Neutral Citation [2012] IEHC 482

THE HIGH COURT

[2011 No. 6205P]

BETWEEN

POINT VILLAGE DEVELOPMENT LIMITED AND HENRY A. CROSBIE

PLAINTIFFS

AND

DUNNES STORES

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 15th day of November, 2012.

Factual background

1. These proceedings are the latest episode in a long running saga arising out of agreements entered into in February 2008 between the parties under which the defendant (Dunnes) agreed to acquire from the second plaintiff (Mr. Crosbie) what was referred to as the Anchor Site in the development known as Point Village at the North Wall Quay in the City of Dublin and entered into a development agreement with the first plaintiff (the Developer) for construction of a retail store on the site. The agreements entered into between the parties in February 2008 were the following:

> (a) an agreement for sale dated 26th February, 2008 made between Mr. Crosbie, as vendor, and Dunnes, as purchaser, wherein Mr. Crosbie agreed to sell the Anchor Site to Dunnes by way of a long lease for two hundred and fifty years at a nominal rent, the purchase price being €5m; and
>
> (b) a development agreement dated 27th February, 2008 (the Development Agreement) made between the Developer and Dunnes with Mr. Crosbie participating to consent to the provisions thereof.

The agreement referred to at (a) above was completed by the grant of the lease, which was dated 28th November, 2008 (the Lease) by Mr. Crosbie to Dunnes, whereupon Dunnes became the owner of the Anchor Site as so demised.

2. Disputes arose between the parties in relation to the development and on 2nd June, 2009 Dunnes commenced proceedings against the Developer and Mr. Crosbie in the High Court (Record No. 2009/5004P) (the 2009 Proceedings) seeking various reliefs and the Developer and Mr. Crosbie counterclaimed also seeking various reliefs. After the 2009 Proceedings came on for hearing, terms of settlement were reached between the parties on 7th July, 2010. The terms of settlement, which I will refer to as the "Settlement Agreement", were concluded early in the morning of 7th July, 2010 after the parties had spent the night negotiating. The Settlement Agreement is handwritten.

3. Despite the fact that the Settlement Agreement was intended to dispose of the 2009 Proceedings, further disputes arose between the parties in relation to its implementation and the matter had to be brought back before the Court. In connection with the further hearing of the matter, the parties negotiated supplemental terms of settlement, to which I will refer as the "Supplemental Agreement", on 1st November, 2010. The issues in these proceedings arise out of the variation of the terms of the Development Agreement by the Settlement Agreement and the Supplemental Agreement. However, in order to put those variations into perspective it is appropriate to briefly consider how the Settlement Agreement and the Supplemental Agreement impacted on the terms of the Lease.

Variation of the Lease

4. In Clause 2 of the Settlement Agreement it was provided that the demise to Dunnes effected by the Lease was to be varied as set out in Schedule 1 thereto. In other words, Dunnes "take" was to be varied. There were also minor variations to the terms of the Lease. For example, it was to be provided that Dunnes would not object to any sale by the cinema in Point Village of sweets, popcorn, beverages or other similar products. The variations were to be completed within twenty one days of the date of the Settlement Agreement. However, that did not happen.

5. The Supplemental Agreement contained more extensive provisions in relation to the variation of both the "take" under the Lease and the variation of its terms, which were to be implemented by 5th November, 2010. It is not necessary to detail the variations because, in fact, this aspect of the Supplemental Agreement was implemented by two deeds dated 5th November, 2010, one being a deed of partial surrender of that date between Dunnes and Mr. Crosbie and the other being a deed of variation of the same date between Mr. Crosbie and Dunnes. So the current position is that Dunnes, having paid €5m, is the owner of the Anchor Site as demised by the Lease and as varied by the two deeds of 5th November, 2010. On the other hand, Mr. Crosbie has relinquished ownership of the Anchor Site and, accordingly, cannot substitute another major retailer for Dunnes as anchor tenant in Point Village.

Relevant provisions of the Development Agreement

6. The Developer's obligations under the Development Agreement primarily relate to the "Building Works", which expression is defined as "the Store Works, the Centre Works and the Minimum Works" (Clause 1.5). The "Centre" is defined as the Shopping Centre (including the Store and the Car Park) and the multi-screen cineplex to be constructed on the Centre Site (Clause 1.7). The Store is defined as that part of the Centre to comprise a retail anchor store and service yard together with ancillary areas (Clause 1.66). As I have outlined, the site of the Store was demised to Dunnes by virtue of the Lease, as varied by the deeds of 5th November, 2010. The development works in relation to the Centre and the Store, including the Minimum Works, which go to make up the Building Works, are defined with precision in the definitions in the Development Agreement by reference to specifications, plans and suchlike and in the provisions in relation to the Developer's obligations to carry out the Building Works. It is provided that the Developer shall procure that the Building Works are designed, carried out and completed in a good and workmanlike manner and in accordance with good building practice and so forth (Clause 4.1). The time span within which the Developer is to diligently procure the execution and completion of the Building Works is that it is to do so "within the Development Period" (Clause 4.2). The Development Period is defined as the period of forty eight months commencing on the Effective Date (Clause 1.21), which is related to the procurement of a revised

fire safety certificate (Clause 1.28). As I understand it, the Effective Date occurred during 2008, but nothing turns on that for present purposes. There is a proviso in Clause 4.2 to the effect that –

". . . once the Access Date is achieved the Developer shall, subject to the provisions of Clause 4.9, diligently procure the execution and completion of the remaining Building Works in accordance with this Agreement within twenty six weeks from the Access Date."

That twenty six week period corresponds with the "Fit Out Period" which will be referred to later. Clause 4.9, which provides for extensions of time to enable the Developer to complete the Building Works, is not of any relevance for present purposes.

7. The Access Date (Clause 1.2) is defined as –

> ". . . the date on which the Developer's Architect issues written confirmation to Dunnes Representative certifying that the Store Works have reached Practical Completion in accordance with this Agreement and that the remaining Building Works have reached a stage enabling Dunnes and its contractors safely and efficiently to carry out Dunnes Works and use the Fit-Out Compound and safely and efficiently to proceed with and complete Dunnes Works without interruption or delay . . .."

