

No. 2

O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice



Supreme Court record number .....140/18

[Title and record number as per the High Court proceedings]

Court of Appeal Record No. 2016/363

High Court Record No. 2014/10040P

Dunnes Stores v Paul McCann, Stephen Tennant and Point Village Development  
Limited

**Date of filing:** 25 September 2018

**Name of respondent:** Paul McCann, Stephen Tennant and Point Village Development Limited.

**Respondent's solicitors:** McCann FitzGerald Solicitors, Riverside One, Sir John Rogerson's Quay.

**Name of appellant:** Dunnes Stores.

**Appellant's solicitors:** DAC Beachcroft Dublin, Fleming Court, Fleming Place, Dublin 4.

### 1. Respondent's Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name: Paul McCann, Stephen Tennant and Point Village Development Limited.

The respondent was served with the application for leave to appeal and notice of appeal on date: 11 September 2018

The respondent intends:

to oppose the application for an extension of time to apply for leave to appeal .....

not to oppose the application for an extension of time to apply for leave to appeal .....

to oppose the application for leave to appeal X

not to oppose the application for leave to appeal .....

to ask the Supreme Court to dismiss the appeal .....

to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court .....

Other (*please specify*) .....

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal: X

Respondent's Representation:

Solicitor:

Name of firm:

Email:

Address:

Telephone:

DX:

Ref.:

How would you prefer us to communicate with you?

Document Exchange .....

E-mail .....

Post .....

Other (please specify) .....

Counsel

Name:

Email:

Address:

Telephone:

Document

Exchange no.:

Postcode:

Counsel

Name .....

Email .....

Address .....

Telephone no. ....

Document .....

Exchange no. ....

Postcode .....

If the Respondent is not legally represented please complete the following  
Current postal address .....

Telephone no. ....

e-mail address .....

How would you prefer us to communicate with you?

Document Exchange .....

E-mail .....

Post .....

Other (please specify) .....

**2. Respondent's reasons for opposing extension of time**

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

### 3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

- (a.) The Respondents do not accept the Appellant's description of the background to these proceedings as they are set out at section 4 of the Notice of Appeal. However, because in purporting to describe the background to the proceedings, the Appellant has referred to a number of extraneous factual matters which are not relevant to the application for leave to appeal or to the appeal itself, the Respondents do not intend to parse the Appellant's description of the background and to individually identify each particular part of the background as recounted by the Appellant with which the Respondents disagree. In truth, the only facts which are relevant to the Appellant's application for leave to appeal are those as stated below, all of which are undisputed or incapable of dispute.
- (b.) The contractual provision which the Respondents through the appointment of the Independent Expert seek to procure the Appellant to perform is Clause 11 (d) of the Terms of Settlement of the 27<sup>th</sup> July 2010 which provides *"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."*
- (c.) The contractual provision which describes the jurisdiction of the Independent Architect to determine disputes between the parties to the Development Agreement is clause 15.1 of the Development Agreement of the 27<sup>th</sup> February, 2008 which provides:

*"Where in this Agreement it is stated that a dispute or difference shall be determined by Expert Determination to either the Independent Architect or the Independent Surveyor in accordance with this Clause 15, then, either party may forthwith give a notice in writing to the other of such dispute or difference and the same shall thereupon be referred to such a 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 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 the Chartered Surveyors in Ireland, which appointee in both cases shall act as an expert and not as an arbitrator and his decision shall be final and binding on the parties hereto".*  
[emphasis added].

Thus, the jurisdiction of the Independent Architect, once appointed, is not circumscribed or limited in any way. Furthermore, the parties agreed that his decision, once it was given, would be *"final and binding on the parties..."*

- (d.) Following the Independent Architect's appointment, the parties were in agreement upon the issue which he was required to determine which was whether Point Square had been completed in accordance with the requirements of 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."*
- (e.) The parties' positions on this point were expressed in clear and unequivocal terms in written submissions which, following an invitation to this effect, they delivered to the Independent Architect. In their first submission of the 23<sup>rd</sup> October, 2014, the Respondents set out their position that Point Square had been completed in accordance with the Development Agreement and

argued that they had complied with the requirements of *inter alia* clause 7.7.2 of the Development Agreement. In their second submission, the Respondents' solicitors stated:

