THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 159

Record No. 2016/360

Ryan P.
Irvine J.
Hogan J.

BETWEEN/

POINT VILLAGE DEVELOPMENT LIMITED (IN RECEIVERSHIP)

PLAINTIFF /

RESPONDENT

- AND -

DUNNES STORES

DEFENDANT/

APPELLANT

Record No. 2016/520

BETWEEN/

DUNNES STORES

PLAINTIFF /

APPELLANT

- AND -

POINT VILLAGE DEVELOPMENT LIMITED (IN RECEIVERSHIP)

- AND -

HENRY A. CROSBIE

DEFENDANTS /

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 12th day of May 2017

1. In the halcyon days of 2006 and 2007 the entrepreneur and businessman, Mr. Henry Crosbie, had great plans for the development of what was to be known as the Point Village at North Wall Quay, Dublin 1. It was envisaged that this development would provide elaborate new retail facilities which would appeal to fashion-conscious, affluent young people. By an agreement in February 2008 the parties agreed that Dunnes Stores would be a major anchor tenant in this new development. In addition, however, it was contemplated that the Point Village project would be accompanied by three major developments, namely, the construction of a 39 storey landmark watchtower (which was to be the largest structure in Dublin), a building known as "The Spine" and the "U2 Experience Museum", the latter being a development designed to recognise the achievements of this celebrated popular music group.

2. Like many such ambitious plans, however, these developments were swept away in the aftermath of the banking and financial crash of September 2008. Since the development of the Watchtower, the "Spine" and the U2 Experience were no longer feasible, Dunnes Stores were less keen to participate in this project and claimed that the plaintiff development company, Point Village Development Ltd. ("PVDL"), had breached the terms of the development agreement. To that end Dunnes Stores commenced proceedings in 2009 seeking various reliefs arising from an alleged breach of the development agreement between the parties. These proceedings were then compromised by means of a settlement agreement dated 7th July 2010 ("the 2010 agreement")

3. The settlement agreement envisaged that in return for being absolved of its obligation to build the Watchtower, the Spine or the U2 Experience, the contract price to be paid by Dunnes Stores was to be reduced from €46m. to €31m.. This latter sum was to be paid into a joint nominated account to be released in instalments in accordance with Clause 11 of the agreement. Clause 11(c) of the agreement provides that:

> "The following provisions shall apply to the release of monies in the nominated account:-
>
> (c) The sum of €15m. (plus accrued interest to date) shall be released within five working days of receipt by Dunnes Stores of confirmation by William Fry 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 Stores should have commenced the fit

out of the store."

4. Clause 6 of the 2010 agreement is also of some importance, since it provides that:

> "The developer/landlord will discuss with Dunnes the tenant mix for the ground floor on the Centre prior to entering into binding agreements for lease with tenants."

5. It is not disputed that the parties engaged in extensive correspondence regarding the proposed tenancies for the Point Village Centre. A meeting between the parties also took place on 18th July 2014 at which the proposed tenant mix was discussed. It is agreed that this was, in fact, the only meeting between the parties at which the tenant mix was discussed.

6. Some years after the 2010 agreement a receiver and a statutory receiver were appointed in respects of the assets of PVDL and it is the receivers who now have effective carriage of the proceedings. By letter dated 29th February 2016 the solicitors for the receivers, McCann FitzGerald, wrote to Dunnes Stores claiming to have provided the confirmation required by clause 11(c). (No issue arises from the fact that the confirmation was provided by McCann FitzGerald, the solicitors for the receivers, rather than William Fry the erstwhile solicitors for PVDL). While this confirmation was disputed by Dunnes Stores on several grounds, the chief objection was that the reference to "tenants" in Clause 11(c) of the 2010 agreement was to "high quality" tenants, *i.e.*, tenants of a quality consistent with the projected quality of the Point Village development. Dunnes Stores contend that the tenants acquired by the receivers fall far short of that, so that it has in fact no obligation to pay pursuant to the confirmation provided by McCann FitzGerald.

