:

> "44. ...But there are compelling policy reasons which warrant the courts respecting the choice of the parties to submit to adjudication by expert in commercial disputes of this nature. . . .
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> 45. The policy interest in endorsing the use of alternative dispute resolution clauses in order to provide litigants with a means of resolving their dispute which is cheaper and more efficient than ordinary litigation would naturally be undermined if a party to an alternative dispute resolution clause could at any time halt the alternative dispute procedure in question by initiating court proceedings in order to seek a judicial determination of any particular legal issue. The very facts of this case in their own way highlight the dangers inherent in the adoption of any other judicial approach."

28. The Court went on to conclude that the claim advanced by Dunnes was entirely without merit and rather than simply staying the proceedings, struck out the proceedings as an abuse of process.

Discussion and decision

29. In granting leave to appeal, this Court in its Determination in this case noted at paragraph 7 onwards that:

> "7. ...Parties frequently resort to expert determination as a means of resolving disputes. The extent to which it may be permissible to invoke the jurisdiction of the Court to resolve an issue of law which forms part of the determination which the expert is required to make has, therefore, the potential to arise regularly.
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> 8. While it may well be said that there is significant United Kingdom authority on the point, it remains the case that the common law in Ireland on this issue has not yet been determined. It is the view of this Court that this is not one of those cases where it can be said that it is sufficiently clear both that the common law in this jurisdiction is identical to the common law in the United Kingdom and that the common law in the United Kingdom is itself sufficiently clear so as to remove any doubt as to the appropriate principles to be applied."

30. Accordingly, at the heart of this case is the question of the extent to which an expert can decide questions of law or whether it is appropriate for a court to be asked in advance to determine questions of law which may arise in the course of a determination by an expert of a dispute which the parties agreed to refer to the expert for determination.

31. I propose to refer to some of the U.K. authorities relied on by the parties and the arguments based on those. At the outset, counsel for Dunnes took issue with a proposition relied on by Point Village to the effect that an expert has the exclusive right to decide all issues before him including questions of law based on the decision in *British Shipbuilders v VSEL Consortium plc* 1997 1 Lloyds Rep. 106. Counsel for Dunnes rely on another part of that judgment to support their position. That case set out a number of legal principles derived from a number of earlier authorities, where Lightman J. stated as follows at page 109:

> "Five principles govern the status of decisions of a person occupying the role of the expert:
>
> (1) Questions as to the role of the expert, the ambit of his remit (or jurisdiction) and the character of his remit (whether exclusive or concurrent with a like jurisdiction vested in the court) are to be determined as a matter of construction of the agreement.
>
> (2) If the agreement confers upon the expert the exclusive remit to determine a question, (subject to (3) and (4) below) the jurisdiction of the court to determine that question is excluded because (as a matter of substantive law) for the purposes of ascertaining the rights and duties of the parties under the agreement the determination of the expert alone is relevant and any determination by the court is irrelevant. It is irrelevant whether the court would have reached a different conclusion or whether the court considers

that the expert's decision is wrong, for the parties have in either event agreed to abide by the decision of the expert.

(3) If the expert in making his determination goes outside his remit e.g. by determining a different question from that remitted to him or in his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the court may intervene and set his decision aside. Such a determination by the expert as a matter of construction of the agreement is not a determination which the parties agreed should affect the rights and duties of the parties, and the court will say so.

(4) Likewise the court may set aside a decision of the expert where (as in this case) the agreement so provides if his determination discloses a manifest error.

(5) The court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the conditions which the expert must comply with in making his determination, but (as a rule of procedural convenience) will (save in exceptional circumstances) decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one parties considers that the expert got it wrong. To apply to the court in anticipation of his decision (and before it is clear that he has got it wrong) is likely to prove wasteful of time and costs – the saving of which may be presumed to have been the, or at least one of the, objectives of the parties in agreeing to the determination by the expert."

32. Lightman J. stated that he deduced those principles from the judgment of Lord Justice Hoffmann in the Court of Appeal and the speech of Lord Slynn in the House of Lords in *Mercury Communications* and the judgments of the Court of Appeal in *Jones v. Sherwood Computer Services Plc.* [1992] 1 W.L.R. 277 (hereinafter "*Jones*") and *Norwich Union Life Insurance.* He also made an observation which is interesting to the effect that a suggestion in Woodfall on *Landlord and Tenant*, Vol. 1, paragraph 8.030 that the House of Lords in *Mercury Communications* overruled the other two cases cited and that the court has jurisdiction to correct an error in the construction of an agreement by an expert in all cases, is wrong. (See p.110 of the judgment.)

33. *Mercury Communications* was a case which concerned the role of the Director General of Telecommunications under the Telecommunications Act 1984. The plaintiffs, Mercury and the second named defendant had been granted licences for the running of telecommunication systems. There was an agreement between the plaintiff and the second named defendant in relation to telephony interconnection. Provision existed for the possibility of varying the agreement between the parties and ultimately under the relevant legislation and agreements the amounts to be charged for connection and conveyance of calls was referred to the Director General of Telecommunications. He made a determination on the 2nd December, 1993. He also proposed a new clause to the agreement between the parties to give greater flexibility to himself and the parties to deal

with changes in the market and the regulatory regime. It was contended by the plaintiffs that the Director General had misinterpreted certain phrases in the second defendant's licence and ultimately proceedings were commenced against the defendants seeking a declaration that on the true construction of the licence the relevant costs and overheads were those for which they contended. The defendants applied for the summons to be struck out as being frivolous or vexatious or otherwise an abuse of the process of the court on the basis that the matters concerned could only be raised in the context of an application for judicial review together with a number of other grounds challenging the proceedings. Lord Slynn of Hadley delivered the judgment in the House of Lords with which the other members agreed and expressed the view that the plaintiff could only deal with the matter by way of an application for judicial review. He went on to say at page 58 of his speech as follows:

> "Reference was made to *Jones v. Sherwood Computer Services Plc*. [1992] 1 W.L.R. 277 where the Court of Appeal held that in a case where parties had agreed to be bound by the report of an expert the report could not be challenged in the courts unless it could be shown that the expert had departed from the instructions given to him in a material respect. In that case the experts had done exactly what they were asked to do.
>
> What has to be done in the present case under Condition 13, as incorporated in Clause 29 of the Agreement, depends upon the proper interpretation of the words 'fully allocated costs' which the defendants agree raises a question of construction and therefore of law, and 'relevant overheads' which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in Clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under Condition 13 of the BT licence and that the principles to be applied by him should be 'those set out in those conditions' they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear. His interpretation could therefore be reviewed by the Court. There is no provision expressly or impliedly that these matters were remitted exclusively to the Director, even though in order to carry out his task he must be obliged to interpret them in the first place for himself. Nor is there any provision excluding altogether the intervention of the court. On the contrary Clause 29.5 contemplates that the determination shall be implemented 'not being the subject of any appeal or proceedings'. In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the Court's jurisdiction by the agreement of the parties."