*"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",*

In its second submission of the 4<sup>th</sup> November, 2014, the Appellant made clear 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."*

- (f.) In making their submissions to the Independent Architect, the Appellant had no difficulty in describing what clause 7.7.2 meant and what its effect was. The Appellant's letter of the 4<sup>th</sup> November was supported by a report dated the 31<sup>st</sup> October, 2014 from DMOD Architects ("DMOD") which purported to set out Dunnes' case to the Independent Architect that the Point Square had not been completed in accordance with 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."*

Thus, the Appellant's clearly stated submission to the Independent Architect was that he ought not to conclude that the Point Square had been completed in accordance with the Development Agreement because it did not meet the standards provided for in clauses 7.7.1 and 7.7.2 of the Development Agreement. The Appellant had no difficulty in understanding the meaning of Clause 7.7.2.

- (g.) While the Appellant asserts in these proceedings that these proceedings are necessary because a dispute on a point of law has arisen which the court must rule upon before the Independent Architect embarks on his determination, neither the Appellant nor its solicitors has ever actually identified or described what that dispute is. The Appellant has never been able to state what point of law it is on which the parties disagree despite being called upon to do both in correspondence which preceded the commencement of the proceedings and during the proceedings itself. During the course of the hearing before the Court of Appeal, when pressed by the Court to describe the point of law about which the parties were in dispute, counsel for the Appellant referred to the Declaration which the Appellant had sought at paragraph (ii) of the General Indorsement of Claim on the Plenary Summons and stated that it was the Appellant's application for a declaration in the terms set out therein which was the legal dispute between the parties. However, at paragraph (ii) of the General Indorsement of Claim, the

Appellant seeks a "... Declaration that clause 7.7.2 of the Development Agreement and the design and specification and requirements therein are to be interpreted, applied and implemented in accordance with the factual matrix as of the date of execution of the Development Agreement ...". There is no dispute that the contract is to be interpreted in accordance with the factual matrix as it applied on the date of the contract. This is a legal truism and cannot conceivably be described as a dispute on a point of law between the parties.

- (h.) In light of those undisputed or indisputable facts, the Respondents contend that the court should not grant the Appellant leave to appeal the judgment of the Court of Appeal to this court because in truth, there is no legal basis for the Appellant's application given that the expert's jurisdiction has been validly engaged and the nature of the dispute to be determined by him clearly identified by the parties. While the Appellant correctly states that these proceedings are the first occasion on which the Irish courts have been called upon to consider the jurisdiction of an expert appointed to determine disputes between contracting parties, the point which the Appellant says arises for determination, i.e. whether an independent expert has the jurisdiction to determine a point of law or whether the court should intervene to determine that dispute before the expert has made his determination, is not actually a point which requires to be determined by this court. The overwhelming weight of authority in England and Wales is to the effect that independent experts do have the jurisdiction to determine points of law and the Court of Appeal has in this jurisdiction delivered a clear judgment applying that authority in Ireland. There is no disagreement regarding the nature of the dispute to be determined by the Independent Architect. In addition, the jurisdiction of the expert has been validly and legitimately engaged and in such circumstances there can be no dispute as to the scope of his jurisdiction, which includes the ability to determine all matters which need to be resolved in order to adjudicate the dispute which has been referred to him - including construing the contractual obligations arising under the Development Agreement in question (which was not carved out of his mandate by the parties). The Appellant should not be afforded the



opportunity to argue the issue again before this court and to further delay the Independent Expert from proceeding with his determination.