7. In 2016, however, PVDL issued special summons proceedings against Dunnes Stores contending that pursuant to clause 11(c) of the 2010 agreement the later company is required to release €15m. to the receivers of PVDL in view of the certificate. These proceedings have not yet come to trial and the present appeals concern, first, an application for discovery and, second, an application to permit the solicitors and counsel for Dunnes Stores to have access to certain discovery documentation generated in the earlier 2009 proceedings. I propose to deal with these two appeals in turn.

The first appeal: discovery

8. The first appeal is an appeal from the *ex tempore* decision of McGovern J. in the High Court dated the 4th July 2016 insofar as he refused the defendant's application for discovery. In its notice of motion dated the 22nd June 2016 Dunnes Stores sought the following discovery:

> "Category 1:
>
> All documents evidencing and / or relating to the plaintiff's engagement with the defendant pursuant to clause 6 of the settlement agreement.
>
> Category 2:
>
> All documents evidencing and / or relating to the plaintiff's engagement with actual or potential tenants in respect of units in the Point Village Centre for the purpose of complying with clause 11(c) of the settlement agreement, including all documents and correspondent exchanged between the plaintiff, its servants or agents including its letting agents and / or other property advisors, in this regard and, all documents and correspondent exchanged in the plaintiff's servants or agents (including its letting agents and / or property advisors and actual tenants.
>
> Category 3:
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> All documents evidencing and / or relating to the agreement for lease and /or leases entered into by the plaintiff with the tenants set out at para. 7.14 of the affidavit of Stephen Tennant sworn on the 6th April 2016.
>
> Category 4:
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> All documents evidencing and / or relating to the tenant mix for the Point Village Centre, including all documents evidencing and / or relating to the types, quality of the tenants envisaged and were proposed for the Point Village Centre from when the development was first envisaged to date. "

9. In his decision McGovern J. ruled against the majority of the reliefs claimed, saying in respect of Category 1 as follows:

> "This is an application for discovery of four categories of documents, the first one is all documents evidencing and/or relating to the plaintiff's engagement with the defendant pursuant to Clause 6 of the settlement agreement. In my view the offer made by Messrs McCann FitzGerald in their letter of 28th June 2016 with regard to this category was reasonable, they offered to make discovery of the *inter partes* correspondence exchanged between the parties pursuant to Clause 6 of the settlement agreement and all notes and memoranda recording what transpired at the meeting between the parties on 18th July 2014. This document is relevant to the compliance by the defendant of Clause 6 and no more than that. It seems to me that it is only the interactions between the plaintiff and the defendant that are relevant to the discovery which has been offered, so that letter is reasonable and that is the discovery I will direct."

10. Turning then to categories 2, 3 and 4 McGovern J. said:

> "Category 2 is all documents evidencing and/or relating to the plaintiff's engagement with potential and actual tenants in respect of units of the Point Village Centre for the purpose of complying with Clause 11(c) of the settlement agreement, including all documents and correspondence exchanged between the plaintiff and its servants or agents, including its letting agents and/or other property advisors in this regard and all documents and correspondent engaged between the plaintiff's servants or agents, including its letting agents and/or other property advisors and potential and actual tenants.
>
> In my view the discovery that is sought is not necessary on the issues which have been joined. Either the tenants are high end or high class tenants or they are not. That's a question of fact which can be determined by expert of other evidence at the hearing having regard to the nature of the tenants who are occupying the various premises and it doesn't depend on the discovery sought in Category 2. So I am refusing that category.
>
> Category 3 is all documents evidencing and/or relating to the agreement for lease and/or leases entered into by the plaintiff or the tenants set out at paragraph 7.14 of the affidavit of Stephen Tenant sworn on 6th April 2016. In my view

> the discovery sought is not necessary because all that was required was confirmation of a binding agreement and this confirmation has been furnished by the defendant to the plaintiffs. So I am going to refuse category 3 as being unnecessary and irrelevant.
>
> Category 4 is in respect of all documents evidencing and/or relating to the tenant mix for the Point Village Centre, including all documents evidencing and/or relating to the type and quality of the tenants envisaged and/or proposed for the Point Village Centre from when the development was first envisaged to date. This category seems to me to be far too wide and also is neither relevant nor necessary, it goes way beyond the external contact between the plaintiff and the defendant, which is all that was required under the terms of the agreement. I am going to refuse category 4."