Lord Slynn of Hadley continued at page 59 to say as follows:

> "The present case, however, in my view does not raise questions which are academic or hypothetical or wholly in the future in the sense that they may or may not arise. The Director in the 1993 Determination has given his interpretation and he has made it clear in the present proceedings that he adheres to that. It is unreal to proceed on the assumption that he will or may change his mind. Longmore J. was right to regard the case as exceptional in this respect. Moreover B.T. and Mercury are required to discuss and to negotiate the various issues between them. It is no less unreal to expect B.T. to abandon its support for the interpretation adopted by the Director. The meaning of the phrases in dispute is a key part of the negotiations and of the Director's decision. It makes a good deal of sense, in view of the existing Determination and of the future steps which have to be taken by all three parties, that these matters should be raised and decided at this stage. I do not consider that Mercury is in any way barred from so raising them by the fact that it did not seek by judicial review to set aside the 1993 determination or that it was willing on this occasion to adopt the figures arrived at whilst seeking to clarify the position for future negotiation and determination. So to act cannot in any way be regarded as creating an estoppel against it."

Finally he concluded as follows:

> "In my view Longmore J. came to the correct conclusion. In any event I agree with Hoffmann L. J. that when it comes to a question of striking out for abuse of the process of the Court the discretion exercised by the trial judge should stand unless the arguments are clearly and strongly in favour of a different result to that to which he has come. That is not the present case."

In those circumstances the appeal was allowed.

34. Much emphasis was placed on the dissenting judgment of Hoffmann L.J. in that case in the Court of Appeal which, as has been noted, was agreed with by Lord Slynn of Hadley in the House of Lords. Dunnes placed considerable reliance on the judgment of Hoffmann L.J. to argue that the courts could intervene in an expert determination process if the expert is to act, or has acted, outside of his decision-making authority. Further it was argued that such intervention could occur prior to the expert determining the issue. It was nonetheless accepted that as a matter of "procedural convenience" the courts may not intervene in advance of the expert making his determination. In that context it is relevant to look at precisely what was said by Hoffmann L.J. Thus, at page 13 of his judgment he observed as follows:

> "This is a shorthand for saying that when parties have agreed to appoint someone to determine a question in dispute, they should not pre-empt his decision by asking the Court to decide the matter in advance. It is however important to notice that there are two separate principles involved. One is a matter of substantive law and the other a matter of procedural convenience. I can illustrate the difference in this way. The parties agree that a firm of accountants shall determine the value of a parcel of shares. They do not prescribe any particular principal evaluation, such as

allowing a discount for a minority interest. In such a case, the Court will not intervene to decide how the valuation should be done. Neither in advance of the valuation nor afterwards. The parties have agreed to accept the accountants' valuation and in the absence of fraud or collusion they are bound by whatever it is. The same is true of other decisions entrusted to experts. This is a rule of substantive law: *Jones v. Sherwood Computer Services Plc.* [1992] 2 All ER 170, [1992] 1 W.L.R. 277."

He went on to say:

> "One must be careful about what is meant by the decision-making authority. By decision-making authority I mean the power to make the wrong decision, in the sense of a decision different from that which the Court would have made. Where the decision maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to decide what they mean. It does not mean that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision maker has acted upon what in the Court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision maker the question of whether given facts fall within the specified criterion."

He then continued at page 13:

> "These are the principles upon which a court will decline as a matter of substantive law from intervening in a matter which the parties have agreed to submit to the decision of a third party. It does not follow, however, that because the Court will intervene to correct a decision maker who has gone outside his authority it will declare in advance what the limits of that authority are. The reason for this reluctance is not one of substantive law but procedural convenience. It is because in advance of the decision, the true meaning of the principles upon which he has to decide is usually a hypothetical question. It is hypothetical because it will only become a live issue if one of the parties thinks that the decision maker has got it wrong. It is always possible that he may get it right and therefore wasteful and premature to come to the Court until he has made his decision. The practice of the courts is not to decide hypothetical questions . . .

There is a further factor which plays a part in the Court's reluctance to make a pre-emptive ruling on the construction of the principles according to which the decision maker is required to decide. A party may be attempting to secure a ruling in advance because he fears that if the decision maker departs from what he considers to be the correct meaning of those principles, he may have evidential

> difficulties in proving that he has done so. The terms of the valuation or award may not provide enough material to enable the Court to say that the decision maker has gone outside his authority. But this is not usually a legitimate reason for seeking a pre-emptive ruling. The party has agreed to submit to a particular form of decision-making with whatever evidential difficulties that might entail."

35. It is evident from the submissions made herein that Dunnes have a fear that the expert in this case will not consider all of the material sought to be relied on by Dunnes in the course of the consideration of the dispute between the parties.

36. Counsel on behalf of Dunnes placed particular reliance on a further observation of Hoffmann L.J. in that case at page 14 of his judgment where it was stated:

> "I contrast *Norwich Union* with the present case, in which Mercury has agreed to a determination in which the principles to be applied shall be those set out in [Condition 13]. It has not entrusted to the Director the decision-making authority as to what those principles are, except in the trivial sense I have mentioned, namely that the Director will have to form a view about what they mean in order to make a determination. So Mr. Charles concedes that if the Director misconstrues those principles, the Court can set aside his award. There is a dispute as to whether all the matters on which the originating summons seeks a declaration raise questions of construction. Mr. Charles says that some involve questions of judgment within the remit of the Director and therefore excluded from judicial intervention by the rule of substantive law. But this is an application for summary striking out of the summary summons. Mr. Charles concedes that one issue at least (marginal costs against average costs) raises an arguable point of pure construction and it seems to me impossible to say at this stage that the other declarations plainly and obviously involve matters within the decision-making authority of the Director.
>
> In my judgment therefore we are concerned solely with the principle of procedural convenience. What are the factors relevant to whether or not it is just and convenient to entertain the application for declarations at this stage? First is the question hypothetical in the sense that it will arise only if the Director disagrees with Mercury's view on construction? Unusually in this case we know exactly what, in the absence of a Damascene conversion, the Director will decide. He has not only expressed his view in the 1993 Determination but adhered to that view in affidavits filed in opposition to the original summons. . . .
>
> Secondly, is this a case in which a party is seeking to escape from the consequences of having agreed to a particular form of decision-making? As it is conceded that the rule of substantive law does not apply, there is no question, as in *Norwich Union*, of asking the Court to decide a question which the parties have agreed to submit to the decision maker. The parties have not agreed to submit the construction of Condition 13 to the decision of the Director. Nor is there any question of trying to avoid the procedural consequences of having agreed to a

particular form of decision-making. Mercury does not want to have the questions of construction decided in advance because the decision-making process may create evidential obstacles to having them decided afterwards. It wants them decided in advance simply because it is commercially more sensible than going through a fruitless negotiation followed by a predictable determination before being able to demonstrate, if it is right, that the Director has made a determination according to principles other than those to which it is agreed. In my judgment, to strike out the originating summons on the ground that the parties agreed to a determination by the Director is, in the application of a principle of fairness and commercial convenience, to grasp at the shadow of *pacta sunt servanda* while allowing the substance to escape."