#### **4. Respondent's reasons for opposing leave to appeal**

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

*In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal) –*

\* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance

\* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

- (a.) The Respondent opposes the Appellant's application for leave to appeal the judgment of the Court of Appeal to the Supreme Court on the basis that: (i.) that decision does not involve a matter of general public importance; and (ii.) it is not otherwise in the interests of justice necessary that there be an appeal to the Supreme Court.
- (b.) The Appellant asserts at section 5, paragraph 1 of the Notice of Appeal that the decision in respect of which leave to appeal is sought involves a matter of general public importance because *"this is the first case of its type in Ireland to consider the scope and jurisdiction of expert determination clauses as a means of alternative dispute resolution, and the extent to which a court may intervene in that process."* It is undoubtedly true that no Irish court has ever previously been called upon to consider the question of the jurisdiction of independent experts and whether they are entitled to determine questions of law or whether the court may intervene in the expert determination process and resolve a point of law before the independent expert has delivered his determination. However, this is because the jurisdiction of independent experts is generally understood and there is no real dispute but that independent experts are entitled to determine all matters which need to be resolved in order to determine the issue which has been referred to them. An

observation to this effect was made by Hogan J. at paragraph 4 of the judgment of the Court of Appeal:

*"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."*

(c.)

- (i.) At section 5, paragraph 2 of the Notice of Appeal, the Appellant asserts that the Supreme Court should hear this intended appeal because the Court of Appeal was *"simply incorrect"* to state that there was *"clear UK authority"* to the effect that independent experts have the jurisdiction to determine points of law and the courts have no jurisdiction to intervene in the expert determination process and to determine points of law before the independent expert has reached his determination. In fact, the Court of Appeal was wholly correct in this statement and the Appellant has misrepresented the position by stating to this court that *"Both the Court of Appeal and House of Lords in England have revisited those decisions ..."*
- (ii.) There can be no doubt but that the overwhelming weight of authority in England is to the effect that independent experts have the jurisdiction to determine points of law, arising within the scope of his agreed mandate, and the courts have no jurisdiction to intervene in the expert determination process or to determine points of law before the independent expert has reached his determination. Examples of

judgments which have decided this point include the High Court decisions in *British Shipbuilders v VSEL Consortium plc*;<sup>1</sup> *Jones v Sherwood Computer Services plc*;<sup>2</sup> *Norwich Union Life Insurance Society v P&O Property Holdings Limited*;<sup>3</sup> *Nikko Hotels (UK) Limited v MEPC plc*;<sup>4</sup> *Vimercati v BV Trustco Ltd*;<sup>5</sup> *MP Kemp Ltd v Bullen Developments Ltd*;<sup>6</sup> and the decision of the English Court of Appeal in *Premier Telecom Communications Group Limited v Webb*.<sup>7</sup>

(iii.) The judgments in which the Appellant says that the foregoing authorities were re-visited have not actually changed the established legal position in any way. In *Mercury Communications Limited v Director General of Telecommunications*,<sup>8</sup> the House of Lords restrained an expert from proceeding because the expert set out the approach he proposed to adopt and in doing so, it was clear that he was straying beyond his mandate. Under an agreement for the provision of telecommunication services, the Director General of Communications was required to determine whether the telecommunication systems licence would be renewed in accordance with specific criteria set out in the body of that contract. Instead, the Director General stated that he intended to consider criteria other than those set out in the agreement and the House of Lords held that in this special circumstance, the court would intervene to restrain him from doing so. That case is clearly wholly different to this case where the Independent Architect has merely invited submissions from the parties and the dispute to be determined by the expert clearly falls within his mandate.

(iv.) The only other authority which the Appellant refers to is *Barclays Bank plc v Nylon Capital LLP*<sup>9</sup> which did not actually decide that independent experts do not have the jurisdiction to determine points of law. Instead,

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<sup>1</sup> [1997] 1 Lloyd's Rep. 106.

<sup>2</sup> [1992] 2 All E.R. 170.

<sup>3</sup> [1993] 1 EGLR 164.

<sup>4</sup> [1991] 2 EGLR 103.

<sup>5</sup> [2012] EWHC 1410 (Ch)

<sup>6</sup> [2014] EWHC 2009 (Ch)

<sup>7</sup> [2014] EWCA Civ. 994.

<sup>8</sup> [1996] 1 WLR 48.

