Neutral Citation [2016] IEHC 344

THE HIGH COURT

[Record No. 2014/10040 P]

BETWEEN

DUNNES STORES

PLAINTIFF

AND

PAUL MCCANN

FIRST NAMED DEFENDANT

AND

STEPHEN TENNANT

SECOND NAMED DEFENDANT

AND

POINT VILLAGE DEVELOPMENTS LTD.

THIRD NAMED DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 2nd day of June, 2016.

1. This is an application brought on behalf of the first, second and third named defendants to these proceedings to stay the proceedings pending the determination of a dispute that has arisen between the parties, by an expert appointed for that purpose by agreement between the parties.

Background

2. By agreement made 27th February, 2008, the third named defendant and the plaintiff entered into an agreement (hereinafter the "development agreement") whereby the third named defendant (hereinafter the "developer") agreed to develop, on a site to be acquired by the plaintiff from the developer, pursuant to an agreement for sale made on 26th February, 2008, a retail centre within the development to be known as Point Village located at the Docklands in Dublin. The plaintiff was to be the anchor tenant in the development, which formed part of a much larger scheme including: *inter alia*, the development of a hotel (now the Gibson Hotel); a large apartment complex to be known as the "Watch Tower" a museum to be known as the "U2 Experience", a spire and other facilities centred around a public area to be known as the Point Square, which is central to the dispute that has now arisen. The first and second named defendants in these proceedings are the receivers appointed over the assets of the third named defendant.

3. It will come as no surprise to anybody with even a passing knowledge of recent Irish economic history that the development soon afterwards ran into difficulties, the precise details of which were not opened to the Court but which are in any event not relevant to these proceedings. What is relevant is that these difficulties gave rise to litigation between the parties, which was ultimately resolved by a settlement agreement concluded in the early hours of 7th July, 2010 (hereinafter the "settlement agreement"), some of the provisions which are also central to this application.

4. Clause 15.1 of the development agreement provides:-

> "Where in this agreement it is stated that a dispute or difference shall be determined by Expert Determination of either the Independent Architect or the Independent Surveyor in accordance with this clause 15, then either party may forthwith give notice in writing to the other of such dispute or difference and the same shall thereupon be referred to such a person agreed upon between the parties or failing such agreement within 5 working days after either party has given to the other a written request to concur in the appointment of 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"."

5. Clause 7.7.2 of the Development Agreement provides:-

> "The design and specification for Point Square shall be to a 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."

6. Clause 11(d) of the settlement agreement provides:-

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

7. The development agreement in its original form (i.e. prior to amendment by the settlement agreement) provided that the Developer would procure for the plaintiff the construction of the building works which, as defined in the development agreement, comprised the 'Store Works', the 'Centre Works' and the 'Minimum Works' (each of which has a defined meaning) all of which were to be completed in accordance with obligations set out in the development agreement. The plaintiff was to pay the developer the sum of €46 million, in stages, as provided for in clause 9.1 of the development agreement. Under the terms of the settlement agreement, the contract sum

payable by the plaintiff to the developer was reduced to €31 million; that sum was to be paid into a nominated account by the plaintiff and the settlement agreement provided for the release of these monies from the nominated account in four separate stages.

8. On 15th March, 2013, the developer's architect, Scott Tallon Walker produced a certificate pursuant to clause 11(d) of the Settlement Agreement which certified that "*the Point Square has been completed in accordance with the Development Agreement*." This certificate was sent to the plaintiff together with a letter from the developer's solicitors of 19th March, 2013, demanding that the sum of €3 million be released from the nominated account in accordance with clause 11(d) of the settlement agreement.

9. The plaintiff did not release the sum of €3 million from the nominated account as requested and instead its' solicitors wrote to the solicitors for the developer by letter dated 28th March, 2013 stating that the plaintiff would not consent to the release of the monies because of the failure by the developer to provide the plaintiff with plans, information, papers and explanations as required by clause 4.14 of the development agreement to enable the plaintiff to satisfy itself that the Developer had complied with its obligations under the development agreement. Correspondence then followed between the first and second named defendants and the plaintiff, and the solicitors for the defendants and the plaintiff. The developer's architect, Scott Tallon Walker, issued a further certificate that the Point Square had been completed in accordance with the development agreement on 11th August, 2014. On the basis of this certificate, the defendants again demanded the release of the sum of €3 million.