Finally, in considering the question of a judge's discretion Hoffmann L.J. quoted from Longmore J. giving his decision in the High Court in that case where Longmore J. said:

> "It goes without saying that in normal circumstances no court would give declaratory relief about the legality of a prospective decision before the decision maker has given it. That is very largely because any question of the decision maker being wrong is entirely hypothetical before the decision maker has published his decision. But the position may be different if the decision has already been made which is part of a wider determination and if that decision is unlikely to be reversed when the next occasion arises for a further determination to be made.
>
> It is a strong thing to say that once the decision maker makes the decision which will
>
> (1) Be the background against which the contracting parties have to negotiate their contract and which
> (2) will be likely to be the background against which any subsequent reference to the decision maker is made and which is likely to be maintained by the decision maker, the legality or otherwise of that decision for the future cannot be declared unless the applicant seeks to quash that decision."

Thus, Hoffmann L.J. concluded that the trial judge took the relevant matters into account in exercising his discretion and that he would have come to the same decision.

37. Quite clearly, the decision in that case is unusual in that there was what might be described as a pre-determination by the expert or perhaps, to put it more accurately, on a previous occasion, the Director had unambiguously indicated his view on construction of the clause by which he was to determine the dispute that had then arisen. Further, an important consideration in that case was the fact that it was not provided for expressly or by implication that the matters referred to the Director were excluded from the possible intervention of the Court. Accordingly, in that case, the view of the Court was that the issues were not ones which were removed from the Court's jurisdiction by the agreement of the parties. However, it does seem to be clear that the general rule is that the courts should not intervene in a matter in which the parties have agreed to submit a dispute to

an expert for determination in advance of the dispute resolution process provided for in the parties' contract and should only do so in the case of exceptional circumstances such as the circumstances that arose in that case.

38. In essence the argument made by Dunnes is that while the U.K. authorities tended to be to the effect that courts should not intervene in relation to an issue of interpretation or construction of a clause to be considered or applied by an expert in advance of the expert commencing and completing his determination, it is submitted that more recent authority from that jurisdiction is no longer so fixed in that view. Dunnes make the point that there is a dispute now between the parties as to the interpretation and construction of Clause 7.7.2 of the Development Agreement and it is said that that dispute needs to be resolved in the first instance before the independent architect can make his determination in accordance with the correct interpretation of that clause. It is contended that the independent architect is not authorised under the agreement between the parties to carry out an interpretation of Clause 7.7.2.

39. To support their argument further, reference was made by Dunnes to the decision of the Court of Appeal in the United Kingdom in the case of *Barclays Bank*. The defendant in that case was a limited liability partnership and was the investment manager of two hedge funds. The claimant bank was a partner in the defendant partnership. Under the agreement between the parties there was provision for the allocation of profits among the members. There was an expert determination clause in respect of issues regarding the amount of any profit or loss allocation due to a member or any payment due to an ongoing member under one of the clauses of the agreement and it was provided that "(a)ny affected party may refer the matter or matters in dispute to a partner in an independent firm of internationally recognised chartered accountants agreed upon them." Clearly the expert determination clause in that case was broad in that it was envisaged that any dispute that might arise could be referred to the independent expert. A dispute having arisen between the parties, Barclays brought proceedings seeking declaratory relief as to its obligations to pay profits on capital investments in the hedge funds. The defendant brought an application to stay the proceedings on the basis that the expert determination clause applied to the dispute. The case was made on behalf of the defendant in that case that the Court should not intervene in the determination of the jurisdiction of the expert. It was also argued in the course of that case by the defendant that a generous construction should be given to the expert's jurisdiction, since in that respect the expert determination clause should be treated no differently to an arbitration clause, where it was established that the construction of the clause should start on the assumption that the parties were likely to have intended that any dispute arising out of their relationship should be decided by the same tribunal. It was further argued that the expert was entitled not only to determine the meaning of the agreement, the terms of which were in dispute as between the parties, but also whether he had jurisdiction to determine that issue. The Court in that case dismissed the appeal of the defendant from the decision of the Court below. The principal judgment was given by Thomas L.J. and Lord Neuberger M.R. agreed with his judgment and delivered a further judgment dealing with two aspects of the matter.

40. In the course of his judgment, Thomas L. J. noted at paragraph 23:

> ". . . expert determination is a very different alternative form of dispute resolution to which neither the 1996 Act nor any other statutory codes apply. It is clear, however, that in any case where a dispute arises as to the jurisdiction of an expert, a court is the final decision maker as to whether the expert has jurisdiction, even if a clause purports to confer that jurisdiction on the expert in a manner that is final and binding."

He continued at paragraph 28 having discussed the contrast between expert determination and arbitration as follows:

> "In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of the *Fiona Trust* case does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. The LLP agreement illustrates this: the parties agreed by Clause 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under Clause 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute. Therefore, quite unlike the position under agreements with arbitration clauses (as exemplified by the *Fiona Trust* case), the parties have chosen two alternatives forms of dispute resolution. There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in the *Fiona Trust* case is inapplicable. The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way."

Thomas L.J. proceeded then to consider a number of earlier decisions on the issue of expert determinations, namely *Jones*, *Nikko Hotels* and *Norwich Union Life Insurance*. He also referred to the consideration of those cases in the Mercury Communications decision to which reference has already been made. Having done so he observed at paragraph 35 as follows:

> "The decisions in *Nikko*, *Sherwood* and *Norwich Union* all involved mixed issues of fact and law. In the present case it is not necessary to decide whether, if an issue of the kind described is determined by the expert and is solely one of law, a wrong determination of law may have the consequence that the expert is not determining the issue in accordance with the mandate given to him. That is because Clause. 26.1 is a wide clause that allows issues of interpretation to be left to the expert and, more importantly and, as I shall explain, there is no issue yet within the jurisdiction of the expert. However I consider that the cases to which reference has

> been made do not decide that, where a pure issue of law of the type I have described arises in the course of a determination by an expert acting under the usual form of clause, a wrong determination by the expert of that issue cannot be challenged in the courts in circumstances where the interpretation adopted by the expert has the consequence that he is not determining the matter in accordance with the mandate given to him. That remains to be decided applying the approach set out in *Jones* case as elucidated by Hoffmann L.J. in the *Mercury Communications* case. Since preparing the draft, I have had the advantage of reading the observations of the Master of the Rolls at paras. 63 to 72 below. I see force in his observations but the issue needs detailed examination when it arises. I would prefer to express no concluded view."