The definition goes on to provide for the referral of any dispute as to whether the Access Date "has properly occurred" to an Independent Architect. It is expressly provided that the Access Date shall not be deemed to have been achieved until the date of issue to Dunnes of the Access Certificate in accordance with the agreement. The Access Certificate is the certificate of the Developer's Architect or the Independent Architect, as the case may be, certifying the Access Date in accordance with the Development Agreement (Clause 1.1).

8. The expression "Dunnes Works" is not defined, but it clearly means the Fit Out Works, as defined, to the Store.

9. Dunnes' obligations in relation to the Fit Out Works, which are defined as "such fitting out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the Store (Clause 1.38)", are set out in Clause 11. It is provided that from the Access Date Dunnes shall procure that the Fit Out Works are designed, carried out and completed in a good and workmanlike manner and in accordance with good building practice and suchlike (Clause 11.4). Clause 11.5 deals with the time span and provides that Dunnes shall with effect from the Access Date diligently procure the execution and completion of the Fit Out Works within the Fit Out Period, that is to say, twenty six weeks from the Access Date, but there is a proviso for an extension of time in certain circumstances and there is also a proviso which regulates Dunnes' obligation to open the Store at a particular time of the year, which it is not necessary to dwell on.

10. Aside from that proviso in Clause 11.5, Dunnes' obligation to open the Store is dealt with in Clause 11.12 which provides:

> "Subject to the achievement of Practical Completion . . . of the Building Works, Dunnes shall commence trading to the public from the Store as 'Dunnes' and/or 'Dunnes Stores' no later than the Store Opening Date . . .."

The Store Opening Date is defined as the later of the expiry of the Fit Out Period and Centre Opening (Clause 1.67). Centre Opening is defined in Clause 1.8, subject to the provisions in relation to extensions of time to which I have referred, as follows:

> "The date following the Practical Completion of the Building Works in accordance with this agreement that the Developer formally declares the Centre (other than the hotel and offices) open to the public, which date shall be not later than twenty six weeks after the Access Date . . .."

11. Practical Completion is defined in Clause 1.57 in relation to the Store Works or the Building Works, as the case may be, as meaning that the relevant works have been carried to a stage that they can be taken over and used for their intended purpose and that any items of work or supply then outstanding or any defects then patent are of a trivial nature only. While the definition is more expansive than I have outlined, and there is provision for the appointment of an Independent Architect in the event of a dispute, the kernel of the definition is as stated above.

12. The Contract Sum originally payable by Dunnes under the Development Agreement was €46m plus VAT (Clause 1.17). Originally, in broad terms, the payment arrangement between the Developer and Dunnes was that a deposit account referred to as the "Nominated Account" would be opened in the joint names of the Developer's solicitors and Dunnes' solicitors at Allied Irish Banks Plc and that initially the monies payable by Dunnes would be paid into the Nominated Account and the monies so paid in plus accrued interest would subsequently be released to the Developer from that account by a single payment (Clause 9.5) within five working days of receipt by Dunnes of a Payment Certificate certifying Practical Completion of the Building Works.

13. The arrangements originally embodied in the Development Agreement provided for the Contract Sum to be paid by Dunnes in stages, as outlined in Clause 9.1. Nine stages in all were provided for, broadly speaking, by reference to the state of completion of the Building Works, which would have had the following effect, if implemented:

> (a) Compliance in accordance with the first six stages would have resulted in 62% of the Contract Sum having been paid into the Nominated Account. At the end of those stages a stage of substantial completion of the roof of the Centre would have been reached.
>
> (b) The seventh stage (Clause 9.1.7) provided for payment of another tranche as follows:
>
> > "16% of the Contract Sum into the Nominated Account on the Payment Date following the receipt by Dunnes of a Payment Certificate certifying the Access Date."
> >
> > There is a definition of "Payment Certificate" (Clause 1.50), which seems to me to be somewhat out of kilter with the various stages of payment provided for in Clause 9.1. I think it is reasonable to assume that what was intended was that, in the case of Clause 9.1.7, the Payment Certificate would be contemporaneous with the Access Certificate.
>
> (c) The eighth tranche was equivalent to 20% of the Contract Sum and it was payable directly to the Developer, not into the Nominated Account, and the time for payment was the later of –

(i) the Payment Date following the receipt by Dunnes of a Payment Certificate certifying Practical Completion of the Building Works; and

(ii) the date which is twenty working days after the date Dunnes or Dunnes' solicitors receive the documents provided for in Clause 10 (Clause 9.1.8).

(d) The ninth and final tranche, being 2% of the Contract Sum, was payable directly to the Developer on the Payment Date following the date of expiry of the Defects Liability Period, which was defined as being a period of twelve months from the Access Date.

While, in consequence of the agreed variations of the Development Agreement to which I will refer later, various provisions became irrelevant, the Development Agreement originally provided for the amount of the additional costs of variations to be paid by Dunnes to the Developer on the Access Date and also provided for an adjustment of the Contract Sum based on the Gross Internal Area of the Store (Clause 8.4).

14. Clause 10, which is mentioned in Clause 9.1.8, dealt with documentation which was to be furnished by the Developer to Dunnes. Some of the documentation specified was to be furnished on the Access Date, some within three months of the Access Date and the remainder on the date of Practical Completion of the Building Works.

Variation of the Development Agreement by the Settlement Agreement

15. The core issue which the Court has to determine in this judgment is an issue of construction which arises from the variation of the Development Agreement by the Settlement Agreement. Therefore, it is necessary to consider the provisions of the Settlement Agreement which affect the Development Agreement in some detail. As I have already outlined, the Settlement Agreement came into being as a settlement of the 2009 Proceedings. It came into being approximately two and a half years after the Development Agreement was executed, at a time when the property "bubble" had imploded. In the introduction to the terms set out in the Settlement Agreement it was clearly stated that, in the event of any inconsistency between the terms of, *inter alia,* the Development Agreement and the Settlement Agreement, the Settlement Agreement shall prevail. It was also provided that words and expressions defined in the Development Agreement shall, where the context so admits or requires, have the same meaning where they appear in the Settlement Agreement (Clause 17).