10. There followed further correspondence between the plaintiffs and the solicitors for the defendants, but no agreement was reached and ultimately on 12th September, 2014 the solicitors for the defendants wrote to the plaintiff stating that in view of the fact that it had failed to release the sum of €3 million from the nominated account as previously demanded, it was apparent that the plaintiff did not accept the validity of the certificate issued by the developer's architect of 11th August, 2014. Referring to clause 11(d) of the settlement agreement, they nominated two individuals to fulfil the role of independent architect to determine the dispute and gave the plaintiff until 19th September, 2014 to indicate whether or not it would accept either of these nominees, in default of which they stated they would write to the President of the Royal Institute of Architects of Ireland ("RIAI") to appoint an independent architect in accordance with clause 15.1 of the development agreement. Ultimately that is what occurred and Mr. Anthony Reddy was appointed, as expert by the President of the RIAI to determine the dispute on 16th October, 2014.

11. It should be noted as this juncture that no issue was raised at this time by the plaintiff either in relation to the validity of Mr. Reddy's appointment, or as regards whether or not the dispute was one which could be referred for determination by an expert, in accordance with the terms of the development agreement and the settlement agreement. In response to a question from the Court, counsel for the plaintiff accepted that the dispute was one which could be so referred (notwithstanding some correspondence from the plaintiff's solicitors suggesting otherwise). The solicitors for the plaintiff did raise in correspondence certain matters regarding the appointment of Mr. Reddy, in particular issues relating to his terms and conditions of appointment and whether or not he might have a conflict of interest, but they have no bearing upon this application.

12. Following upon his appointment, Mr. Reddy wrote to the parties inviting submissions. The parties made their submissions to Mr. Reddy, and the dispute giving rise to these proceedings, and this application, arises out of their submissions and the respective stances adopted by the parties in the very considerable volume of correspondence that followed. While the defendants had referred to Mr Reddy a dispute regarding the compliance by the defendants with their obligations under the development agreement as regards the construction of the Point Square, there emerged in the correspondence a further dispute as to precisely what had been agreed between the parties as regards the design and specifications for Point Square. The plaintiff's arguments as made in this correspondence may be summed up (for the purpose of this application) as follows:

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

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

14. As these differences of interpretation of the development agreement and the settlement agreement emerged, the solicitors for the plaintiff wrote, on 6th November, 2014, to the expert and the Developer's solicitors, stating that there is a fundamental issue between the parties over the interpretation of the development agreement insofar as relates to works to be carried out at the Point Square, and further stating that the Expert is not entitled to rule on that question of interpretation. They asserted that "*points of interpretation of this nature are points of legal interpretation and will require a judge to determine how the contract is to be interpreted*". They invited the agreement both of the expert and of the developer that the expert should defer any adjudication of the dispute referred to him until issues of interpretation have been determined by the Courts.

15. In a reply to this letter on behalf of the defendants, dated 7th November, 2014, Messrs McCann Fitzgerald state the following under the heading "Contractual Interpretation":

> "It is stated at paragraph 3 of your letter to the Expert that there is a dispute as to whether:
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> (a) "What has physically been constructed and built is complete; and
>
> (b) The Developer and Architect have satisfied their contractual obligations in what has actually been constructed."

> The above appears to be a distinction without a difference. The second limb of the contention seems to be based on a suggestion that an architect is not qualified to assess the meaning of certain clauses in the Development Agreement. This again disregards the fact that that is precisely what the parties contracted for. How could an independent architect determine the validity of a certificate issued by PVDL's architect confirming that the Point Square has been completed in accordance with the Development Agreement, without referring to the clauses of the agreement that deal with the Point Square? The relevant clauses of the Development Agreement (clause 4.1.3, clause 7.7.2, schedule 1, part II and schedule 1, part III) are set out in the STW report dated 5th November, 2014. Notwithstanding that clause 11(d) amounts to a contractual agreement that these clauses be assessed by the independent architect, it also makes sense that this would be the case, as these clauses do not involve complex legal principles, rather, they refer to specifications and designs associated with construction, falling within the expertise of an architect, not a member of the judiciary.

16. Further correspondence ensued about this and other issues between the parties. On 26th November, 2014, the solicitors for the plaintiff wrote to the expert, and to each of the defendants stating that there was a dispute not just as to the fact as to whether or not the Point Square has been completed in accordance with the development agreement (as amended) but also as to the correct construction and interpretation of clause 7.7.2 of the Development Agreement. They stated that

> "it is the position of the plaintiff that the development agreement is to be `constructed and interpreted in accordance with the terms of the development agreement, as amended, and the various plans (including those appended to the development agreement and Terms), sections, elevation drawings, perspective images and marketing material that illustrated the overall design, specification and quality that the Point Square was to resemble upon completion."

They invited the expert and the defendants to confirm agreement as to this construction and interpretation of clause 7.7.2 of the development agreement by 10am the following day, 27th November, 2014 failing which they stated that the plaintiff would issue proceedings to determine the matter. They informed the expert that in such an event he would be likely to be named as a notice party and that the plaintiff would seek to stay the determination of the dispute by the expert.

