Neutral Citation Number: [2012] IEHC 93

THE HIGH COURT

COMMERCIAL

2011 370 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 – 1998 AND

IN THE MATTER OF THE ARBITRATION ACT 2010, SECTION 4 AND IN THE MATTER OF AN ARBITRATION

BETWEEN

DUNNES STORES

APPLICANT

AND

HOLTGLEN LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Kelly delivered on the 27th day of March, 2012

Introduction

1. Dunnes Stores ("Dunnes") seek to set aside an arbitral award ("the award") made by Mr. Eoin McCullough, S.C., ("the arbitrator") on 7th October, 2011. The award was made on foot of a counterclaim made by Holtglen Limited ("Holtglen") in an arbitration between these parties.

2. The arbitration arose on foot of a development agreement of 13th June, 2007 ("the agreement"), which was made between Dunnes, Holtglen and a company called Deerland Construction Limited as surety. The agreement was in respect of works that were to be carried out in Co. Kilkenny on a premises now know as the Ferrybank Shopping Centre (the centre).

3. Included in the centre was a site that was purchased by Dunnes for the purpose of establishing an anchor store there. The works to be performed under the agreement included the construction of that store.

4. Dunnes contended that Holtglen had breached the agreement in a number of ways and had not remedied those breaches. Thus, it was argued, it was entitled to terminate the agreement. Holtglen defended that claim and counterclaimed for monies due to it under the agreement.

5. On 15th June, 2001, the arbitrator made a determination which upheld in large part Dunnes claims concerning Holtglen's breaches of the agreement. However, he found that the breaches had been remedied and accordingly, Dunnes were not entitled to terminate the agreement. That determination of the arbitrator is not challenged in these proceedings.

6. In September 2011, the arbitrator embarked upon the hearing of Holtglen's counterclaim and made the award in favour of Holtglen on 7th October, 2011.

7. The arbitrator determined that Dunnes were liable to pay Holtglen the sum of €20,269,732.81 pursuant to clauses 17.1.5, 17.1.6, 17.1.8 and 17.3 of the agreement. He also ordered Dunnes to pay €15,905.55 pursuant to clause 12 of the agreement. He made ancillary orders dealing with costs and the payment of interest. Dunnes now seek to set the award aside. They do so on the grounds that there is a fundamental error of law upon the face of the award.

8. Before I consider the merits of the application, I ought to deal with the jurisdiction of the court and the criteria applicable to it.

Jurisdiction

9. Section 36 of the Arbitration Act 1954, provides as follows:-

> *"(1) In all cases of reference to arbitration, the Court may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire.*
>
> *(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order."*

10. This section provides a mechanism for the remittal of an award. It does not specify the grounds upon which an award may be remitted. The section enables the court to make the order contemplated but the grounds for so doing are to be found in common law. Quite apart from this statutory provision, there is, in any event, a common law jurisdiction to remit or set aside an award if there is an error of law on its face. This is clear from the judgment of Costello J. in *Church and General Insurance Co. v. Connelly and McLaughlin* (Unreported, 7th May, 1981) where he said that:-

> *"…there is no doubt that at common law the court can either remit or set aside an award if there is an error of law on its face…in my view the court's jurisdiction to set the award aside in such circumstances is given by the common law."*

11. Nowadays most, if not all, applications of this nature are brought pursuant to the provisions of section 36.

12. This jurisdiction, according to McCarthy J. in *Keenan v. Shield Insurance Company Limited* [1988] I.R. 89 at 96, is limited to *"an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged".*

13. This approach was followed by Clarke J. in *Limerick City Council v. Uniform Construction Limited* [2007] 1 I.R. 30 at p. 43 where he said the jurisdiction is *"limited and arises only where the error is 'so fundamental' that it cannot be allowed to stand (Keenan v. Shield Insurance Co. Limited [1988] I.R. 89) or 'clearly wrong' (McStay v. Assicurazioni Generali SPA)".*

14. In recent years, the task of convincing a court that it ought to intervene and remit or set aside an arbitrator's award has become quite onerous. This much is clear from the observations of O'Donnell J. in *Galway City Council v. Samuel Kingston Construction Limited* [2010] 3 I.R. 95, where he said at p. 106:-