11. It may be convenient now to consider each of these categories in turn.

Category 1
12. By letter dated 28th June 2016 McCann FitzGerald on behalf of the receivers agreed to make the following discovery in respect of category 1:

> "The *inter partes* correspondence exchanged between the parties pursuant to clause 6 of the settlement agreement and all notes and memoranda recording what transpired at the meeting between the parties on 18th July 2014."

13. In an earlier letter of 14th June 2016 McCann FitzGerald indicated that it accepted that the inter-actions between the parties in this regard were relevant, furthermore, that the plaintiff relied on such correspondence and the meeting between the parties on 18th July 2014 as "demonstrating the plaintiff's compliance with clause 6" of the 2010 agreement."

14. It is probably fair to observe that the scope of the discovery offered and ordered by the High Court in respect of category 1 was not central to the scope of the present appeal. In my view, the discovery ordered by McGovern J. was nevertheless proportionate and measured in the circumstances. This Court has repeatedly stressed that open-ended discovery generating large volumes of documentation is rarely in the interests of justice: see, *e.g.*, *IBB Internet Services Ltd. v. Motorola Ltd.* [2015] IECA 282.

15. While it would be surprising if the documentation generated under this heading would overwhelm the action – the very concern expressed in *IBB Internet Services* – at the same time one may doubt if any wider discovery than that actually ordered by McGovern J. in respect of this category would actually be of any real practical utility. It is true that Dunnes Stores dispute the adequacy of the discussions and engagement between the parties regarding the tenant mix (see paragraph 39 *et seq.* of the replying affidavit of Mr. Sheridan of 9th May 2016). It must nevertheless be recalled that there is no suggestion that there were any other discussions or engagement other than that actually included in the discovery ordered.

16. In these circumstances, I can see no basis upon which the discovery as ordered by McGovern J. in respect of category 1 can realistically be challenged.

Category 2: The plaintiff's engagement with actual and potential tenants
17. As I have already noted, the core of Dunnes Stores' case is that the reference to "tenants" in clause 11(c) is a reference to "high class" tenants for the purposes of a prestigious retail shopping centre such as they say was always envisaged. The meaning of clause 11(c) of the 2010 agreement will, however, ultimately be determined by the High Court employing standard interpretative techniques used in construing commercial contracts of this kind. One of these basic rules is the parol evidence rule which – subject admittedly to exceptions – precludes the courts receiving evidence from the parties as to what their subjective beliefs as to the meaning of the agreement actually was. This is not some technical rule of evidence, but rather reflects the preference of the common law for the written word as the most straightforward way of determining the nature of the contractual bargain which the parties actually arrived at.

18. Viewed thus, the plaintiff's engagement with actual or potential tenants could only be relevant to show what the subjective beliefs of PVDL regarding the scope and meaning of the reference to "tenants" in clause 11(c) actually were. But since such evidence would – generally speaking, at least – be inadmissible at trial for this purpose, the discovery sought in aid of this line of inquiry must also be deemed not to be relevant so far as any issues in these proceedings are concerned.

19. At the hearing of the appeal counsel for Dunnes Stores, Mr. Hayden S.C., argued forcefully that such evidence might be relevant to show, for example, that Point Village acted inconsistently with the argument as to the construction of clause 11(c) which it now advances in these proceedings. Discovery might show, for example, that immediately after the settlement agreement Point Village sought high class tenants to the exclusion of all other forms of tenants on the basis that this was what was in fact understood by the terms of clause 11(c). If that were so – or so the argument ran – this might provide immediate, contemporary evidence as to what the parties had actually understood by the agreement.