17. The solicitors for the defendants replied to the solicitors for the plaintiff stating that the position of their clients was as per their letter of 7th November, 2014 and stating that the defendants did not agree with the plaintiff's construction of clause 7.7.2 of the development agreement. The letter goes on to say that the parties have expressly contracted for the dispute which has arisen between them to be determined by an independent expert.

18. On 26th November, the expert wrote to the solicitors for the plaintiff and the defendants inviting submissions by both parties "*on the issue (if required) … by close of business at 5.30pm on Monday 1st December*".

19. The solicitors for the plaintiff caused the issue and service of proceedings on 27th November, 2014. On 28th November they wrote to the expert asking him to confirm by 1pm on Monday 1st December that he would stay the expert determination process pending the outcome of these proceedings, and informing him that unless they received such confirmation they would bring an application to join the expert as a notice party to the proceedings and also seek an interlocutory injunction to restrain him from taking any further steps in the process pending the determination of these proceedings. The expert was also warned that in such as event the plaintiff would rely on that letter to hold the expert responsible for the costs of any such application.

20. Arising out of this letter, the expert wrote again to the solicitors for both the plaintiff and the defendants requesting submissions on the request of the solicitors for the plaintiff to stay the expert process pending the determination of the proceedings. He requested such submissions by 5.30pm on 2nd December, 2014. The solicitors for the plaintiff replied with further submissions, but the solicitors for the defendants did not issue any reply to this letter until 3rd December, after the deadline given by the expert. In the meantime, the expert had agreed to stay the expert determination process pending the outcome of these proceedings.

The Proceedings

21. The plaintiff claims the following relief in the indorsement of claim herein:-

> (i) A declaration that the area known as Point Square, as defined in the development agreement of 27th February, 2008, does not comply with the defendants' obligations under clause 7.7.2 of the said development agreement;
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> (ii) Insofar as is necessary, 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, to include all representations both by action, conduct and orally and, in particular, the various plans (as appended to the development agreement and Terms), sections, elevation drawings, perspective images and marketing material together with the comparators as so stated in clause 7.7.2 that illustrate the overall design, specification, quality and completion of the Point Square and the manner in which the Point Square was to ultimately present;
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> (iii) An order for specific performance as against the defendants compelling them to comply with and give effect to clause 7.7.2 of the development agreement;
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> (iv) An order for damages in lieu of specific performance;
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> (v) Such further and/or other orders;
>
> (vi) Costs.

The Issues on this Application

22. The defendants bring forward this application on the grounds that the matters in dispute in the proceedings are the subject of an alternative dispute resolution clause and were, up until the issue of these proceedings, and consequent decision of the expert to stay the proceedings before him, under consideration by the expert who has been appointed pursuant to the terms of the development agreement and the settlement agreement, to determine the dispute. On this basis, the defendants argue that the plaintiff is not entitled to take any further steps in these proceedings, pending the determination of the expert. The defendants submit that the expert has full jurisdiction to determine any issues that necessarily arise in the discharge of the task assigned to him. It is their contention that once a dispute has been referred to an expert for determination he is in all respects "at large" and that he sets the procedures for the expert determination process and takes into account such evidence as he considers appropriate entirely at his

discretion. This, it is submitted, follows, from the fact that the parties have entered into a contract submitting in full to the jurisdiction of the expert.

23. Counsel for the defendants accepted however that where an issue of pure law requires to be resolved, the authorities are undecided as to whether or not it is within the mandate of an expert to decide such a question unless she or he is expressly conferred with the power to do so. However, in this case, the defendant submits that no question of law arises; in their submission the only matters to be determined are matters of fact i.e. whether or not the Point Square has been completed in accordance with the terms of the development agreement and the settlement agreement.

24. Counsel for the plaintiff contends that an issue of law does arise. They submit that the differences of interpretation of the development agreement and the settlement agreement that have been submitted to the expert constitute differences in the interpretation of a contract which is a matter of law, and that the expert has no jurisdiction to adjudicate upon matters of law. For that reason the plaintiff issued these proceedings with a view to having the Court adjudicate upon the difference of interpretation before the expert determination process may resume, although the reliefs sought by the plaintiff are couched in somewhat different terms, and I will return to this point later.

25. The plaintiff further submits that the expert has already made a decision to stay the expert determination process which, by reason of clause 15.1, is a decision that is final and binding on the parties. Moreover, in this regard it is submitted on behalf of the plaintiff that for this reason, this aspect of the dispute is *res judicata*. It was further argued on behalf of the plaintiff that the defendants have acquiesced in the acceptance of the expert that he does not have jurisdiction to interpret clause 7.7.2.