41. In other words, it is clear from that case that there may be circumstances in which it is appropriate for a court to intervene in advance of the expert to determine the extent of the mandate of the expert, having regard to the terms of the agreement between the parties. In the course of his judgment to which reference has already been made, Lord Neuberger M.R. in considering the issue of the mandate of the expert made a number of observations on the judgments in *Jones* referred to previously and *Nikko Hotels*. As he said at paragraph 65 of his judgment:

> "Of course, it is very dangerous to generalise, as the extent of the expert's mandate in any case must depend on the words of the particular contractual provision and the documentary, factual and commercial matrix of that provision. Nonetheless, in the absence of any other direction or indication, it seems to me that a contractual provision which simply required an expert to value specified shares in a company may well not mean that his determination was immune from attack if it could be shown that, as a matter of law he had valued the shares on the wrong basis. . . . To value shares on the assumption that they could not be freely sold, when, as a matter of law, they could be, would not, it can be said with force, result in a valuation of the shares according to the contractual arrangement between the parties."

Clearly, Lord Neuberger M.R. was not in agreement with the views of Knox J. in *Nikko Hotels.* He noted that the parties could expressly or impliedly agree in their original contract or thereafter that:

> "(i)f the valuation exercise entrusted to an expert 'necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts', but I do not consider that this by any means necessarily represents the general rule. After all, if there is a dispute between the parties as to the number of shares owned by the party whose shares are to be valued, a mistaken conclusion on the point by the expert would, according to Dillon L.J., render the valuation assailable in court, whereas, according to Knox J.'s approach, the conclusion would appear to be unassailable as being one which 'necessarily' had to be decided in order to effect the valuation."

He went on to indicate that he was of the view that the correct position was the one identified by Hoffmann L.J. in *Mercury Communications* and noted that its authority derived much support from the fact that his view prevailed in the House of Lords.

42. He went on therefore to observe at paragraph 69 to 70 as follows:

> "69. Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann L.J. said in the *Mercury Communications* case [1994] CLC 1125 at 1140, 'The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority', and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.
>
> 70. I appreciate that in cases of this sort, the advantage of leaving all points of law to the final determination of the expert is that it results in a relatively quick and cheap process for the parties. However, it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations. It would, I suggest, be surprising if that were the effect of an expert determination agreement, when the Arbitration Act 1996 gives the right (albeit a limited and prescribed right) to the parties to refer points of law to the court. That Act applies where the parties have entered into an arbitration agreement, which gives them a much greater ability, in law and in practice, to make representations and to involve lawyers in connection with the arbitration, than parties enjoy in connection with the great majority of contractual expert determinations."

He concluded by saying at paragraph 71:

> "After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue. If they do not, they may also think it sensible to try and agree whether the expert's decision on the point will be treated as final and binding or whether the disappointed party should have the right to refer the issue to the court. If the latter, then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision and it may also assist the parties in arriving at a settlement."

43. It is contended therefore on behalf of Dunnes that the decision in *Barclays Bank* demonstrates some movement away from the more black and white approach to be seen in cases such as *Jones* and *Nikko Hotels*.

44. Relying on the authorities referred to above, counsel on behalf of Dunnes has submitted that the following principles can be extracted from that authorities, namely:

(1) Courts retain jurisdiction to review a decision of an expert as to his jurisdiction;

(2) A question concerning the scope or remit of the jurisdiction/authority of an expert, including the principles as derived from the contract upon which that determination must be made, is a question of law;

(3) The authority/jurisdiction of an expert to determine an issue is dependent upon the interpretation and construction of the contract/clause appointing him;

(4) The determination as to the authority/jurisdiction of an expert is solely a question of construction on the terms of the contract/clause appointing him and having regard to the matrix thereto. The courts do not imply terms into such a contract/clause that might expand the remit of an expert's jurisdiction/authority beyond that expressly agreed between the parties. There are no applicable presumptions;

(5) Expert determination clauses are not to be interpreted as broadly as arbitration clauses;

(6) The courts are reluctant to accept that parties to a commercial contract intended to agree to appoint an expert to determine a dispute absent any qualification/experience in respect of the subject matter of the dispute. Such reluctance is heightened when it is contended that the parties did so while intending not to have any recourse to the courts;

(7) A court will intervene in an expert determination process to decide a question concerning the authority/jurisdiction of the expert;

(8) A court will intervene and determine a question concerning the authority/jurisdiction of the expert prior to affording the expert the opportunity to consider that question where it is just and convenient to do so. "Exceptional" circumstances do not need to be established to justify such intervention;

(9) A court will only intervene prior to affording the expert the opportunity to consider the question provided there is a real, as opposed to hypothetical, dispute between the parties; and

(10) In considering whether it is just and convenient to intervene a court will have regard to the following:

(a) Any decision by an expert as to if his jurisdiction is not final. It is reviewable by a court. To avoid a possible waste of time and costs it is preferable for a court to determine the issue of an expert's jurisdiction upon the raising of the issue thereby enabling the expert process to continue thereafter on foot of a correct interpretation and construction of the applicable clause/contract appointing the expert;

(b) In circumstances where the jurisdiction of an expert, or the extent thereof, is dependent on the determination of a point of law, such as the interpretation and construction of a contract, then it is preferable that a court make such a determination prior to the expert engaging in the process before him any further.

45. Accordingly, it is argued on behalf of Dunnes that an issue has been raised as to the authority/jurisdiction of the independent expert and the extent to which he is empowered to determine matters in dispute as between the parties. It is stated that the issue to be determined is "(w)hether the Point Square has been completed in accordance with the Development Agreement". It is contended on behalf of Dunnes that the situation that has arisen following the submissions of the report presented by DMOD on behalf of Dunnes and STW on behalf of the receivers has demonstrated that there is a dispute between the parties as to what had in fact been agreed and recorded in Clause 7.7.2 and that therefore before any determination can be made pursuant to Clause 11(d) of the terms of settlement it is necessary to determine the exact scope of Clause 7.7.2. It is said that that involves a question of interpretation and construction of the clause and that that is in turn a question of law. Accordingly, it is said that there is no basis upon which disputes as to matters of law fall within the authority/jurisdiction of the independent architect herein. Therefore, it is the contention on behalf of Dunnes that it would be just and convenient that the issue of interpretation of Clause 7.7.2 should be determined before the expert determination proceeds any further.

46. Point Village in its submissions has characterised the issues to be decided as follows:

(1) Where the parties to a contract have agreed to refer a dispute to an independent expert for a final and binding determination, does the expert have the authority to decide issues of law or contractual interpretation which are necessary for the resolution of the dispute?

(2) Is there, in this case, any dispute that can properly be characterised as an issue of law or contractual interpretation?

(3) If (1) there is a dispute of law or contractual interpretation and (2) that dispute falls outside the expert's authority, should the Court intervene to grant an advisory declaration about the meaning of a contractual clause before the expert has expressed any view on the issue?

(4) If the plaintiff is seeking to litigate in the courts an issue which is subject to an agreed dispute resolution mechanism, what relief should the Court grant? Should the Court stay, or alternatively strike out, the proceedings?