16. As regards the variation of the Development Agreement, one of the principal effects of the Settlement Agreement was to vary the Contract Sum and the terms in relation to payment of the balance due by Dunnes into the Nominated Account and payment out of the monies in the Nominated Account to the Developer. The Contract Sum was varied downwards from €46m plus VAT to €31m plus VAT (Clause 5). As I have already recorded, there was provision for variation of the Lease and, in particular, variation of Dunnes "take" by virtue of the Lease. In consequence, it was provided that Clause 8.4 of the Development Agreement, in relation to adjustment of price ceased to apply.

17. In relation to payment of the balance due by Dunnes to be paid into the Nominated Account, it was provided in Clause 8 that:

> ". . . payment of the balance of the adjusted Contract Sum, (less the 2% retention) being the sum of €7,380,000, into the Nominated Account by Dunnes shall take place within twenty one days from the date hereof."

It is obvious that the effect of compliance with that requirement by Dunnes would be to render the staged payment process provided for in Clause 9.1, apart from the provision in Clause 9.1.9 in relation to payment of 2% of the Contract Sum directly to the Developer on the expiry of the Defects Liability Period, defunct.

18. The provision in the Development Agreement in relation to payment out of the monies in the Nominated Account to the Developer was radically varied, in that, instead of a single payment as provided for in Clause 9.5 of the Development Agreement, payment out was to be in stages. This was provided for in Clause 11. Four stages were provided for, which addressed the release of four sums aggregating €30.38m, as outlined below.

19. Paragraph (a) of Clause 11 was the first stage and it provided as follows:

> "the sum of €11,880,000 (plus interest accrued to date) shall be released within five working days of the later of (a) receipt by Dunnes of a Payment Certificate certifying Practical Completion of the Building Works with the exception of those of the Building Works in Point Square and (b) the date that Dunnes or its solicitors receive the documents provided for in Clause 10 of the Development Agreement with the exception of the documents referred to in paragraph (b) below."

A comparison of that provision and Clause 9.5 of the Development Agreement, leaving aside the variation of Clause 10, reveals that, significantly, it deals with only approximately 40%, rather than the entire, of the monies in the Nominated Account, but the date for payment out in Clause 11(a) is the date provided for in Clause 9.5, but subject to the exclusion of Practical Completion of the Building Works at Point Square. The linking in paragraph (a) of Clause 11 of the date of payment to the date of compliance with Clause 10 of the Development Agreement, subject to the exception provided for in paragraph (b) of Clause 11, eliminated the staged process provided for delivery of documentation in Clause 10.

20. Paragraph (b) of Clause 11 was the second stage and provided that the sum of €500,000 (plus interest accrued to date) was to be released within five working days of receipt by Dunnes or its solicitors of evidence in compliance with financial conditions in relation to the development of the Store, the detail of which is not relevant. I think it is reasonable to assume that that particular provision, which also varied Clause 10 of the Development Agreement, was necessitated by a belief that there would be some difficulty in obtaining the relevant evidence.

21. The third stage was paragraph (c) of Clause 11 which provided as follows:

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

Paragraph (c) introduced a wholly new factor into the terms on which the monies in the Nominated Account were to be released, in

that it tied the release of approximately 50% of the monies in the Nominated Account to confirmation by the Developer's solicitors, William Fry, of the existence of binding leases or agreements for lease in relation to seven units in part of the Centre which were identified with specificity, which, for convenience if not accurately, will be referred to as "the seven specific units" hereafter. The last sentence in Clause 11(c) envisages that conditional agreements or leases may have been entered into before Dunnes is obliged to commence the fit out of the anchor store, the conditionality being linked to the commencement of the fit out.

22. The fourth and final stage was dealt with in paragraph (d) of Clause 11 which provided for the release of €3m (plus accrued interest to date) within five working days of the receipt by Dunnes of proof that Point Square has been completed in accordance with the Development Agreement, the proof being in the form of either a certificate by the Developer's architect, or, in the event of a dispute, by the Independent Architect within the meaning of the Development Agreement.

23. Clause 12 of the Settlement Agreement provided that the retention fund of 2%, which amounted to €620,000, was to be paid and released in accordance with the Development Agreement, which essentially confirmed Clause 9.1.9 of the Development Agreement, that is to say, the Developer was to get the retention fund at the expiry of the Defects Liability Period, although it would be released from the Nominated Account rather than paid directly by Dunnes to the Developer.

24. Clause 14 of the Settlement Agreement is the clause which has given rise to the construction issue. It provided as follows:

> "Notwithstanding anything to the contrary contained in the existing contracts, the Access Date shall be 30 days after the date of receipt by Dunnes of the certificate referred to in paragraph 11(c) herein."

The Access Date was a crucial point in time in relation to the respective obligations of the Developer and Dunnes under the Development Agreement. As outlined earlier, the Access Date was the trigger for the delivery to Dunnes by the Developer of some of the documentation listed in Clause 10. The Developer's obligations under Clause 10 must now be read in the light of the provisions of paragraphs (a) and (b) of Clause 11 of the Settlement Agreement, in that the release of monies from the Nominated Account to the Developer is contingent on delivery of documents as provided in those paragraphs. More significantly, under the terms of the Development Agreement, the Access Date is the starting point of the "Fit Out Period", as defined, and, accordingly, the trigger for Dunnes to commence the Fit Out. The effect of the variation of the definition of Access Date, as provided for in Clause 14, is to vary the date on which Dunnes' obligation to commence the Fit Out comes into force. The construction issue concerns identifying the Access Date as varied by Clause 14 and, in particular, when the thirty days period commences.

25. While in the Settlement Agreement the Developer was released by Dunnes from certain obligations in relation to the development of Point Village, for example, in Clause 1 it was provided that the Developer was released from "any contractual obligation to construct the Watchtower, the Spine Building or the U2 Experience/Museum", it was specifically provided in Clause 10 thereof that the Developer should not vary or seek to vary the Building Works relating to Point Square. As is implicit in Clause 11(a), the timeframe for completion of the Building Works on Point Square was varied by the Settlement Agreement and this was expressly provided for in Clause 10 in which it was provided that the Developer –

> ". . . shall commence the remaining works provided for in the Development Agreement in relation to Point Square within 12 weeks from the date hereof."

Non-compliance by the Developer with that provision is one of the grounds on which Dunnes seek to defend this action.