<sup>9</sup> [2012] 1 All ER (Comm) 912.

the English Court of Appeal in that case held that the independent expert's right to even embark upon the determination process was subject to the occurrence of a particular condition precedent (under the relevant agreement, a particular accountant was required to make an express allocation of profits between the contracting parties before the issue could be considered by the independent expert) which had not yet occurred. The situation is very different in this case and it is not part of the Appellant's case that a precondition to the Independent Expert's appointment and/or the engagement of his mandate, has not occurred. Moreover, the Appellant's entire reliance on this case is based on one single comment from Lord Neuberger MR at paragraph 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." However, this comment was *obiter* and was not shared or agreed upon by either of the two other judges who heard the case. The extent to which the decision of the English Court of Appeal in *Barclays Bank plc v Nylon* did not alter the legal position is illustrated by the fact that *Vimercati v BV Trustco Ltd*<sup>10</sup> and *MP Kemp Ltd v Bullen Developments Ltd*<sup>11</sup> were decided after the decision in the *Barclays Bank* case and reiterated that Independent Experts do have the jurisdiction to determine points of law.

The Appellant criticises the judgment of the Court of Appeal in surprisingly trenchant terms for referring only to the decisions listed in paragraph c(ii) above and not referring to the decisions in *Mercury Communications Limited v Director General of Telecommunications*,<sup>12</sup> *Barclays Bank plc v Nylon Capital LLP*.<sup>13</sup> However the English authority on the point is, as the Court of Appeal described it, "*clear*." The decisions which

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<sup>10</sup> [2012] EWHC 1410 (Ch)

<sup>11</sup> [2014] EWHC 2009 (Ch)

<sup>12</sup> [1996] 1 WLR 48.

<sup>13</sup> [2012] 1 All ER (Comm) 912.

the Appellant refers to are not actually on-point and the fact that the Court of Appeal did not expressly refer to the decisions does not mean that this appeal raises a "*matter of general public importance*."

- (d.) At section 5, paragraph 3 of the Notice of Appeal, the Appellant states that it is necessary in the interests of justice that there be an appeal to the Supreme Court because the Court of Appeal struck out the proceedings as an abuse of process despite the fact that the Respondents did not seek a relief to this effect in their Notice of Motion. The Appellant claims that the Court of Appeal determined the appeal on issues not before it and that it should therefore have the right to appeal to the Supreme Court to overturn this injustice. There are three points to be made in response to this part of the Appellant's application.

Firstly, it is usual that when an appellant seeks leave to appeal to the Supreme Court on a particular point, that point when resolved should be capable of having an application to cases other than the particular case the subject of the appeal. The fact that the Appellant is dissatisfied that its own case was struck out as an abuse of process does not meet that threshold.

Secondly, it is beyond dispute that the courts have an inherent right to strike out proceedings which they consider to be an abuse of process irrespective of whether the moving party in the application has expressly sought an order to that effect. It is difficult to understand the Applicant's suggestion that it was not afforded fair procedures by the Court of Appeal, which is an extremely serious accusation to make of any court, when the Appellant was given the opportunity to set out its case in full both in writing and orally; the members of the Court repeatedly requested counsel for the Appellant to explain why it was that Dunnes had a legal basis to maintain these proceedings; and Counsel for the Appellant was given the opportunity to explain his client's position. The court was fully entitled to form the view that, having heard the Appellant's appeal and counsel for the Appellant's submissions, the case was an abuse of process.

Finally, it is difficult to understand why this proposed ground of appeal warrants determination by the Supreme Court. The Appellant's complaint is that its case was struck out without being given the opportunity to make full submissions on why it should not be struck out. Even if a court came to the view that the Court of Appeal ought to have invited submissions from the Appellant on whether the case should be struck out as an abuse of process as opposed to on some other ground, this would not have altered the practical outcome of the appeal as the case would have been stayed on the basis Dunnes had no right to ask the High Court to determine a point of law in circumstances where a case involving an expert determination clause before the Independent Expert could do so because the Independent Expert has full jurisdiction to determine all points of law arising in the matter.

#### **5. Respondent's reasons for opposing appeal if leave to appeal is granted**

Please list (as 1, 2, 3 etc. in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

As a preliminary observation, the Respondents note and object to the fact that the Appellant provides no detail for its Grounds of Appeal and does not explain in any way the basis of their case. For example, while the Appellant baldly states at various instances that the Court of Appeal "erred" in adopting a particular approach, it does not state why the approach that the Court of Appeal took was in error and what legal principle or rule it offended.