47. It is the view of Point Village that there is no dispute of law or contractual interpretation between the parties. There is an issue of professional judgment or fact about the weight that ought to be attached to certain factors and documents in determining the dispute between the parties as to whether or not Point Square has been completed to a "first class standard appropriate to a prestigious shopping centre commensurate with" the three named comparators. In any event it is contended that if there was an issue of contractual interpretation, the expert has the authority to decide it. It is the view of Point Village that these proceedings are premature in circumstances where no decision has been reached or no view has been expressed on the matter by the expert. For the situation to be dealt with by the Court at this stage would involve the Court intervening in advance to give an advisory declaration on a hypothetical question on the basis that Dunnes fears that there may be a possibility that the expert could operate outside his mandate. In the circumstances it is contended that the approach of the Court of Appeal was correct.

48. Counsel on behalf of Point Village emphasised the fact that in general, courts will stay or strike out proceedings which seek to litigate a dispute that is the subject of an expert determination clause. In that context they refer to the decision of the House of Lords in *Channel Tunnel Group v. Balfour Beatty Construction* [1993] AC 334, a decision which was referred to by the Court of Appeal in the course of its judgment. In the course of that judgment Lord Mustill at page 353 stated:

> "…I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go."

Reliance was also placed on a number of cases in which parties who have sought to attempt to litigate issues which were the subject of expert determination clauses, the courts in the United Kingdom have struck out part or all of the proceedings rather than granting a stay. See in that context *Jones.* Thus, it was contended that where there is such a provision in a contract between parties, there are strong policy reasons for the courts not to get involved in resolving a dispute which is the subject of an expert determination clause. I have no difficulty with that proposition as a general principle. Clearly, when two parties enter into a contract such as the one at issue in this case, in general, there is no reason why the parties should not be left to resolve their disputes in accordance with the manner in which they have agreed to do so. It will not be appropriate as a general proposition for the courts to intervene. There may be unusual situations or circumstances in which an intervention can arise as has been canvassed in some of the authorities previously referred to.

49. The point was then made on behalf of Point Village that an expert determination is binding on the parties. The courts will only set aside an expert determination on the grounds of (a) bad faith, or (b) where the expert has failed to do what he was required to do. In that context, reliance was placed on the decision of the English Court of Appeal in the case of *Jones* to which reference has previously been made. In that case it was held that an expert determination could not be challenged on the ground of mistake, unless the expert had "departed from his instructions in a material respect" or in other words, the expert had "not done what he was appointed to do". That particular view was approved in the High Court in this jurisdiction by Clarke J., as he then was, in *O'Mahony v. Patrick O'Connor Builders* [2005] 3 I.R. 167 in which it was stated as follows at paragraph 10.2:

> "There is no doubt that there is ample authority for the proposition that where parties agree to be bound by the report of an expert, such report cannot be challenged in the courts on the ground that mistakes have been made in its preparation unless it can be shown that the expert had departed from the instructions given to him in a material respect or had in some way acted in bad faith, see *Jones and Others v. Sherwood Computer Services plc* (1992) 1 WLR 277."

50. There is nothing particularly controversial about the proposition contended for on behalf of Point Village. Clearly, parties who enter into a contract providing for resolution of disputes by expert determination intend that such determination should be binding. That, of course, does not mean that the courts cannot and will not intervene in an appropriate case. In any event, it has to be said that whether or not a court would intervene in any expert determination given in this case simply does not fall to be considered at this point in time. Any such intervention would appear to be premature. As is clear from the authorities, the courts will not intervene unless there is an appropriate basis for doing so. To a large extent, the Court in this case is being asked to deal with a hypothetical situation given that the independent architect has not given any indication of his approach and there is nothing to suggest that he will venture outside the terms of his mandate.

51. The next point raised on behalf of Point Village was to the effect that where a dispute is referred to an expert, the expert is required to determine the meaning of any contractual term necessary for the determination of the dispute. In making this submission, reliance was placed on a number of decisions including *Jones*, *Nikko Hotels*, *Norwich Union Life Insurance*, *Mercury Communications Barclays Bank*. It may be useful to refer to a passage relied on by Point Village in relation to the extent of the Court's oversight in respect of expert determinations. In *Norwich Union Life Insurance*, the dispute involved was between a lender and a developer about whether the "completion date" had occurred within the meaning of a loan agreement. "Completion date" was defined as "the date . . . on which the development has been completed in accordance with the design documents". It was provided in the contract between the parties that an independent expert was to be appointed to determine a dispute concerning the completion date. It was argued by the lender that the word "completed" was meant to mean that all snagging items must be completed. They also argued that certain documents did not constitute

design documents within the meaning of the contract. In the High Court, it was stated at p. 166 that:

> "Parties to a contract such as this enter into a clause such as Clause 6(9) with the object of obtaining a speedy and conclusive determination on the matter in dispute by the Tribunal they have chosen. They are not readily to be taken to have intended that any necessary prerequisite to that determination, which raises a question of law, is to be outside the matter so remitted. On the contrary, they are unlikely to have intended that fine and nice distinctions were to be drawn between factual matters which fall within the expert's remit and questions of law or questions of mixed law and fact which do not."

The Court continued:

> "In order to decide whether the development has been completed in accordance with the design drawings, inevitably and obviously the nominated arbiter will have to identify what are the design drawings. He will also have to consider whether the works have reached the standard which the word 'completed' would reasonably be understood as bearing in the context of the definition in this agreement. The parties must have intended that the nominated arbiter should determine these matters as well as looking at the physical state of the works."

It was concluded therefore:

> "Far from this being unlikely, it seems to me that identifying what are the design drawings in accordance with which the development was to be completed was typical of the questions the nominated arbiter would be expected to answer if a dispute arose on whether a particular document was or was not a design document. Answering this question may give rise to issues of fact or mixed fact and law, but architects and surveyors not infrequently are faced with such issues in the course of references of this nature. Likewise as to the meaning of the word 'completed'."

The decision of the High Court in that case was then appealed to the Court of Appeal and in its judgment at page 168, Dillon L.J. stated:

> "In my judgment, those questions are entirely within the remit of the nominated arbiter since they are matters which he must necessarily decide as he proceeds to amass and marshal the design documents for the purposes of determining whether the development has been completed in accordance with the design documents."

Accordingly, the Court of Appeal agreed with the decision of the Vice Chancellor in the High Court in respect of the matter.

52. Finally, it was concluded in response to a decision of Hoffmann L.J. in *Royal Trust International Ltd. v. Nordbanken*, an unreported decision of October 13th, 1989 where it was stated by Hoffmann J. that it was not right "that the Court has no jurisdiction to make declarations in advance of an expert's determination except with the consent of the

parties". Thus, as Dillon L.J. observed, Hoffmann L.J. considered the Court had such a discretion to stay the proceedings if necessary pending the making of such declarations but Dillon L.J. disagreed with this approach and continued by saying:

> "But with all respect I do not agree. The function of the expert is to make the decision and that is not the function of the Court where the decision has been entrusted to the expert. It is otherwise if both parties agree – as they often do – to get a ruling from the Court to determine the basis on which an expert is to proceed, and if it is practical to assist the Court will do so. But here there is no such agreement."