20. This is an argument with some theoretical attractiveness which might possibly prevail in an appropriate case. It is, however, unnecessary to consider it any further so far as the facts of the present case are concerned. The plain fact of the matter is that it was the receivers who sourced these tenants at some stage after their appointment in 2014. The receivers were not a party to the 2010 agreement and their conduct in sourcing these tenants after their appointment (and, hence, several years after the 2010 agreement) cannot realistically be of any relevance in demonstrating some form of contemporanea expositio as to what was understood by the parties at the time of agreement.

21. It follows, therefore, that both the beliefs and the conduct of the receivers regarding the sourcing of these tenants is irrelevant to the issue of construction of the 2010 agreement at the trial. This had the further consequence that the discovery sought in respect of category 2 is irrelevant.

Category 3
22. Under the terms of the 2010 agreement, the obligation to pay was triggered by the provision of the confirmation from PVDL's solicitors regarding the lease(s) arranged with the seven tenants. Absent fraud or manifest error – neither of which have been alleged – it does not seem to me that Dunnes Stores can look behind the certificate provided by McCann FitzGerald, unless, of course, it could be shown that this firm proceeded from an incorrect understanding of the proper construction of clause 11(c) itself.

23. One might therefore ask: what purpose would this discovery serve? It could, at most, serve to show the understanding of the receivers' solicitors. But, as I have just explained in the context of category 2, the construction of clause 11(c) will not be dependent on the beliefs of third parties such as the receivers' solicitors regarding the meaning of the clause.

24. It follows, therefore, that for the reasons just stated in the case of category 2, the discovery sought in respect of category 3 likewise fails the test of relevance. Such discovery could only at best assist in demonstrating the beliefs of the solicitors for the receiver regarding the proper construction of clause 11(c), yet evidence along these lines would not be admissible at the trial of the action.

Category 4: The relevant tenant mix
25. The discovery sought under this category is all documents relating to the tenant mix proposed for the Village Centre. It seems to me that discovery under this heading is open to the same objections as obtained in the case of category 2 and, indeed, category 3. Such discovery could only assist to show what the subjective beliefs of PVDL and the receivers regarding what the reference to "tenants" in clause 11(c) actually was.

26. It accordingly all comes back to the proper construction of clause 11(c) of the 2010 agreement. But this is a matter to be determined by the High Court by reference to the standard principles of contractual construction as explained in leading cases such as *Analog Devices BV v. Zurich Insurance* [2005] IESC 12, [2005] 1 I.R. 274 and, to repeat, the beliefs of the parties regarding the meaning of the clause are irrelevant.

27. It is essentially for this reason that I consider that the discovery sought in respect of category 4 fails the basic test of relevance.

Conclusions regarding the first appeal
28. For all of these reasons, therefore, I would dismiss Dunnes Stores' appeal against the order of McGovern J. insofar as he granted only limited discovery in respect of category 1 and refused to grant discovery in relation to categories 2, 3 and 4.

The second appeal: release from the implied undertaking
29. The appeal concerns an appeal brought by Dunnes Stores from the decision of Cregan J. delivered on the 9th November 2016. Dunnes Stores had by motion dated the 12th October 2016 sought an order permitting it to disclose to its legal representatives the discovery documentation which had been made available in the 2009 proceedings. As it happens, 15 categories of discovery were made in the 2009 proceedings. Of these categories of discovery most are quite irrelevant to the present proceedings, but category 13 is nonetheless potentially of some importance. Under this heading PVDL had been required to make discovery in the 2009 proceedings of all documents comprising or relating to:

> "…the steps taken for the purposes of letting retail premises within the Point Village Development and/or any lettings, offers of lettings or offers to take lettings that were made."

30. It is plain that there is a clear overlap between the wording of category 13 in respect of the 2009 proceedings (which discovery was granted) and the documents contained in categories 2, 3 and 4 sought in the 2016 proceedings, albeit by definition the category 13 discovery could only have related to documents generated prior to the pre- July 2010 settlement agreement. It is also worth stating that the 2009 proceedings involved somewhat different and broader issues (such as the alleged failure by PVDL to build the Watchtower or the U2 Experience), whereas the focus of the 2016 proceedings is on the contention that the tenants now secured by PVDL and the receivers do not constitute the "high class tenants" said to be required by clause 11(c) of the 2010 agreement.