- (1.) The argument that the Court of Appeal erred in holding that "*a question concerning the scope or remit of the jurisdiction/ authority of an expert, including the principles derived from the contract upon which that determination must be made is a question of law*" is not understood as it is not clear from the judgment that the Court actually came to this conclusion. In any event, the Court was certainly correct to find, as it did at paragraph 40 of the judgment, that there is clear authority to the effect that independent experts have "*the right to consider questions of law and to interpret the meaning of contractual clauses.*"

- (2.) The Appellant's case before the High Court and the Court of Appeal was that a point of law had arisen which required to be determined before the Independent Architect could embark on his determination. The Court of Appeal was wholly correct to find that an independent expert once appointed has full jurisdiction to consider and determine all matters which need to be determined within his mandate, including points of law, in order to resolve the issue which have been referred to him for determination.
- (3.) The Court of Appeal did not at any point err "*in failing to appreciate properly, or at all, the nature of the dispute between the parties ...*" Having made its case on the basis that a point of law had arisen which required to be determined by the court because the Independent Architect was not competent to do so, the Court pressed counsel for the Appellant to describe the point of law about which the Appellant and the Respondents disagreed. Counsel for the Appellant failed to identify any such disputed point of law. The height of the Appellant's case was that clause 7.7.2 of the Development Agreement was to be interpreted in accordance with the factual matrix as of the date of execution of the Development Agreement. Yet there is no dispute between the parties on this issue. In addition, the dispute which the expert must determine (namely, whether the Point Square has been completed in accordance with the terms of the Development Agreement) necessarily involves construing the relevant provisions of the Development Agreement and the parties' respective obligations under it. If an expert was never in a position to construe the terms of a written contract on the basis that this is a legal exercise that only a court of law is competent to undertake, no expert could ever proceed with his mandate in circumstances where a written contract is central to the dispute before him. This is clearly an untenable position and the Court of Appeal was therefore wholly correct to conclude that an independent expert has the authority "*to consider questions of law and to interpret the meaning of contractual clauses.*" (paragraph 40 of the judgment of the Court of Appeal).
- (4.) This purported Ground of Appeal does not actually explain or describe any error allegedly made by the Court of Appeal and merely states that there was

an issue between the parties as to *"what materials properly inform the proper construction and interpretation of clause 7.7.2 of the Development Agreement ..."*. The Appellant has never identified any specific materials which it says the Independent Architect should consider and which the Respondents claim should not be considered. There is no doubt but that the Independent Architect should construe the meaning of clause 7.7.2 of the Development Agreement in accordance with the factual matrix as it stood on the date that the Development Agreement was executed. The weight to be attached to the particular aspects of the factual matrix when construing the clause was not a matter on which the Appellant asks the High Court to rule but is in any event a matter which can only be determined by the party to whom the determination of the dispute has been entrusted, i.e. the Independent Architect.

- (5.) The Court of Appeal was wholly correct to treat the application before it as *"in substance one seeking to strike out the proceedings as disclosing no sustainable cause of action."* To apply to *"stay"* is to apply to permanently prohibit the party issuing proceedings to progress them. The Respondents' express ground for their application to stay the proceedings was that there is no legal basis on which the Appellant could bring them because the court has no jurisdiction to intervene in the independent expert determination process in the manner suggested by the Appellant. At paragraph 4 of the Grounding Affidavit of Stephen Tennant it was averred:

*"The basis of the application is that in bringing the proceedings, the Plaintiff is blatantly attempting to circumvent the mandatory provisions of clause 11(d) of the Terms of Settlement which requires that disputes of the sort that has arisen between the parties be remitted to the determination of an Independent Architect within the meaning of the Development Agreement (as defined below), and consequently this Honourable Court does not have jurisdiction to deal with the dispute."*

- (6.) The Court of Appeal did not err in *"failing to appreciate properly, or at all, that the parties did not contract for an Independent Architect to determine legal disputes between the parties."* The parties agreed by clause 15 of the Development



Agreement that the decision of the Independent Architect would be "...*final and binding on the parties hereto*". The English authorities described at section 4, paragraph c(ii) above decided that the effect of such clauses was that the parties contracted that the independent expert would have authority to determine all matters that need to be determined in order to resolve the issue before the expert, including points of law. The Court of Appeal applied that authority and was correct to do so.