53. It was pointed out that the decision in that case was cited with approval by Hoffmann L. J. in *Mercury Communications* and by the majority of the Court in the *Barclays Bank* case.

54. In considering the decision in *Mercury Communications*, counsel on behalf of Point Village emphasised that it did not lay down different principles to the cases of *Jones*, *Norwich Union Life Insurance* or any of the other cases referred to in this context. It was pointed out that Hoffmann L.J. cited those cases with approval. The other point made was that there was a clear distinction in that case between linguistic "ambiguity" and "conceptual imprecision". It was suggested that where the difficulty is ambiguity in the terms of the contract, that leaves to the judgment of the decision-maker the question of whether the facts of the particular case fall within the specified criterion. (See pages 1139 to 1140 of the judgment of Hoffmann L.J. in *Mercury Communications*.) Relying on that, it was suggested that in cases where the expert's determination will turn on the meaning of a technical concept that is not well defined in the contract, it will fall to the expert and his decision will not be reviewed by a court. However, in *Mercury Communications* itself the contract contained detailed definitions and it was in that context that the expert was seen to depart from his mandate by failing to apply those definitions.

55. Acknowledging that Dunnes relied to a significant extent on the decision of the Court of Appeal in the *Barclays Bank* case, and stating that the ten principles identified by Dunnes as being applicable were derived in large part from that decision, it was said by Point Village that the reliance on that decision is misplaced given that the dispute in that case was principally as to whether or not the expert had any jurisdiction to consider the dispute at all. It was argued in that case that the contractual terms provided that a dispute could only be referred to the expert after there had been an "allocation" of profits. In circumstances where there had been no allocation, the precondition for a referral to the expert had not been met and therefore the expert had no jurisdiction. It was concluded in that case that what was ultimately the decision for the Court was to decide whether the preconditions for his jurisdiction had been met. However, in this case it is argued on behalf of Point Village that there is no question in the present circumstances that the expert has "jurisdiction" in the sense in which that phrase was used in *Barclays Bank*. A dispute has arisen between the parties. That dispute has been properly referred to the expert. It is also suggested that there is no pure issue of law in this case.

56. Further, it was pointed out that in the concurring judgment in that case, Neuberger M.R. went further than the majority in that case. He considered and queried whether an expert determination should be open to challenge on the basis of a mistake of law, thus calling into question whether *Nikko Hotels* was an authority that could safely be relied on (see p. 930 of his judgment) but as Point Village have pointed out, Thomas LJ, in his judgment at p. 925, having noted the observations of Neuberger M.R., said:

> "I see force in his observations but the issue needs detailed examination when it arises. I would prefer to express no concluded view."

One would have to agree with counsel for Point Village that the decision in *Barclays Bank* does not go so far as to endorse the views of Neuberger M.R. as to the correctness of Knox J.'s observations in *Nikko Hotels*. The point is made on behalf of Point Village, that contrary to the suggestion made by Dunnes, the decisions in *Jones* and *Norwich Union Life Insurance* continued to be relied on in the United Kingdom. Thus, in the case of *Premier Telecoms*, the Court of Appeal rejected an argument to the effect that the court should decide all questions of law on a valuation.

57. Moore-Bick L.J. at paragraph 12 of his judgement in that case said:

> "Questions of law pervade many of the issues that are likely to arise on a valuation of this kind and it is inherently unlikely that the parties intended that on none of them should the valuer's view be binding. Parties who refer a matter to an expert for decision usually do so in order to obtain a quick and relatively inexpensive decision of a binding nature on a matter that calls for informed judgement. Often that involves the application of principles and expressions that are familiar and well understood in the particular field of endeavour, whatever that may be. In such cases it would be surprising if they had intended the expert's decision to be of no effect if it could be shown that he had made a mistake in the application of some well recognised principle. Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert."

58. Arising from that decision, Point Village contends that the principles found in English case law and set out in paragraph 8 of the judgement in *Premier Telecoms* which were identified by the trial judge in paragraph 40 of his judgement, were a correct summary of the relevant principles and should be followed in this jurisdiction. They are as follows:

"40. Drawing the threads of the cases together, it seems to me that they support the following principles:

(1) Where the parties have chosen to resolve an issue by the determination of an expert rather than by litigation or arbitration, the expert's determination is final and binding unless it can be shown that he acted outside his remit.

(2) A distinction must be drawn between the expert who has misunderstood or misapplied his mandate with the consequence that he has not embarked on the exercise which the parties agreed he should undertake, and the expert who has embarked on the right exercise but has made errors in concluding that exercise and has come up with what is arguably the wrong answer.

(3) A failure of the first kind means that the determination is not binding because it is not a determination of the kind that the parties have contractually agreed should be binding.

(4) A failure of the second kind does not invalidate the determination, but may leave the expert exposed to a claim in negligence.

(5) In deciding whether an expert determination can be challenged, the first step is to construe his mandate. This is ultimately a matter for the court.

(6) The second step is to ascertain whether the expert adhered to his mandate and embarked on the exercise he was engaged to conduct by asking himself the right question(s) and applying the correct principles.

(7) Once it is shown that the expert departed from his instructions in a material respect, the court is not concerned with the effect of that departure on the result. The determination is not binding.

(8) Where the expert has made an error on a point of law which is not delegated to him, the error means that the determination will be set aside. (It has yet to be decided whether an error by the expert on any point of law arising in the course of implementing his instructions will also justify setting aside the determination – see Lord Neuberger M.R. in *Barclays Bank v Nylon Capital*).

(9) Where a procedure has been laid down (e.g. to produce a draft memorandum) the expert must follow it. However, what the procedure requires the expert to do is an aspect of the mandate, and ultimately a matter for the court."

59. Moore-Bick L. J. observed at para. 9:

> "Mr Harrison for the appellants did not quarrel with the judge's formulation of the applicable principles and I am content to accept them as a helpful summary. My only reservation concerns the suggestion that an error by the expert on *any* point of law arising in the course of implementing his instructions might justify setting aside the determination. The judge treated this as an open question on the basis of certain comments made by Lord Neuberger M.R. in *Barclays Bank v Nylon Capital.* It is necessary to remember, however, that those comments were obiter and that neither of the other members of the court expressed agreement with them. It is possible that the parties might by their agreement define the terms of the expert's mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases to do so would risk undermining the whole purpose of the reference. Ultimately, however, as Lord Denning observed in *Campbell v Edwards* 1976 1 WLR 403, 407, (and as Lord Neuberger M.R. himself was at pains to emphasise in *Barclays Bank v Nylon Capital*), it all comes down to the construction of the contract under which the expert was appointed to act. Only by

construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties."