26. It is further submitted on behalf of the plaintiff that the defendants seek to invoke the equitable jurisdiction of the Court in pursuing the relief sought in this motion and it is claimed on the basis of the maxim "equity will not act in vain", that the relief sought should be refused because of the resulting futility of the relief sought if it is granted. This futility, it is submitted, is inevitable because of the decision already made by the expert to stay the expert determination process pending the outcome of these proceedings. The plaintiff submits that if the defendants are granted the relief sought, this will result in a stalemate and that accordingly the relief sought should not be granted.

27. The plaintiff also argues that the defendants have failed to invoke the correct jurisdiction of the Court in making this application. They submit that by this application the defendants are, in effect, attempting to strike out the substantive proceedings and indeed they point to that part of the written submissions of the defendants in which they state that "Dunnes Stores have no right to maintain these proceedings". They also refer to paragraph 41 of the second affidavit sworn by Stephen Tennant on behalf of the defendants, in support of this application in which it is stated:

> "The defendants did not use the term "stay" to connote some form of temporary halt be put on the substantive proceedings and the term is used where one party seeks that an indefinite halt is put to the proceedings in question ... to be very clear, the defendants believe that the within proceedings have no merit and should be indefinitely halted."

28. The plaintiff submits that the defendants have brought an application to stay the proceedings rather than bringing the more appropriate application to strike out the proceedings, because of the significantly higher threshold that they would have to meet in such an application. It is argued on behalf of the plaintiff that it is either entitled to pursue the relief sought in the substantial proceedings or it is not – that there is no halfway house. That being the case, the appropriate relief that the defendants should have sought is an application to strike out the proceedings and that there is no scope for the granting of a stay instead.

Submissions on Jurisdiction of Experts

29. The defendants submit that the Courts will stay proceedings which seek to determine a dispute that is the subject of an alternative dispute resolution clause, including a clause which requires that the dispute be referred to the determination of an independent expert. The defendants submit that this arises out of a line of authorities in the United Kingdom that the Courts will generally require parties to comply with the terms of the contracts which they have made. The earliest of the authorities relied upon is the case of *Racecourse Betting Control Board v. Secretary for Air* [1944] 1 Ch. 144 in which MacKinnon LJ. stated that the power to stay an action in circumstances where the parties had agreed to an arbitration clause did not arise under the arbitration legislation, but rather:

> "…under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined."

30. This view was endorsed by and followed by Lord Mustill in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] A.C. 334 were he said:

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

31. That view was further endorsed, again in 1997, by the case of *Thames Valley Power Ltd. v. Total Gas and Power Ltd.* [2006] 1 Lloyd's Rep. 441 where Christopher Clarke J. stated:

> "The question therefore arises as to what approach the Court should take when faced by an application by one of the parties to a dispute to stay proceedings in order to give effect to an agreed method of dispute resolution, namely expert determination, which does not amount to an arbitration agreement, and the extent to which the merits or lack of them are relevant to the exercise of that discretion. That the Court has such a power to stay is apparent from the decision in *Channel Tunnel Group*."

32. It was further submitted by the defendants that an independent expert is not only authorised, but is obliged, to decide all issues which require to be decided in order to determine the dispute between the parties. It was submitted that this includes the interpretation of the meaning of contractual clauses and the consideration of questions of law in doing so. In this regard reliance was placed upon the case of *British Ship Builders v. VSEL Consortium Plc*. [1997] 1 Lloyd's Rep. 106 where Lightman J. held:

> "If the agreement confers upon the expert the exclusive remit to determine a question, (subject to (3) and (4) below) the jurisdiction of the Court to determine that question is excluded because (as a matter of substantive law) for the purposes

of ascertaining the rights and duties of the parties under the agreement the determination of the expert alone is relevant and any determination by the Court is irrelevant. It is irrelevant whether the Court would have reached a different conclusion or whether the Court considers that the expert's decision is wrong, for the parties have in either event agreed to abide by the decision of the expert."

33. Subparagraph 3 and 4 referred to in the paragraph above provide as follows:

> "(3) If the expert in making his determination goes outside his remit e.g. by determination a different question from that remitted to him or in his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the Court may intervene and set his decision aside. Such a determination by the expert as a matter of construction of the agreement is not a determination which the parties agreed should affect the rights and duties of the parties, and the Court will say so.
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> (4) Likewise the Court may set aside a decision of the expert where (as in this case) the agreement so provides if his determination discloses a manifest error."