26. Clause 11.12 of the Development Agreement in relation to the date on which Dunnes are required to commence trading to the public was varied by Clause 15 of the Settlement Agreement which provided:

> "Dunnes shall have no obligation to open the Store until
>
> (a) at least seven of the ground floor units marked X on the annexed ground floor plan have opened to the public for trade, four of which shall be internal units; and
>
> (b) compliance with clauses 11(a) and 11(d) above has occurred."

The new element provided for in Clause 15 on which Dunnes' obligation to open the Store is conditional is the element in paragraph (a) in that clause, because the combined effect of the requirements of paragraphs (a) and (d) of Clause 11 is that Practical Completion of the entirety of the Building Works will have been achieved. Subject to one qualification, there is consistency between Clauses 11 and 15 of the Settlement Agreement in that release of the entirety of the monies in the Nominated Account is conditional upon certification of Practical Completion of all of the Building Works, including the Point Square Works (paragraphs (a) and (d) of Clause 11) and also procuring tenants for the seven specific units (paragraph (c) of Clause 11), which are the very conditions stipulated in Clause 15 to trigger the obligation on Dunnes to open the Store. The qualification is that, while the trigger for release of the €15m is the existence of agreements for lease or leases in relation to the seven specific units, even conditional agreements or leases, Dunnes' obligation to open the anchor store is related to the seven specific units being open and trading, which implies that the conditionality attached to the agreements or leases no longer exists.

27. It is convenient at this point to advert to a technical inconsistency in the Settlement Agreement. In Clause 14 the cross-reference is to "paragraph 11(c)", whereas in Clause 15(b) the reference is to "clauses 11(a) and 11(d)". That variation of terminology, in my view, is wholly immaterial. In the interest of consistency, each of the individual provisions of the Settlement Agreement is referred to as "Clause . . ." and the components of a clause are referred to as "paragraph . . ." in this judgment.

28. The Settlement Agreement was conditional upon fulfilment of certain conditions set out in Clause 19, one of which was qualified in Clause 20. However, no issue now arises in relation to fulfilment of those conditions.

Relevant provisions of Supplemental Agreement

29. Clause 20 of the Settlement Agreement provided for the disposition of the 2009 Proceedings, in that, subject to fulfilment of the conditions in Clause 19, as qualified, they were to be struck out. However, the parties to the 2009 Proceedings and to these proceedings remained in dispute. Faced with the resumption of the hearing of the 2009 Proceedings, the parties entered into further terms of settlement in the Supplemental Agreement. Having already referred to the variations of the lease provided for therein, it is only necessary to refer to the provisions of the Supplemental Agreement which are, or may be, of relevance to the construction issue arising from Clause 14 of the Settlement Agreement.

30. In Clause (b) of the Supplemental Agreement the date for payment by Dunnes of the sum of €7,380,000 into the Nominated

Account was extended to 5th November, 2010, so that Clause 8 of the Settlement Agreement was varied.

31. The only other provision of the Supplemental Agreement which is relevant is Clause (j) which, insofar as it is relevant, provided as follows:

> "(i) [Dunnes] accepts that Practical Completion of the Building Works (excluding Point Square) was achieved on 7 September, 2010 under and in accordance with the Development Agreement and further acknowledges that it has received all documents as required to be delivered under Clause 10 of the Development Agreement save those referred to at paragraph 11(b) of the [Settlement Agreement] . . ..
>
> (ii) [Dunnes] shall on the expiry of five working days procure the release to the Developer of the sum of €11,880,000 (plus all interest accrued to date) from the Nominated Account."

32. The combined effect of compliance with the provisions in Clause (b) and Clause (j) of the Supplemental Agreement, which subsequently occurred, had the following consequences in relation to the obligations of the parties under the Development Agreement, as varied by the Settlement Agreement:

> (a) Of the total principal (€31m) deposited by Dunnes in the Nominated Account, €18.5m remained in the Nominated Account.
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> (b) The Developer's entitlement to the release of those monies remained regulated by paragraphs (b), (c) and (d) of Clause 11 of the Settlement Agreement. Paragraph (a) of Clause 11 of the Settlement Agreement had become defunct, following the release of €11.88m to the Developer.
>
> (c) The date on which Dunnes was obliged to commence the Fit Out Works remained the date stipulated in Clause 14 of the Settlement Agreement. However, there was consensus between the parties that the Practical Completion component of the definition of Access Date (except in relation to Point Square) had been achieved on 7th September, 2010, which must be interpreted as acceptance by Dunnes that the formal requirements in relation to certification of Practical Completion had been fulfilled (except in relation to Point Square), or, alternatively, that they could be dispensed with.
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> (d) The Supplemental Agreement is silent in relation to the Developer's obligation to commence the Building Works in relation to Point Square, which had not been commenced in accordance with Clause 10 of the Settlement Agreement. The date for commencement provided in Clause 10 (twelve weeks from 7th July, 2010) had expired by 1st November, 2010. Whether it was implicit in the Supplemental Agreement that the period of twelve weeks for completion of the Point Square works would commence on 1st November, 2010 is immaterial, because it is common case that those works did not commence until April 2012. Further it has been acknowledged by the Developer that the commencement and completion of the Point Square works were not carried out in time, so that the Developer breached Clause 10 of the Supplemental Agreement. However, there is a dispute as to the consequences of such breach.

The pleadings

33. These proceedings were initiated by a plenary summons which issued on 8th July, 2011. The primary reliefs which the plaintiffs claim against Dunnes in the statement of claim delivered on the same day are specific performance of the Development Agreement, the Settlement Agreement and the Supplemental Agreement coupled with an order requiring Dunnes to commence forthwith the Fit Out Works and to complete them within the Fit Out Period, as defined in the Development Agreement. The nub of the claim of the plaintiffs is that, in accordance with Clause 14 of the Settlement Agreement, the Access Date for the purposes of Clause 11 of the Development Agreement occurred thirty days after 7 September, 2010, that is to say, on 7th October, 2010 and that, in breach of Clause 11.5 of the Development Agreement, Dunnes has failed to diligently procure the execution and completion of the Fit Out Works within the Fit Out Period, which it is contended expired on 7th April, 2011.