60. The summary of principles set out in that case is helpful and as a general proposition, I see no reason why those principles should not find favour in this jurisdiction in assisting the courts here in considering the approach to expert determinations. However, while those principles are of some assistance, they should not be elevated into a rigid set of principles to be slavishly applied in every case. It is important to emphasise that in every case, it will be necessary to construe the precise terms of the contract to see what the parties actually agreed between them as to the role of the expert. Thus, one needs to consider precisely what disputes were intended to be referred to the expert, whether the dispute that has arisen is one that is intended to be resolved by expert determination and whether there is any other relevant term in the contract as to how the expert is to reach his determination. It is important to bear in mind that if the expert goes outside the terms of his mandate, his decision will be invalid.

61. The final point made on behalf of Point Village was that the application in this case by Dunnes was premature and that, as a general rule, courts will not intervene to give observations in advance of a determination on the role of an expert in a particular case. Thus, it is argued that this court should not intervene at this point in time and should allow Mr Reddy to proceed with his determination. It is acknowledged that in some cases the courts in the United Kingdom have intervened in advance such as in the case of *Mercury Communications* referred to above. The point is made however that in that case it was clear that the expert had previously expressed a view as to the meaning of the relevant provisions in the contract and as such given that it was argued that his views were incorrect previously it was appropriate, in circumstances where the expert's view of the disputed provisions was already known, to give a decision on the interpretation of the disputed provisions in advance of the determination. Thus, it is accepted that in appropriate cases it may be appropriate for a court to intervene in advance of the expert determination. However, Point Village contends that this is not such a case.

Decision

62. Bearing in mind the principles derived from the authorities referred to above, I propose to consider the relevant provisions of the Development Agreement and the Settlement Agreement. Although these have been referred to previously, it would be helpful to set them out again.

Clause 1.32 defines "expert determination" as "(t)he reference of any dispute under this agreement in accordance with Clause 15".

Clause 7.2 provides as follows:

"The developer shall permit Dunnes and any person authorised by Dunnes to inspect the building works with the developer's architect and afford to Dunnes the

opportunity of making representations to the developer's architect regarding the proposed issue of the access certificate and/or the certificate of practical completion of the remaining building works and the developer shall procure that the developer's architect takes reasonable and proper account of such representations provided always that if any dispute shall arise in relation to the access certificate or the certificate of practical completion of the remaining building works, then Dunnes shall be entitled to refer the matter to the independent architect for expert determination."

Clause 7.7 goes on to provide as follows:

"For the avoidance of doubt, the developer shall procure that:

7.7.1 Point Square (with the exception of those parts of Point Square which may be securely hoarded off to facilitate ongoing construction work to the Watchtower Building/U2 Experience Building approximately along the hoarding lines shown on the minimum works plans) has been completed and open to the public by the date of centre opening;

7.7.2 The design and specification for Point Square shall be to a first class standard appropriate to a prestigious shopping centre commensurate with the newly re-developed Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza at Dublin Town Centre."

Clause 11(d) of the Settlement Agreement provides:

"The sum of €3 million (plus accrued interest to date) shall be released within 5 Working Days of receipt by Dunnes of a certificate by PVDL's Architect (or in the event of a dispute, the Independent Architect within the meaning of the Development Agreement) confirming that the Point Square has been completed in accordance with the Development Agreement."

It would also be helpful to refer briefly to Clause 15. It provides as follows:

"15.1 Where in this agreement it is stated that a dispute or difference shall be determined by expert determination to either the independent architect or independent surveyor in accordance with this Clause 15 then, either party may forthwith give notice in writing to the other of such dispute or difference and the same shall thereupon be referred to such person agreed upon between the parties or failing such agreement within five working days after either party has given to the other a written request to concur in the appointment to a person to be appointed in the case of the independent architect, by the President of the Royal Institute of the Architects of Ireland, and in the case of the independent surveyor by the President or other Chief Acting Officer for the time being of the Society of Chartered Surveyors in Ireland which appointee, in both cases, shall act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties hereto.

15.2 The expert shall allow both parties to make representations in writing and shall consider such but shall not be limited or fettered by them in any way and shall be entitled to rely on his own judgment and opinion. . . ."

63. There are a number of observations to be made in relation to Clause 15.1. First of all it is clear that the independent architect is meant to act as an expert and not as an arbitrator. Secondly, it should be noted that the decision of the independent architect "shall be final and binding on the parties hereto." The fact that a decision of an independent expert is stated to be final and binding on the parties to the agreement does not mean that the matter is forever precluded from being considered by a court. Clearly, it goes without saying, bearing in mind the case law reviewed above, that an expert who goes outside his remit does not make a decision which is binding on the parties. However, it is also clear from the terms of Clause 15 that if the expert makes a determination which falls within the scope of his remit, then the parties have already agreed in their contract that his decision shall be final and binding on them.

64. It is also relevant to bear in mind the provisions of Clause 15.2 which make it clear that whilst the parties are entitled to make representations in writing to the expert, he is not "limited or fettered by them" and is entitled to come to his own judgment and opinion in relation to the dispute that arises. This is a relevant point to bear in mind when one recalls the fact that these proceedings commenced following the exchange of representations between the parties and in circumstances where a dispute had arisen between the parties as is apparent from their respective submissions on the interpretation of Clause 7.7.2 of the Development Agreement.

65. It is undeniably the case that a dispute has arisen between the parties as to the interpretation of Clause 7.7.2 and that it may be necessary in the course of the process of expert determination for the independent architect to consider the interpretation of that clause. But I find it difficult to go so far as Binchy J. in the High Court in his conclusion at paragraph 53 of the judgment to the effect that the interpretation of the agreement is a matter of pure law involving a consideration of what the parties meant by the terms in dispute and that this was a separate exercise from deciding whether or not the parties were in compliance with the agreement. Hogan J. in the Court of Appeal took a different view from Binchy J. and at paragraph 44 of his judgment, said:

> "But there are compelling policy reasons which warrant the courts respecting the choice of the parties to submit to adjudication by expert in commercial disputes of this nature. Accordingly, such respect means that the courts must – and will – accept a ruling from the duly nominated expert who is appointed with exclusive authority to determine a particular dispute. It also means a judicial acceptance that the expert should, in principle, at least, have full authority to determine all issues which require to be decided in order to determine the dispute, including questions of law and the interpretation of contractual terms."