34. Reliance was also placed upon the cases of *Jones v. Sherwood Computer Services Plc.* [1992] 2 All E.R.170, *Norwich Union Life Insurance Society v. P&O Property Holdings Ltd.* [1993] 1 EGLR 164 and *Nikko Hotels (UK) Ltd. v. MEPC Plc.* [1991] 2 E.G.L.R. 103 in all of which cases the exclusive jurisdiction of an expert to adjudicate upon and decide the issue referred to him, including any issues of interpretation, or issues of mixed fact and law, was affirmed. In *Jones* Dillon J. held that "the first step must be to see what the parties have agreed to remit to the expert" and went on to say:

> "Any number of issues could arise under the various sub-paragraphs of paragraph 2 of appendix 1 at the application of the wording of those sub-paragraphs to particular facts. All these issues are capable of being described as issues of law or mixed fact and law, in that they all involve issues as to the true meaning or application of wording in paragraph 2. I cannot read the categorical wording of paragraph 7 as meaning that the determination of the accountants or of the expert shall be conclusive, final and binding for all purposes "unless it involves a determination of an issue of law or mixed fact and law in which case it shall only be binding if the Court agrees with it".

35. Paragraph 7 to which Dillon J refers in this passage stated simply;

> "The Accountants and the Expert (if any) shall act as experts and not as arbitrators and their or his determination shall be conclusive and final and binding for all purposes"

36. In *Norwich Union* the Court held that the appointed expert was entitled to interpret the meaning of a building agreement in determining whether the development concerned had been completed in accordance with the design documents. Nicholls VC. held:

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

37. In *Nikko Hotels* Knox J. said, after referring to *Jones*:

> "In my judgment *Jones* provides for a contractual analysis of the task set for the expert to perform and it gives full effect to the parties' agreement regarding with what it was that the expert should be entrusted. The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity. "

38. It is submitted on behalf of the plaintiff however that this proposition has been significantly qualified by subsequent authorities, most notably the cases of *Mercury Communications Ltd. v. Director General of Telecommunications* [1996] 1 W.L.R. 48 (House of Lords) and *Barclays Bank Plc. v. Nylon LLP* [2011] EWCA Civ 826. Both cases were somewhat unusual on the facts. In *Mercury Communications* the plaintiff claimed that the defendant had incorrectly interpreted the provisions of a telecommunications licence and issued proceedings seeking a declaration to this effect and further seeking a declaration that the correct interpretation was the one for which they contended. The defendant was by statute charged, with the responsibility of determining the permitted terms and conditions in relation to specified matters that were to apply to a licence to be granted by the second named defendant to the plaintiff in connection with the provision of telecommunication services. While the case gave rise to an overlap between issues of public and private law, it is of interest in the context of these proceedings because of comments made in the dissenting judgment of Hoffmann LJ. in the Court of Appeal and Lord Sleyn in the House of Lords. Lord Hoffmann, after drawing a distinction between expert determination clauses where the parties had prescribed principles by which the expert was to determine the matter entrusted to him and those where parties had not, said:

> "So in questions in which the parties have entrusted the power of decision to a value or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority. One must be careful by what is meant by 'the decision-making authority'. By 'a decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leads to the judgment of the decision-maker the question of whether given facts fall within the specified criterion."

39. That was as I have said, the dissenting judgment in the Court In the House of Lords, Lord Sleyn had this to say:

> "What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words "fully allocated costs" which the defendants agree raises a question of construction and therefore of law, and "relevant overheads" which may raise analogous questions. If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly, then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in clause 29.5 that the Director's determination should be limited to such matters as the Director would have power to determine under condition 13 of the B.T. licence and the principles to be applied by him should be "those set out in those conditions", they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear. His interpretation could therefore be reviewed by the court. There is no provision expressly or impliedly that these matters were remitted exclusively to the Director, even though in order to carry out his task he must be obliged to interpret them in the first place for himself. Nor is there any provision excluding altogether the intervention of the court. On the contrary clause 29.5 contemplates that the determination shall be implemented "not being the subject of any appeal or proceedings." In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties."

40. On the basis of this decision, and the subsequent decision in *Barclays*, the plaintiff submits that while the Courts in England have not departed from the basic principle that parties who have agreed to refer a dispute for resolution by an expert will be bound by that agreement, where a question of construction or interpretation arises that is a question of law which, unless expressly conferred by the agreement upon the expert, is not within the scope of his mandate and is a matter for determination by the Courts.