34. In its defence Dunnes denies that the Access Date occurred on 7th October, 2010 or at any time and also denies that the Fit Out Period expired on 7th April, 2011 or on any other date. Having quoted Clause 14 and Clause 11(c) of the Settlement Agreement, Dunnes plead that neither Dunnes nor its solicitors has at any time received from the Developer's solicitors any confirmation regarding binding agreements for lease or leases as provided for in paragraph 11(c) and, accordingly, the Access Date has not occurred.

35. An alternative defence advanced by Dunnes is based on alleged failure of the Developer to execute and complete the remaining Building Works as they pertain to Point Square in accordance with Clause 4.2 of the Development Agreement. In particular, failure to comply with Clause 7.7.2 of the Development Agreement, which obliges the Developer to procure that the design and specification for Point Square shall be to a first class standard appropriate to a prestigious shopping centre, Eyre Square in Galway, Grand Canal Square in Dublin and Civic Plaza at Dundrum Town Centre being cited as comparators, is alleged. It is pleaded that, by reason of that breach, the plaintiffs are not entitled to call upon Dunnes to perform any of the alleged obligations pleaded in the statement of claim or to seek the relief claimed in these proceedings and, in particular, the equitable relief claimed.

36. The response to Dunnes' contention that the Access Date has not occurred in the reply delivered on behalf of the plaintiffs has given rise to the construction issue. It is pleaded that the cross-reference in paragraph 14 of the Settlement Agreement is and was intended to be a reference to paragraph 11(a) and not paragraph 11(c) of the Settlement Agreement. Further, it is contended that such is the true meaning and intent of the parties is, as a matter of construction, apparent from a consideration of the document as a whole and the factual background against which it was made. It is further contended that paragraph 11(a) has been complied with by the Developer.

37. Issue is joined with Dunnes' alternative defence and it is denied that the Developer has breached either Clause 4.2 or Clause 7.7.2 of the Development Agreement in relation to Point Square.

38. In the reply it is further pleaded that, in the event that the cross-reference in Clause 14 of the Settlement Agreement is construed as a reference to Clause 11(c) rather than Clause 11(a) of the Settlement Agreement, the Settlement Agreement was drafted and signed under a mutual mistake of fact or, alternatively, under a unilateral mistake of fact on the part of the plaintiffs and an order for rectification will be sought, if necessary.

39. In response, Dunnes in their rejoinder, without prejudice to their contention that there is no mistake in Clause 14, plead that, if the cross-reference in paragraph 14 of the Settlement Agreement is construed as a reference to Clause 11(a) and not Clause 11(c),

Dunnes will seek an order for rectification, so as to correct any such construction and ensure that Clause 14 of the Settlement Agreement refers to paragraph 11(c), as actually agreed between the parties.

The issues for determination
40. The parties have agreed that the Court should not address the rectification issues at this juncture. Moreover, while there is a claim in the proceedings for damages for breach of contract, by agreement of the parties, the Court is not required to deal with the issue of damages at this juncture. The issues with which this judgment deals are:

> (a) the issue of the proper construction of Clause 14 of the Settlement Agreement; and
>
> (b) whether the alternative defence in relation to the Point Square Works is an answer to the claim for specific performance by the Developer and Mr. Crosbie against Dunnes.

Issue on construction of Clause 14 of the Settlement Agreement
41. In summary, the construction issue arises out of the contention of the plaintiffs that the reference in Clause 14 of the Settlement Agreement to "the certificate referred to in paragraph 11(c)" should be construed as meaning "the certificate referred to in paragraph 11(a)". Dunnes reject that contention.

The law on the construction of contracts
42. In both their written and oral submissions, counsel for both sides have fully informed the Court of the veritable mountain of authorities which has emerged, both in this jurisdiction and in the United Kingdom, during the past fifteen years on the construction of contracts and, in particular, commercial contracts. I am deliberately adopting an economical approach in addressing the authorities cited, although, of course, I have had regard to what was laid down by the Supreme Court in *Igote Ltd. v. Badsey Ltd*. [2001] 4 I.R. 511 and in *Analog Devices v. Zurich Insurance* [2005] 1 I.R. 274. The task with which the Court is faced is to identify the principles of construction relevant to the plaintiffs' argument for correction of Clause 14 of the Settlement Agreement by way of construction and to apply those principles to the documents to be construed in their context. Reliance on the application of the principles to other documents in other contexts, in my view, is not necessarily helpful. For that reason, I do not propose to address an authority from the United Kingdom to which the plaintiffs have attached considerable weight, namely, WW Gear Construction Ltd. v. McGee Group Ltd. [2010] EWHC 1460.

43. I agree with counsel for the plaintiffs that the starting point is the following passage from the judgment of Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43 (at p. 55):

> "In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

44. I also agree with counsel for the plaintiffs that, when interpreting a commercial agreement, the court will endeavour to give it a commercially sensible construction. As he pointed out in *BNY Trust Co. (Ireland) Ltd. v. Treasury Holdings* [2007] IEHC 271, in delivering judgment in the High Court, Clarke J. approved (at para. 4.4) the oft cited passage from the judgment of Lord Diplock in *Antaios Compania Naviera SA v. Salen Rederierna A.B.* [1985] AC 191 (at p. 201) to the following effect:

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense."

45. Apart from those general propositions, counsel for the plaintiffs rely on a series of authorities in which the courts have been prepared to correct a mistake in a contract as a matter of construction. In *Moorview Developments Ltd. & Ors. v. First Active Plc & Ors*. [2010] IEHC 275, Clarke J. considered what he described as "correction of mistakes by construction" principles in the context of construing a guarantee, where the liabilities guaranteed were specified as including the liabilities of a company described as "Moorview Properties Ltd.". In his judgment (at paras. 3.5 and 3.6) Clarke J. stated:

> "3.5 This aspect of the case concerns what has, in some of the case law, (see for example *East v. Pantiles (Plant Hire) Ltd* (1981) 263 E.G. 61) been described as 'correction of mistakes by construction'. As is clear from East and from the speech of Lord Hoffman in *Investors Compensation Scheme Ltd v. Bromwich Building Society* [1998] 1 W.L.R. 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be.
>
> 3.6 It is also clear from the speech of Lord Hoffman in *Investors Compensation* that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus, a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in *Chartbrook v. Persimmon Homes Ltd* [2009] 1 A.C. 1101, represent the law in this jurisdiction."