31. Discovery in court proceedings is a forensic mechanism designed to promote the fair administration of justice. By its order for discovery the court obliges the parties to release and disclose documentation that would otherwise remain confidential and private. As Ryan J. explained in *Green Pastures (Donegal) Ltd. v. Aurivo Co-Operative Society Ltd.* [2014] IEHC 209:

> "A party's documents are its own property and it is not obliged to reveal them to another litigant even in proceedings between them, unless the specific document or category of documents is actually relevant to the issues."

32. The disclosure is, however, to the other side for the purposes of the litigation only and not for any other purpose. The documents in question which may be the subject of a discovery order may be highly sensitive and, depending on the nature of the proceedings, might include documents such as tax returns, bank statements, medical records and even documents dealing with criminal investigations. The fact that the documents are made available in discovery does not, however, mean that the recipients of the discovery documentation are free to use them as they please for other purposes. The disclosure of such documents in the discovery process is accordingly subject to the implied undertakings that the documents will be used for this purpose alone and for none other: see, e.g., the decision of the House of Lords in *Home Office v. Harman* [1983] 2 A.C. 280. As Murphy J. observed in *Countyglen plc v. Carway* [1995] 1 I.R. 208, 218:

> "…discovery is made solely for the purposes of the particular litigation in which the order is made and that the use or abuse of the information obtained in discovery for any other purpose would be a clear contempt of the court and punishable accordingly."

33. It is, however, also the case that the courts have a clear power and jurisdiction to release the a party from the terms of any implied undertaking where the interests of justice so require: see, *e.g.*, *Roussel v. Farchepro Ltd.* [1999] 3 I.R. 567, *Cork Plastics (Manufacturing) Ltd. v. Ineos Compounds (UK) Ltd.* [2007] IEHC 11, [2011] 1 I.R. 492, *Breslin v. McKenna [*2008] IESC 43, [2009] 1 I.R. 298. It is, nevertheless, generally necessary to show what Kelly J. described in *Roussel* as "special circumstances" before any order releasing the party from that undertaking will be made.

34. Can there be said to be "special circumstances" in the present case? In his judgment Cregan J. thought not, saying as follows:

> "The central problem with this application is this:
>
> 1. Dunnes Stores brought an application for discovery in the 2016 proceedings and sought four categories of document. Three of these categories were refused and the fourth was granted, subject to certain amendments. Dunnes Stores has now appealed this decision to the Court of Appeal.
>
> 2. It was only after Dunnes Stores lost this discovery application that they then brought this application to permit their legal advisors to review the 15 categories of documents discovered in the 2009 proceedings.
>
> 3. It is clear, therefore, in my view that the current application is an attempt by, or could be construed as an attempt by, Dunnes Stores to circumvent the judgment of the High Court which is now under appeal.
>
> 4. It was always open to Dunnes Stores to bring this application to be released from the implied undertaking before they

brought their application for discovery. This, they chose not to do. Had they done so then the application would have been a more usual application and would have been considered by the court also in the light of the principles set out by Kelly J. in Roussel.

5. It was also open to Dunnes Stores to include in the four categories of discovery sought additional categories of documents from the 2009 proceedings if they thought they were relevant. Again, however, for their own reason they chose not to do so.

6. It is, of course, also open to Dunnes Stores to bring a second application for discovery which might seek additional categories of documents which they have not sought in their first discovery application in the 2016 proceedings. It is agreed between the parties that there is nothing in principle that prevents Dunnes Stores from so doing.

7. The problem with the current application is that it is an attempt by Dunnes Stores to have a second bite at the cherry in a manner which, in my view, is not appropriate.

8. Point Village Development Ltd. have sought to characterise this application as an abuse of process. I do not believe that it would be fair to characterise this application in this way. However, I do not believe that such an application is appropriate in the circumstances in this case.