41. In *Barclays*, a dispute arose as to the factors to be taken into account in calculating profits due to the members of a partnership. The dispute arose prior to the allocation of such profits by the managing member, whose function it was to do so under the terms of the partnership agreement. The plaintiff issued proceedings seeking a declaration that its profits on its initial capital investment in the partnership were not to be taken into account for the purposes of determining the amount of an allocation of profits in the partnership to the members thereof. The defendant sought to stay the proceedings on the basis that the expert determination clause in the partnership agreement applied to the dispute. The relevant clause of the partnership agreement was clause 26.1 which provided as follows:

> "(A) In the event of any dispute regarding (i) the amount of any profit or loss allocations due to a member pursuant to clause 9 or (ii) any payment due to an outgoing member under clause 17, then if such dispute has not been resolved within 30 days following any determination by the managing member under clause 9.2 or allocation under clause 9.3, or any calculation or valuation made as required under clause 17, any affected party may refer the matter or matters in dispute to a partner in an independent firm of internationally recognised chartered accountants agreed upon between them, or failing such agreement within seven days to be selected at the instance of any party by the president for the time being of the Institute of Chartered Accountants of England and Wales. The parties shall use their respective best endeavours to procure that the accountant delivers his decision within such time as may be stipulated in the terms of reference.
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> (B) Such accountant shall act as an expert and not as an arbitrator and shall determine the matter or matters in dispute (which may include any dispute concerning the interpretation of any provision of this agreement or his jurisdiction to determine the dispute or the content or interpretation of his terms of reference) and his decision shall be final and binding on the parties hereto."

42. In his judgment, Thomas LJ. affirmed the general proposition that where parties have made an agreement for a particular form of dispute resolution, then they shall be held to that agreement. He went on to say:

> "The Court will not generally intervene in a matter which is within the jurisdiction of the expert save in the narrow circumstances circumscribed as a matter of contractual interpretation of such clauses. However, it is important to make clear that in none of these cases [i.e. *Nikko Hotels*, *Norwich Union* or *Mercury Communications*] was there, on the analysis undertaken by the court in each case, an issue which was solely one of law relating to the scope of the expert's mandate (including the principles on which he determines the dispute) as derived from the contract which governed his determination. Although the way in which an expert may approach the issues referred to him for determination is one where there is no statutory code, an expert must nonetheless determine the issue referred to him in accordance with the mandate conferred upon him by the agreement; the scope of that mandate (including the principles as derived from the contract upon which that determination must be made) is a question of law.
>
> The decisions in *Nikko* [1991] 2 EGLR 103, *Jones v. Sherwood Computer Services Plc.* [1991] 1 WLE 271 and *Norwich Union* [1993] 1 EGLR 164 all involved mixed issues of fact and law. In the present case it is not necessary to decide whether, if an issue of the kind described is determined by the expert and is solely one of law, a wrong determination of law may have the consequence that the expert is not determining the issue in accordance with the mandate giving to him. That is because clause 26.1 is a wide clause that allows issues of interpretation to be left to the expert and, more importantly and, as I shall explain, there is not issue yet within the jurisdiction of the expert. However, I consider that the cases to which reference has been made do not decide that, where a pure issue of law of the type I have described arises in the course of a determination by an expert acting under the usual form of clause, a wrong determination by the expert of that issue cannot be challenged in the Courts in circumstances where the interpretation adopted by the expert has the consequence that he is not determining the matter in accordance with the mandate given to him. That remains to be decided applying the approach set out in *Jones* case as elucidated by Hoffmann LJ. in the *Mercury Communications* case.

43. Thomas LJ. went on to say that the matter at issue in that appeal was the issue of jurisdiction and not one relating to interpretation of the mandate given to the expert. That was because in that case the managing member had not yet made the allocation of profits; consequently nothing had yet been referred to the expert for determination, but it was apparent that the parties were not in agreement on a fundamental issue regarding the allocation of profits, and the question arose as to whether that issue could be referred for determination by the Expert before there had been any allocation of profits. Holding that it was clear from the terms of the clause that the expert had no jurisdiction until an allocation had been made, Thomas LJ. said:

> "This view also accords with the commercial rationale of sensible businessmen. They would have considered it sensible to entrust to an accountant for expert determination questions relating to the allocation once an allocation had been made or it had been determined that Mr. Burnell was entitled to make an allocation. The parties would not have gone beyond this … but it is difficult to understand why, save in relation to narrow questions of interpretations relating to the process

> of allocation, it would have been contemplated by rational and sensible businessmen that general issues of interpretation of the agreement in its contractual matrix would fall to be determined by an expert accountant relying on the advice of a lawyer rather than by a judge to whom the opposing arguments would be put briefly and a decision obtained within the well understood procedures of the Chancery Division or the Commercial Court as the Courts chosen by the parties under clause 26.2."