- (7.) The Court of Appeal was correct to find that there was "*clear UK authority for the proposition that where the parties have agreed to adjudication by an 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.*" (paragraph 40 of the Judgment.). As discussed at section 4, paragraph (c)(ii) above, the overwhelming weight of authority in England is to the effect that independent experts have the jurisdiction to determine points of law and the courts have no jurisdiction to intervene in the expert determination process and to determine points of law before the independent expert has reached his determination. Examples of judgments which have decided this point include the High Court decisions in *British Shipbuilders v VSEL Consortium plc*;<sup>14</sup> *Jones v Sherwood Computer Services plc*;<sup>15</sup> *Norwich Union Life Insurance Society v P&O Property Holdings Limited*;<sup>16</sup> *Nikko Hotels (UK) Limited v MEPC plc*;<sup>17</sup> *Vimercati v BV Trustco Ltd*;<sup>18</sup> *MP Kemp Ltd v Bullen Developments Ltd*;<sup>19</sup> and the decision of the English Court of Appeal in *Premier Telecom Communications Group Limited v Webb*.<sup>20</sup> The judgments in which the Appellant says that the foregoing authorities were re-visited have not actually changed the established legal position in any way. As discussed at section 4, paragraph (c)(iii), neither of the cases which the Appellant refers to, i.e. *Mercury Communications Limited v Director General of Telecommunications*,<sup>21</sup>

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<sup>14</sup> [1997] 1 Lloyd's Rep. 106.

<sup>15</sup> [1992] 2 All E.R. 170.

<sup>16</sup> [1993] 1 EGLR 164.

<sup>17</sup> [1991] 2 EGLR 103.

<sup>18</sup> [2012] EWHC 1410 (Ch)

<sup>19</sup> [2014] EWHC 2009 (Ch)

<sup>20</sup> [2014] EWCA Civ. 994.

<sup>21</sup> [1996] 1 WLR 48.

or *Barclays Bank plc v Nylon Capital LLP*<sup>22</sup> are actually on-point nor did they conclude that independent experts did not have the right to determine points of law.

- (8.) It is not clear what is meant by this Ground of Appeal. The Appellant submits that the *"Court of Appeal erred in failing to appreciate properly, or at all, that the extent to which an expert might consider the interpretation of a contract is limited insofar as it is necessary to determine the issues before the expert. However, it does not go so far as to permit, in this case, an Independent Expert, to resolve a dispute between the parties as to what was in fact agreed between them as recorded in Clause 7.7.2 of the Development Agreement."* This seems to be an acknowledgement that the Independent Architect is entitled to construe and interpret the terms of the Development Agreement *"insofar as it is necessary to determine the issues before the expert"* but is not entitled to determine what the parties have agreed. In making this argument, the Appellant appears to fail to understand that the entire exercise of construing contractual provisions is a matter of law and this includes determining what weight to attach to the various aspects of the factual matrix. If as the Appellant acknowledges, the Independent Architect is entitled to construe the Development Agreement *"insofar as it is necessary to determine the issues before the expert,"* then he is entitled to carry out the very exercise which the Appellant has previously argued should be carried out by the Court. In any event, the expert must be allowed to construe clause 7.7.2 of the Development Agreement in order to determine the issue before him and the Court of Appeal was correct in concluding that the Independent Architect had full jurisdiction to so do.
- (9.) The Court of Appeal did address the Appellant's claim as pleaded and as presented both in written and oral submissions to the Court of Appeal. The Court pressed counsel for the Appellant to describe the point of law which his client contended had arisen and required to be determined by the court before the Independent Expert could proceed with his determination. Counsel for the Appellant was unable to do so. In any event, the Court of Appeal concluded that the law provided that independent experts had full

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<sup>22</sup> [2012] 1 All ER (Comm) 912.

jurisdiction to determine all matters that need to be determined in order to resolve the issue which had been referred to the expert for determination, including points of law and was therefore correct to find that the dispute which the Appellant sought to agitate in these proceedings was "*squarely within the ambit of the dispute which was referred to the adjudication of the independent architect as expert.*"

(10.) This refers also to Ground 12.