66. I agree with those observations of Hogan J. It is quite clear from the terms of Clause 15.1 that the decision of the independent architect was to be final and binding on the

parties. It would be very difficult to envisage a situation how such a determination could be reached by the independent architect if he was not in a position to construe and interpret the terms of Clause 7.7.2. The parties agreed that a dispute in relation to whether or not the development had been completed in accordance with the terms of the contract was to be referred to an independent expert for resolution. This necessarily involves a consideration by the independent expert of what Clause 7.7.2 means. Insofar as that may amount to a question of law as to the proper construction of that clause, it seems to me that the parties had clearly agreed that it should be so determined by the independent architect. I cannot see any basis for construing the contract between the parties as excluding from the remit of the expert a consideration of what was meant by Clause 7.7.2. How could it have been envisaged that he could have carried out his function if he was not in a position to decide what was meant by that clause? It would not have made sense for the agreement to provide that a dispute should be referred to an independent architect for resolution whilst, at the same time, leaving open the need to go court to interpret the terms under which he was to resolve the dispute. I simply do not understand the agreement between the parties to have envisaged such a course. The parties agreed that this particular area of dispute should be referred to an independent architect. They agreed that whilst he could receive representations from the parties, he was not to be limited or fettered by them and that he was free to rely on his own judgment and opinion. Finally, it was agreed that his decision was to be final and binding on them. Therefore, in my view, there is no basis for interfering with the resolution of the dispute between the parties by the independent expert. In the circumstances it seems to me that the proper course is to permit the independent expert to carry out the function which the parties to these proceedings had given him.

67. I have already referred to paragraph 45 of the judgment of Hogan J. in this case and I would reiterate the point made by him there with which I agree, namely that there is a public policy interest in encouraging the use of alternative dispute resolution to provide potential litigants with a means of resolving their dispute in a way which is cheaper and more efficient than litigation through the courts and that such policy considerations would be undermined if the process provided for by parties in an agreement could be halted by initiating court proceedings in order to seek a judicial determination of a legal dispute in the course of the expert determination process. I agree that such an approach would be entirely unsatisfactory and would, as he said, undermine the use of the alternative dispute resolution process provided for by the parties themselves.

68. The other point I wish to make at this stage is that it seems to me to be unsatisfactory that this application was made without waiting for the determination of the independent architect. Dunnes entered into an agreement with Point Village in relation to this development. They agreed a process for the resolution of their disputes. That process was initiated. It has now been in abeyance for a considerable period of time because of these proceedings. Rather than allow the expert to get on with his task, these proceedings have stymied the original intention and agreement between the parties as to the resolution of disputes. The proceedings were commenced at a time before the expert had an opportunity to consider and determine the matter having regard to the

submissions of the parties. There is nothing to indicate that the expert has in any way predetermined or prejudged any of the issues raised in the submissions. I am of the view that it was premature on the part of Dunnes to bring a challenge to the role of the expert in this case. He should have been allowed to get on with the task assigned to him by both of the parties. There is no reason to anticipate that the expert will not carry out his function in accordance with the terms of the agreement provided for by the parties and if the expert goes outside the remit provided to him within the agreement, a remedy lies in that regard.

69. The final issue I wish to deal with is the nature of the application before the Court and the observations in the judgment of the Court of Appeal in relation to these proceedings. As will be recalled, Point Village applied for an order staying these proceedings in circumstances where the issue in dispute was the subject of an alternative dispute resolution clause and the matter had in fact been referred to an independent architect for resolution of the dispute between the parties. I noted previously the observation contained at paragraph 36 of the judgment of the Court of Appeal to the effect that the application was in substance one which sought to have the proceedings struck out pursuant to the inherent jurisdiction of the Court as disclosing no sustainable cause of action. It is true to say that from time to time applications for a stay on proceedings will in fact have the effect of bringing proceedings to an end. That is so in this case. On the facts of this case, even if the order made was an order staying the proceedings, it is difficult to see any basis upon which the proceedings could be revived following the determination of the dispute between the parties by the expert. It is the case that the relief sought by Point Village was an order staying the proceedings rather than seeking an order on the basis that the proceedings should be struck out. In practical terms, it seems to me that the reliefs sought in these proceedings by Dunnes are such that there will be nothing in the proceedings left to be determined. I therefore can understand that the Court of Appeal considered it appropriate to make an order striking out the proceedings. However, what I find difficult to understand is the conclusion reached by the Court of Appeal to the effect that the proceedings should be struck out pursuant to the Court's inherent jurisdiction as an abuse of process. It is undoubtedly the case that the Court of Appeal took the view that the proceedings commenced by Dunnes were "entirely without merit". That view is in stark contrast with the view expressed by Binchy J. in the High Court when he said at paragraph 54 as follows:

> "It is in my view abundantly clear that the parties did not intend a disagreement of this kind [as to the interpretation of the agreement] - which it may be observed is substantive and not trivial or vexatious in nature - to be resolved by the expert."

70. The disagreement referred to by Binchy J. was the disagreement as to the interpretation of the agreement between the parties. As was noted in the determination of this Court in granting leave to appeal, the question of the extent to which an expert can decide questions of law or where a court could be asked in advance to determine questions of law which relate to a dispute which parties have agreed to refer for determination by an expert, is of general public importance. It is undoubtedly the case that there was a lack

of clarity as to the appropriate law in relation to expert determinations in this jurisdiction. For that reason, I find it difficult to accept that the proposition that these proceedings were "entirely without merit".

71. In the circumstances of this case, I accept that, given the nature of the relief sought by Dunnes in these proceedings and the fact that once a determination has been made by the independent architect, absent any exceptional circumstances which could give rise to setting aside the determination of the expert, no further purpose could be achieved by keeping these proceedings in being. To that extent, it may be appropriate to consider making an order striking out the proceedings even though no such application was made by Point Village. It is a question on which it would be appropriate to hear the parties.

72. The arguments made in this case centre on the role of an expert and the extent to which mixed questions of fact and law can be determined by the expert in the course of carrying out his function under the terms of a contract. This is not an issue which fell to be decided in this jurisdiction previously. Accordingly, on the facts of this case, I would disagree with the view that the proceedings amounted to an abuse of process or that they were entirely without merit. I cannot accept the conclusion that it was appropriate to strike out the proceedings as an abuse of process.

Conclusion

73. This is a case in which the parties agreed to resolve the dispute at issue by means of an independent determination by an expert. The independent architect has been appointed, and in accordance with the terms of the agreement, submissions have been furnished to him. He should be allowed to proceed with his function. The fact that he may be obliged in the course of carrying out his function to interpret the terms of Clause 7.7.2 does not preclude him from exercising his function. His function necessarily involves the resolution of mixed questions of law and facts. As a matter of practicality, it is difficult to see how he could actually decide whether or not the Point Village Square had been completed in an appropriate fashion by reference to the three comparator squares without interpreting what was meant by Clause 7.7.2. That clearly had to have been within the contemplation of the parties when the agreement was entered into by them.

74. The only other observation to make at this point is that the parties in this case agreed at an early stage that the expert should not complete his function having regard to the institution of these proceedings. In the circumstances of this case, it was premature to issue these proceedings and I would have thought it would have been preferable to allow the expert to complete his function before issuing any proceedings, if necessary. After all, the independent architect might agree with the submissions of Dunnes on the factors to be taken into account in reaching his decision.

75. Finally, I cannot see any basis for labelling the conduct of Dunnes in these proceedings as an abuse of process. It was never contended by Point Village that that was the case and I cannot see any evidential basis for coming to a conclusion that the issuing of these proceedings was an abuse of process.

76. In the circumstances of this case, I would dismiss the appeal.