9. I would, therefore, conclude that to bring an application to allow Dunnes Stores' lawyers to be released from the implied undertaking on discovery in respect of 15 categories of discovery in the 2009 proceedings to see if they can be used in the 2016 proceedings, in circumstances where Dunnes Stores have brought an application in respect of four categories of discovery in the 2016 proceedings and that application has been refused and is under appeal, is an attempt to circumvent the High Court decision on discovery.

10. It is also relevant to look at the nature of the claim in the 2016 proceedings, the category of discovery made in the 2009 proceedings and the categories of discovery sought in the 2016 proceedings;

11. Although I do not think it is correct to offer a concluded view on the 15 categories in the 2009 discovery, it is, in my view, reasonable to offer at least a preliminary view on the basis of the papers furnished to this court in respect of the current application that it is difficult to see how categories 1 to 12, 14 and 15 are relevant to the issues raised in the 2016 proceedings.

12. Moreover, turning to category 13, it does appear to me, again on a preliminary view, that category 13 appears to come within categories 2, 3 and 4 of the Defendant's discovery application in the 2016 proceedings.

13. If that is the case, then it is clear that this application is indeed an attempt to circumvent the judgment of McGovern J. in the 2016 discovery application and is, therefore, inappropriate.

14. If that is *not* the case and category 13 of the 2009 discovery refers to documents *other* than those sought in categories 2, 3 and 4 of the 2016 discovery application then Dunnes Stores can seek these documents by way of a separate discovery request.

15. Whilst Dunnes Stores submit that it is not possible to assess whether categories 1 to 12 of the 2009 discovery are relevant to the 2016 proceedings without seeing the documents, I do not agree with this submission. It is, in my view, reasonable to consider whether these categories, which deal with the Watchtower and U2 Experience, are relevant to the 2016 proceedings, and, on a preliminary note, they are not."

35. For my part, I would find it difficult to improve on this reasoning of Cregan J.. On any view, the timing, content and context of this application to release Dunne Stores from the implied undertaking in relation to category 13 of the 2009 proceedings would amount to a collateral attack on the earlier decision of McGovern J. in relation to the discovery sought in categories 2, 3 and 4 in the 2016 proceedings or, at least, an attempt to circumvent the effects of that ruling given the overlap between the documents sought. There are, in any event, two further considerations which support this conclusion.

36. First, the effect of releasing Dunnes Stores from the implied undertaking would be palpably unfair to PVDL, since it would, in part, deprive it of the benefit of its success in the hearing before McGovern J. After all, it has demonstrated to both McGovern J. and now to this Court that such documents relating to the agreements with tenants and the general tenant mix are not relevant to the present proceedings. Second, it is implicit in *Roussel* that the court would only direct the release of the parties from the implied undertaking where the documentation covered by that undertaking was of obvious relevance to the later proceedings, so that such release was genuinely necessary in the interests of justice.

37. In this context, it is, in any event, difficult to discern how documentation generated in relation to the 2008 agreement could have a direct relevance to the construction of the subsequent 2010 agreement. Besides, the conduct of the parties between 2008 and 2010 in relation to securing tenants at Point Village would not, generally speaking at least, be relevant to interpreting the 2008 agreement. It would have even less immediate relevance to the construction of the later 2010 agreement. In other words, the obvious lack of immediate relevancy of these documents to the issues now arising in these proceedings is in itself a ground for refusing to grant an order releasing Dunnes Stores from the implied undertakings in relation to the category 13 documents.

Conclusions regarding the second appeal

38. In summary, therefore, I would dismiss the appeal of Dunne Stores from the decision of Cregan J. The special circumstances required by Kelly J. in *Roussel* before the courts should consider releasing the party from the implied undertaking are simply not present, as this application appears to amount in substance to an endeavour to circumvent the ruling of McGovern J. in relation to the discovery sought in categories 2, 3 and 4 of the 2016 proceedings. Furthermore, it is clear that the relevance of the documentation in question to the principal issue in the present proceedings – namely, the construction of clause 11(c) of the 2010 agreement – is at best exiguous and remote.

39. It is for these reasons that I would dismiss this second appeal.