(Clause 26.2 of the partnership agreement provided that the agreement and rights of the members were to be governed by and construed in accordance with English law and the members submitted to the exclusive jurisdiction of the English Courts.)

44. Thomas LJ. therefore held that the expert did not have jurisdiction to determine any issues until the managing member had made an allocation of profits, and the question as to whether or not he was entitled to make an allocation which brought into account the profit made by the plaintiff on its capital investment was an issue which went to the jurisdiction of the expert, and in the circumstances therefore he considered that the plaintiff was entitled to have that issue determined before any allocation was made by the managing member, and the Court declined to stay the proceedings brought by the plaintiff.

45. In the same case, Lord Neuberger MR., agreeing with the decision of Thomas LJ. made the following further observations:

> Where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in Court by the party whose argument on the issue is rejected …
>
> 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.
>
> … After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue. If they do not, they may also think it is sensible to try and agree whether the expert's decision on the point will be treated as binding or whether the disappointed party should have the right to refer the issue to the court."

46. The final authority relied upon by the defendants on this issue is that of the Court of Appeal in England and Wales in the case of *Premier Telecommunications Group Ltd., Darren Michael Ridge v. Darren John Webb* [2014] EWCA Civ 994. That case concerned a dispute regarding the valuation of a minority shareholding in a company. At first instance, the Mercantile judge, having considered the leading authorities on challenging expert valuations, including the authorities referred to above, summarised those principles as follows:

> "(1) where the parties have chosen to resolve an issue by the determination of an expert rather than by litigation or arbitration, the expert's determination is final and binding unless it can be shown that he acted outside his remit.
>
> (2) A distinction may be drawn between the expert who has misunderstood or misapplied his mandate with the consequence that he has not embarked on the exercise which the parties agreed he should undertake, and the expert who has embarked on the right exercise but has made errors in conducting that exercise and has come up with what is arguably the wrong answer.
>
> (3) A failure of the first kind means that the determination is not binding because it is not a determination of the kind that the parties have contractually agreed should be binding.
>
> (4) A failure of the second kind does not invalidate the determination, but may leave the expert exposed to a claim in negligence.
>
> (5) In deciding whether an expert determination can be challenged, the first step is to construe his mandate. This is ultimately a matter for the court.
>
> (6) The second step is to ascertain whether the expert adhered to his mandate and embarked on the exercise he was engaged to conduct by asking himself the right question(s) and applying the correct principles.
>
> (7) Once it is shown that the expert departed from his instructions in a material respect, the court is not concerned with the effect of that departure on the result. The determination is not binding.
>
> (8) Where the expert has made an error on a point of law which is not delegated to him, the error means that the determination will be set aside. (It has yet to be decided whether an error by the expert on any point of law arising in the course of implementing his instructions will also justify setting aside the determination – see Lord Neuberger MR. in *Barclays Bank v. Nylon Capital*.)
>
> (9) Where a procedure has been laid down (e.g. to produce a draft memorandum) the expert must follow it. However, what the procedure requires the expert to do is an aspect of the mandate, and ultimately a matter for the Court."

47. In the Court of Appeal, Lord Justice Moore-Bick said that he was content to accept the above as a helpful summary of the applicable principles with one reservation and that was the suggestion that an error by the expert on *any* point of law arising in the course of implementing his instructions might justify setting aside the determination. Pointing out that this remained undecided (as indeed the trial judge had observed) Lord Justice Moore-Bick stated:

> "It is possible that the parties might by their agreement define the terms of the experts' mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases to do so would risk undermining the whole purpose of the reference. Ultimately, however, as Lord Denning observed in *Campbell v. Edwards* [1976] 1 WLR 403, 407 (and as Lord Neuberger himself was at pains to emphasis in *Barclays Bank v. Nylon Capital*), it all comes down to the construction of the contract under which the expert is appointed to act. Only by construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties."

Decision
48. As I have mentioned above, there are no authorities in this jurisdiction dealing directly with questions concerning the jurisdiction of experts. However, the Supreme Court did cite with approval the passage of Lord Mustill above in the case of *Re Via. Networks (Ireland) Ltd.* [2002] 2 IR 47, although that case was concerned with an arbitration clause and not an expert clause. The case does, however, affirm the principle that the courts will hold parties to agreements for alternative resolution of disputes.