The Court of Appeal was wholly correct to describe "*Dunnes Stores dispute underlying the proceedings as 'contrived' and 'specious' and ... 'entirely without merit'...*". The Court was also correct to conclude that the proceedings were an abuse of process.

The proceedings are undoubtedly a cynical attempt to obstruct the work of the Independent Architect who the parties agreed by clause 11(d) of the Terms of Settlement would be appointed. In bringing this case on the basis that a point of law has arisen, the Appellant has prevented the Independent Architect from determining the dispute which has been referred to him almost four years ago. This suits the Appellant's commercial interests because a delay in the Independent Architect process defers the point at which it will have to comply with its contractual obligations to the Respondents which include an obligation to open a very substantial Anchor Unit at the Point Village. However, while the Appellant has repeatedly said that it has brought the case because a point of law has arisen for determination, it has not been able to identify what that dispute is. In addition, the Appellant has not been able to identify any legal authority which has concluded that an independent expert does not have the right to determine points of law. In such circumstances, it is entirely correct to describe Dunnes position as "*contrived*" and "*specious*" and to strike them out as an abuse of process. The Appellant was not denied the opportunity to explain its position or to describe to the Court why it had a legal basis to maintain these proceedings. In fact, counsel for the Appellant was pressed repeatedly to explain why the Appellant had a legal basis to maintain these proceedings and was given a full opportunity to respond. The High Court has the right to determine of its own motion, by

reference to its inherent jurisdiction that proceedings should be struck out as an abuse of process where the evidence before the court supports such a determination.

- (11.) The Court of Appeal was wholly correct to describe the Appellant's claim as being based on a concern that the Independent Architect "*will stray from the terms of the agreement unless he is subject to stringent judicial control.*" The entire basis of the Appellant's case was that the Appellant had never agreed that the Independent Architect would have the right to determine disputes on points of law and that it required to bring these proceedings to ensure that it was the court, and not the Independent Expert, who determined the point of law.
- (12.) See response to Ground 10 above.
- (13.) The Court of Appeal did not mis-describe the case which the Appellant advanced and on which it had brought these proceedings. At paragraph 8 of the judgment, it was stated that "*... Dunnes asserted that there was a dispute on a point of law between the parties as to how clause 7.7.2 of the Development Agreement was to be interpreted. It was said that the independent architect was not competent to resolve this dispute ...*". This was precisely the case which the Appellant advanced before the Court of Appeal and which it has repeated in this very Notice of Appeal to the Supreme Court. It is extremely hard to understand how the Appellant can plausibly argue that the Court of Appeal mis-described or misunderstood its case.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

**ANDREW FITZPATRICK SC**

6. Additional grounds on which decision should be affirmed.

Without prejudice to the point made above that in concluding that there was clear UK authority to the effect that independent experts have full jurisdiction to decide

upon all matters which need to be resolved in order to determine the issue which has been referred to them, the Court of Appeal was not required to expressly refer to *Mercury Communications Limited v Director General of Telecommunications*,<sup>23</sup> or *Barclays Bank plc v Nylon Capital LLP*<sup>24</sup>. The Respondents argue that the decision should be affirmed on the basis that these authorities do not in any way undermine the established legal position regarding the jurisdiction of independent experts.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

No.

make a reference to the Court of Justice of the European Union?

No.

Will you request a priority hearing?

In the event that the Supreme Court grants leave to appeal, the Respondents will apply for a priority hearing.

Signed: McCann FitzGerald

McCann FitzGerald Solicitors for the Respondents  
Riverside One  
Sir John Rogerson's Quay  
Dublin 2

Please submit your completed form to:

The Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.

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<sup>23</sup> [1996] 1 WLR 48.

<sup>24</sup> [2012] 1 All ER (Comm) 912.