I respectfully agree with the principles outlined by Clarke J. in those paragraphs and with his explanation of the rationale underlying them.

46. In the *Moorview* case, Clarke J. found that the reference to Moorview Properties Ltd. in the guarantee was a clear mistake. Not only was it a clear mistake, but also what the correct reference should have been was equally clear. The guarantee should have made reference to Moorview Developments Ltd. Moorview Properties Ltd. did not exist and had never existed. Moorview Developments Ltd., on the other hand, was at the same time as the guarantee was entered into involved in entering into loan arrangements with the lender. Clarke J. held that it was inconceivable that there could have been any other intention of the parties but that the company whose liabilities were to be guaranteed was Moorview Developments Ltd.

47. The *Moorview* case, in my view, is a very good example of the application of the principles relating to "correction of mistakes by construction". It has been followed consistently in this jurisdiction, for example, by the High Court (Charleton J.) in *Danske Bank v.*

Coyne [2011] IEHC 234 and by the High Court (Finlay Geoghegan J.) in *Bank of Scotland Plc v. Fergus* [2012] IEHC 131.

48. The only other authority to which I propose to refer is a recent decision of the Supreme Court in *Marlan Homes Ltd. v. Walsh & Ors.* [2012] IESC 23, on which counsel for Dunnes relied. In his judgment, with which the other Judges of the Supreme Court concurred, McKechnie J. issued a caveat stating that it is not for the Court, either by means of giving business or commercial efficacy or otherwise, to import into a contractual arrangement a meaning that might also be available from an understanding of the more general context in which the documents came to exist, but is one which is not deducible by use of the standard interpretive rules, including the fundamental rule stated by Keane J. in *Kramer v. Arnold* referred to above. As to where the boundary lies between what is permissible and what is not in the context he was considering, McKechnie J. quoted with approval the following passage from the speech of Lord Mustill in *Charter Reinsurance v. Fagan* [1997] A.C. 313 (at p. 388):

> "There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."

Application of the law to Clause 14

49. It was submitted on behalf of the plaintiffs that a fundamental difficulty which arises from construing Clause 14 of the Settlement Agreement as correctly referring to paragraph 11(c) is that, in doing so, the triggering of the Access Date is linked to the furnishing by the Developer, and receipt by Dunnes, of a "certificate", whereas paragraph 11(c) of the Settlement Agreement does not contain the word "certificate", still less the receipt by Dunnes of a "certificate". In my view, the absence of the word "certificate" coupled with the presence of "Dunnes' solicitors" in Clause 11(c) is the only straw at which the plaintiffs can clutch in support of the construction they contend for, that is to say, that the reference should be to Clause 11(a), because the latter provision does contain the word "certificate" to be received by Dunnes. On a proper analysis of the Settlement Agreement, in conjunction with the Supplemental Agreement, in the overall context of the Development Agreement, in my view, one cannot conclude either that the reference to Clause 11(c) in Clause 14 must be a clear mistake, nor is it clear what the correction ought to be. In particular, it is not clear, as urged by the plaintiffs, that it ought to be corrected to refer to Clause 11(a).

50. The analysis upon which I am about to embark will involve endeavouring to ascertain the function of the "Access Date", as defined, under the Development Agreement and then to consider the effect of the changes wrought by the Settlement Agreement, in combination with the Supplemental Agreement, to ascertain whether a reference to Clause 11(c) or a reference to Clause 11(a) in Clause 14 gives rise to a commercially sensible construction, which must have been intended by the parties.

51. The significance of the "Access Date" in the context of the Development Agreement in its original form, was, first, that it triggered the obligation of Dunnes, subject to obtaining a fire safety certificate, to commence the Fit Out Works. The Access Date was linked to the certification of Practical Completion as to part only of the Building Works, as defined, the part being the Store Works, which were required to have reached the stage enabling Dunnes and its contractors to carry out the Fit Out Works and, for that purpose, to be in a position to use the Fit-Out Compound safely and efficiently. As the expression implies, the objective of defining the "Access Date", was to fix a point at which Dunnes would have access to the Store so that the carrying out of the Fit Out Works would be feasible. Secondly, when the Access Date had arrived Dunnes would be liable for the payment of 78% of the Contract Sum into the Nominated Account, which suggests that the parties to the Development Agreement accepted that by that stage the Developer would have carried out a commensurate percentage, being the major portion, of the Building Works. As I have outlined earlier, the remainder of the Contract Sum (22%) was payable directly to the Developer, the final 2% on the expiry of the Defects Liability Period. Thirdly, there was a link between the Access Date and the furnishing of certain documentation by the Developer to Dunnes. It is reasonable to infer that the significance of that was that Dunnes was outlaying money on the fit out and, that being the case, it was concerned to ensure that the regulatory requirements were complied with. In this connection it is apt to record that the evidence at the hearing was that the cost of the Fit Out Works is estimated in the region of €7m to €9m. Finally, there was a link between Dunnes' obligation to start trading in the Store and the Access Date because the obligation to start trading was linked to the later of the expiry of the Fit Out Period (twenty six weeks from the Access Date) and the Centre opening, which, in turn, was linked to Practical Completion of the Building Works and the formal declaration that the Centre (other than the hotel and the offices) was open to the public. Further, the Centre Opening was linked to the Access Date in that it was provided that it should not be later than twenty six weeks after the Access Date.

52. In my view, the manner in which the Access Date, as defined, was designated in the Development Agreement in its original form as the point in time in the process of development of Point Village at which, on the one hand, the Developer was to carry out certain of its obligations in relation to the Building Works and the furnishing documentation and, on the other hand, Dunnes was to carry out its obligations in relation to payment into the Nominated Account of a substantial portion of the Contract Sum and commencement of the Fit Out Works, with a view to opening the Store for trading, was consistent, logical and commercially sensible.