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

50. That is the extent of the expert's mandate as conferred by the agreements. He is given no guidance as to the factors that he might take into account in arriving at any determination of the issues referred to him and, importantly, the agreements do not confer upon him an express jurisdiction regarding the interpretation of any provision of the agreement as was the case in *Barclays.* This not altogether surprising; a dispute regarding whether or not a building or a development has been completed in accordance with an agreement is ordinarily decided by reference to the contract documents and this is a question of fact and not of law. In conducting the exercise, an arbitrator or expert must inevitably interpret the contract documentation and to hold that he cannot do so on the basis that interpretation of the contract documents is a matter of law might well defeat the purpose of the dispute resolution clause. Interpretation of the contract documentation in this "trivial sense" (to adopt the phrase used by Lord Hoffmann in *Mercury Communications*, albeit in a different context) is inevitably part of the task assigned to the expert.

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

52. However, the parties are in disagreement as to the meaning of the obligations imposed by this clause. The plaintiff maintains that the clause should be interpreted literally and in the light of the factual matrix pertaining on the date of the development agreement; the defendants, through their architects, Messrs Scott Tallon Walker, have submitted that the intention of this clause was merely to determine the quality and type of materials to be used in the square and that it is impossible to compare the designs of the squares "post fact". This is a very significant difference of interpretation of the agreement. It could hardly be said that it was the intention of the parties that the expert should resolve disagreements of this nature as that would amount to a determination as to what they agreed, as distinct from whether or not there has been compliance with the agreement.

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

54. It is in my view abundantly clear that the parties did not intend a disagreement of this kind - which it may be observed is substantive and not trivial or vexatious in nature - to be resolved by the expert. This is an altogether different task to that of determining whether or not the Point Square has been constructed in accordance with the development agreement. That being the case, the expert's mandate could only extend to the determination of such an issue if it were expressly conferred, which is not the case here. Since I do not consider it within the expert's mandate to determine what the parties intended by clause 7.7.2 of the settlement agreement, I believe that the plaintiff is within their rights in bringing these proceedings.

55. It is necessary however to deal with the submission of counsel for the defendants that the particular reliefs sought by the plaintiff in the proceedings may not be pursued. The first of those reliefs is a declaration that the Point Square does not comply with the defendants' obligations under clause 7.7.2 of the development agreement. That is quite clearly the very issue to be determined by the expert, and if no other relief were sought I believe the defendants would be entitled to an order staying the proceedings. However, the plaintiff also seeks declaratory relief and directions as to the manner in which clause 7.7.2 should be interpreted by the expert. This is a somewhat curious approach, and one might have expected instead a request for declaratory relief from the court as to the meaning of the clause. Ultimately this will be a matter for the trial judge (if the pleadings are not amended in the meantime) but I am satisfied that the pleadings as they stand are sufficient to put the interpretation of clause 7.7.2 in issue.

56. For all of these reasons, I consider that this application should be refused. The plaintiff has however made a number of other arguments which I propose to deal with, notwithstanding holding in their favour on their central argument:

> (i) Firstly, the plaintiff submits that in making the decision that he has to stay the expert determination process, the expert has made a decision which, by reason of Clause 15.1 of the Development Agreement is final and binding on the parties. However, that characterisation of the decision of the expert to stay the process pending the determination of these proceedings is not correct. The decision that the expert has made is procedural and not substantive in nature. He made that decision in the face of a threat by the plaintiff that they would apply for injunctive relief to restrain him from

continuing the expert determination process and would, if necessary, hold him responsible for any costs incurred with such an application. If the defendants had been successful in their application, and a stay had been placed upon the proceedings, then, in my view, it would be open to the defendant to apply to the expert to recommence the expert determination process and he would be entitled to do so as that would be the raison d'être of the decision to grant the defendants a stay.

(ii) All of this applies with equal force to the arguments made by counsel for the plaintiff that the decision of the expert to stay the process renders that aspect of the same *res judicata*, as it does to the argument that the defendants acquiesced in the decision of the expert to stay the proceedings and are accordingly bound by the same.

(iii) The same rationale applies to the argument made on behalf of the plaintiff that the court should not grant a stay on the basis that "equity will not act in vain", and that the court would be doing so by granting a stay over these proceedings in circumstances where the expert has already decided to stay the expert determination process pending the determination of these proceedings. Since, in my view, it would be open to the expert to reconvene the expert determination process, in the event that the court granted a stay on these proceedings, there would be no question of equity acting in vain.

(iv) Finally, the plaintiff argued that the application to stay the proceedings in circumstances where the intention of the application is to put an indefinite halt to the proceedings is inappropriate and that the defendants should instead have brought an application to strike the proceedings out (but did not do so because of the higher threshold involved in the latter application). The jurisdiction of the Court to stay proceedings in cases where an arbitration clause is invoked was affirmed by the Supreme Court in *Re Via Networks* where the Supreme Court held that the High Court enjoys an inherent jurisdiction to stay proceedings in such cases. There is no reason why that decision should not apply with equal force in cases involving an expert determination.