53. Turning to the significance of the Access Date in the context of the Development Agreement as it has been varied by the Settlement Agreement when construed in conjunction with the Supplemental Agreement, a number of changes to the implementation to the development process are obvious. First, having regard to the acknowledgement by Dunnes in Clause (j) of the Supplemental Agreement of Practical Completion having been achieved on 7th September, 2010, unlike the position that would have prevailed if the Development Agreement had been given effect to in its original form, the Access Date now postdates Practical Completion of the Building Works but excluding Point Square. Secondly, the payment out of the monies in the Nominated Account is no longer linked to the Access Date except in one respect. The first stage payment out to the Developer under Clause 11(a) has occurred. The second stage is linked to receipt by Dunnes or its solicitors of the evidence referred to in Clause 11(b). The third stage is linked to confirmation from the Developer's solicitors, William Fry, of the binding agreements for lease or leases in relation to the seven specific units being in place. The fourth stage is linked to the completion of the Building Works in relation to Point Square. The fifth stage, the 2% retention fund, as was the case under the Development Agreement in its original form, is linked to the expiry of the Defects Liability Period. This is the exception, because the Defects Liability Period is linked to the Access Date, being a period of twelve months therefrom. Thirdly, Dunnes' obligation to open the Store is no longer linked to the Access Date. Instead it is linked to the seven specific units having opened to the public for trade and to compliance by the Developer with its obligations under Clause 11(a) and Clause 11(d), that is to say, the Practical Completion by the Developer of all of the Building Works, including the Building Works in relation to Point Square.

54. Having regard to the introduction of the new elements into the agreement between the parties, that is to say –

(a) the linking of the release of €15m out of the Nominated Account to the Developer to when confirmation of the existence of binding agreements for lease or leases of the seven specific units is received by Dunnes' solicitors, and

(b) the linking of the obligation of Dunnes to open and trade in the Store to the seven specific units having opened to the public for trade,

in my view, to construe Clause 14 of the Settlement Agreement as linking the Access Date to compliance with Clause 11(c) on a plain reading of the text results in internal consistency within the Settlement Agreement itself and also within the Development Agreement, as varied by the Settlement Agreement in conjunction with the Supplemental Agreement. It also points to a development implementation process which is both logical and commercially sensible.

55. On the other hand, if Clause 14 is construed so as to link the Access Date to the certificate referred to in paragraph 11(a), as the plaintiffs contend it should be, one is constrained to ask a rhetorical question: what was the purpose of introducing the new elements into the Settlement Agreement? Other questions might be posed: for instance, why should Dunnes agree to expend approximately €7m to €9m on the fit out without being under any obligation to open the Store and trade until at least the seven specific units are open and trading. I do not think that question is rationally answered by the suggestion in the evidence adduced on behalf of the plaintiffs that the physical presence of Dunnes involved in the fitting out process is necessary to attract tenants to commit to leasing the seven specific units. Finally, while the period of thirty days which was factored into the definition of Access Date by Clause 14 was obviously intended to give Dunnes some leeway, if the plaintiffs' interpretation is correct, one wonders why, given the acknowledgement by Dunnes in Clause (j) thereof, the Supplemental Agreement did not simply provide that Dunnes were obliged to commence the Fit Out Works within thirty days of, say, 1st November, 2012.

56. I think it is improbable that a reasonable commercial person in the position of Dunnes, who had agreed to the terms of Clause 11 of the Settlement Agreement in relation to the release of monies from the Nominated Account and, in particular, the requirement of Clause 11(c) in relation to the existence of binding agreements or agreements for lease in relation to the seven specific units, and who had obviously sought a variation of the Development Agreement which absolved him from opening the Store for trade until at least the seven specific units were occupied, open and trading, would have agreed to commence the Fit Out Works at a time when he had no assurance that any of the seven specific units would ever be occupied and open for trade. To adopt such a position simply would not have made sense.

57. As outlined earlier, the straw on which the plaintiffs rely as indicating an ambiguity in Clause 14, which, it was submitted, indicates that the reference to Clause 11(c) is erroneous, is the fact that the Access Date is defined in Clause 14 by reference to a period, thirty days after "the date of receipt by Dunnes of the certificate" referred to in Clause 11(c), and there is no reference to a certificate in Clause 11(c), or to Dunnes, as distinct from Dunnes' solicitors. It is true that what Clause 11(c) provides for is "receipt by Dunnes solicitors of confirmation from William Fry". Clause 11(a), on the other hand, provides for "receipt by Dunnes of a Payment Certificate certifying Practical Completion". So there are two limbs to the plaintiffs' contention that there is an error in Clause 14: the reference to certificate rather than confirmation; and the reference to Dunnes, rather than to Dunnes' solicitors.

58. As regards the first limb, the expression "Payment Certificate" has a specific definition in the Development Agreement and, accordingly, in the Settlement Agreement. However, the word "certificate" in Clause 14 is not expressly defined in either the Development Agreement or the Settlement Agreement. In my view, it may be properly interpreted as being synonymous with the word "confirmation" in Clause 11(c). Indeed, there is support for that conclusion within the definition of "Access Date" in the Development Agreement, which is defined as the date the Developer's Architect "issues written confirmation to Dunnes Representative certifying that the Store Works have reached Practical Completion . . .".

59. As regards the second limb, the fact that Clause 14 fixes the Access Date by reference to the thirty day period after the receipt by Dunnes of the "certificate", whereas Clause 11(c) stipulates receipt by Dunnes's solicitors from William Fry, of "confirmation" as to the precondition to the release of €15m, in my view, does not point to a mistake in the cross-reference to Clause 11(c), rather than to Clause 11(a), in Clause 14. The distinction between "Dunnes" and "Dunnes' solicitors" is certainly there, but, in my view, it is not material. There is inherent in the Settlement Agreement a degree of flexibility in relation to service of certificates, notices and documents on Dunnes or Dunnes' solicitors or, indeed, Dunnes' Representative, as provided for in the definition of Access Date in the Development Agreement in its original form. This is to be seen in Clause 11(a) itself, which stipulates in the first segment receipt by Dunnes of the Payment Certificate, while stipulating receipt by "Dunnes or its Solicitors" of the documents referred to in the second segment, which suggests that the parties were not attaching any significance to whether the recipient was Dunnes or its solicitors. Accordingly, the reference to Dunnes rather than Dunnes' solicitors in Clause 14, in my view, is not necessarily indicative of a mistake in Clause 14, when Clause 14 is considered in context. The ascertainment of the intention of the parties, and the proper construction of the text of the Settlement Agreement read in the context of the overall agreement between the parties, cannot depend on such distinction.

60. The inevitable conclusion on an objective consideration of the text of the Development Agreement, as varied by the Settlement Agreement in conjunction with the Supplemental Agreement, when construed in the overall context of the three documents, and without regard to the evidence as to what has happened since 1st November, 2010, is that it is not clear that the reference to Clause 11(c) in Clause 14 is a mistake and it follows that it is not clear that the reference in Clause 14 should be to Clause 11(a). Further, there is no ambiguity in Clause 14 when read as part of the entire agreement between the parties, as evidenced by the three documents. Accordingly, it is not open to the Court to correct Clause 14 as a matter of construction in the manner advocated by the plaintiffs. Whether the three documents when read together in context represent the intention of both or either of the parties is for another day.

The Point Square Works

61. Because of the agreement of the parties as to how the Court should address the issues in this case, there is something of a disconnect between the first issue for determination and the second issue as outlined earlier, because the second issue only arises if the plaintiffs establish an entitlement to specific performance, in which case Dunnes' alternative defence, namely, that an order for specific performance should not be made because the Developer is in breach of its contractual obligations in relation to the Point Square works comes into play. In effect, the alternative defence is being considered *in vacuo,* because at this juncture the Court does not have to, and cannot, determine whether an order for specific performance should be made.

62. To recapitulate, what are now known as the Point Square works were originally part of the Building Works. Under Clause 4.2 of the Development Agreement it was provided that once the Access Date was reached, subject to provisions in relation to extension of time, the Developer would complete the remaining Building Works within twenty six weeks from the Access Date. Clause 7.7.2, which was invoked by Dunnes, addressed the quality of the design and specification for Point Square. As regards Point Square, Clause 4.2 was varied by Clause 10 of the Settlement Agreement, under which the Developer agreed to commence the remaining works in

relation to Point Square within twelve weeks from the date of the Settlement Agreement, that is to say, within twelve weeks of 7th July, 2010. The duration allowed to the Developer for completion of those works was not specified, but I think it is reasonable to assume that the parties' intention was that it would be the twenty six weeks provided for in Clause 4.2. There was an incentive in the Settlement Agreement for the Developer to complete the works in relation to Point Square, in that, in accordance with Clause 11(d), €3m of the monies in the Nominated Account together with accrued interest would be released to the Developer on certification of the completion of the Point Square works in accordance with the Development Agreement.

63. In any event, as I have recorded earlier, the Point Square works were not commenced within twelve weeks of 7th July, 2010. In fact they were not commenced until April 2012. Mr. Auke van der Werff, who is a director of the Developer, attributed the failure to commence the works in September 2010 to a number of factors: that the Developer had funding problems; that Dunnes had not started the fit out; and the failure to attract tenants for the Centre. I would infer that the major factor was lack of funding, because the Court was informed that the works are now being carried out with funding from the National Asset Management Agency, commonly referred to as NAMA.

64. The evidence establishes that the Point Square works will be substantially completed this month, November 2012, and Practical Completion, in accordance with the Development Agreement, will be achieved by December this year. The legal basis on which Dunnes contend that the failure of the Developer to comply with Clause 10 of the Settlement Agreement should deprive the Developer of a decree of specific performance is that specific performance is an equitable remedy and, in this case, it should be refused because it would be inequitable to make such an order given the Developer's breach of contract.

65. Counsel for Dunnes relied on the following passage from the judgment of Charleton J. in *Kelly v. Simpson* [2008] IEHC 374 (at para. 9):

> "A court exercising a jurisdiction in equity to grant a remedy such as the specific performance of a contract must look beyond the legal form of transactions to the elements of conscience that may impact on whether it is fair to grant the remedy. The responsibility to do equity is that of the court. If one party, for instance, has taken advantage of the distress or recklessness of the other, such an unconscionable dealing should be left without a remedy should a court order be sought. Similarly, parties are not entitled to come to equity seeking a remedy that will enable them to profit through their bad faith. If there is, to take another example, something in a contract which restricts the purchaser's right to investigate a title, this may have the consequence of suppressing a fair enquiry and result in a court refusing equitable relief. There may also be exceptional cases where hardship requires a court to override legal principles even though the contract was, at that time of its formation, fair and proper but where to enforce it would cause unusual and exceptional hardship; *Roberts v. O'Neill,* [1983] I.R. 47 at 57." While there is no doubt but that the foregoing statement is a correct statement of the law, in my view, Dunnes do not come within its parameters.

66. If, and whenever, an order for specific performance in the terms sought by the plaintiffs against Dunnes is granted, no prejudice whatsoever will have been, or will be, suffered by Dunnes by reason of the Point Square works not having been commenced in September 2010. It would be implicit in such an order that Dunnes would be obliged to commence to carry out the Fit Out Works after the order is made and to set on a course towards opening the Store. Indeed, the plaintiffs have sought a mandatory order directing Dunnes to commence the Fit Out Works forthwith. As the evidence indicates, by the time an order is made, if made, the Point Square works will have been completed and the failure to complete them earlier will not have been to the detriment of Dunnes in any real sense.

67. I consider it unnecessary to address the submission made on behalf of the plaintiffs that, where the term of a contract which has been breached is not an essential or fundamental term, then such a breach does not provide any impediment to the grant of an order for specific performance, citing *Dyster v. Randall & Sons* [1926] Ch. 932. If it is ultimately found that the Developer is entitled to specific performance, that entitlement will be predicated on a breach of contract on the part of Dunnes. Given that Dunnes will have suffered no actual prejudice from the delay in completing the Point Square works, there is no conceivable basis on which a court could form the view that it would be inequitable to make the order for specific performance. The alternative defence, in my view, is wholly unmeritorious.

Summary of findings on the issues to be determined

68. On the first issue, I find that there is no basis for construing Clause 14 of the Settlement Agreement on the basis that the cross-reference should be to Clause 11(a) rather than Clause 11(c).

69. As regards the second issue, if it is determined that the plaintiffs are entitled to a decree of specific performance against Dunnes, the alternative defence could not disentitle them to such a decree.