> *"If the grounds for remittal are matters of common law, then a number of consequences follow. Firstly, the grounds may at least in theory be capable of expansion, as indeed was recognised by Fennelly J. in McCarthy v. Keane [2004] IESC 104, [2004] 3 I.R. 617. By the same token however, the existing grounds can also be developed and if considered appropriate, made more rigorous. Indeed, this in my view is how recent Irish case law should be understood.*
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> *In Keenan v. Shield Insurance Co. Ltd. [1988] I.R. 89, McCarthy J. stated in unmistakeable and trenchant terms the policy considerations that he considered should guide the court particularly in the aftermath of the Arbitration Act 1980, and perhaps more generally in the light of the development of arbitration, both domestic and international. At p. 96 of the judgment he stated:-*
>
> > *'Arbitration is a significant feature of modern commercial life; there is an International Institute of Arbitration and the field of international arbitration is an ever expanding one. It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate, as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration final in every sense of the term. Church & General Insurance Co. v. Connolly (Unreported, High Court, Costello J., 7th May, 1981) itself is an example of the type of fine-combing exercise which courts should not perform when it is sought to review an arbitration award.'*
>
> *Applying this test, he concluded that:-*
>
> > *'There may be instances in which an award which shows on its face an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged.'*
>
> *This it should be noted is a very significant adjustment (and restriction) of the test which had previously applied, which, as McCarthy J. himself identified it on the preceding page was merely that 'there was an error of law appearing on the face of the award'. The same process of adjustment (and restriction) is detectable in the judgment of Finlay C.J. in McStay v. Assicurazioni Generali SPA [1991] I.L.R.M. 237 where he suggested that an arbitration award could be set aside where 'the decision is clearly wrong on its face' (emphasis added). Similarly in McCarthy v. Keane [2004] 3 I.R. 617, Fennelly J. at p. 627 considered that the judgment of McCarthy J. in Keenan v. Shield Insurance Co. Ltd. [1988] I.R. 89 'set the tone for the correct judicial approach to arbitral awards' in general, and thus considered, that while s. 38 of the Arbitration Act 1954 permitted the court to set aside an award for 'misconduct', that the standard or test of misconduct should require 'something substantial, something that smacks of injustice or unfairness'.*
>
> *The position has thus been reached where this approach can and should be taken to each of the grounds for remittal (and in indeed any new or extended ground), namely that it is not enough that there should be an error or misconduct, or new evidence etc., but that the factor must reach the level of being so serious and so substantial, or so fundamental, that it smacks of injustice and the court cannot permit it to remain unchallenged."*

15. That final paragraph summaries the standard that has to be achieved by an applicant for an order of this type. Such an applicant must demonstrate not merely error on the face of the record but an error so serious and so substantial or so fundamental that it smacks of injustice and the court cannot permit it to remain unchallenged.

16. As is clear from a later passage in the judgment of O'Donnell J., this approach of the courts is not to be regarded or described as some form of *"deference"* or *"curial deference"* to an arbitrator. As he says:-

> *"If there is deference, it is not to the arbitrator, but to the parties' choice of a process which values certainty and speed above technical correctness, and which recognises that correctness is itself the matter upon which courts and judges might reasonably differ. The scheme thus created (and chosen by the parties) has a relatively high tolerance for matters which upon close inspection might be revealed to be errors of procedure, fact, evidence or law."*

17. Finally, O'Donnell J. issues a cautionary reminder at p. 108 of the judgment where he says:-

> *"I would suggest that it is important that the courts in considering challenges to arbitral awards should firstly remind themselves of the high tolerance that the system of arbitral review has for arbitral error and furthermore should seek to articulate as fully as possible the consideration of law and policy, and the analysis of the individual proceedings, which lead the court to conclude that in any given case a substantial error has or has not been established which is so fundamental that the proceedings cannot be allowed to stand."*

18. The approach which I take to this application is that identified in the passages from which I have just quoted.

The Agreement

19. In order to understand the criticism which is made of the award, it is necessary to set out in a little detail some provisions of the agreement.

20. The agreement provided that Holtglen was to construct and complete the store for the amount specified in the agreement.

21. Clause 17 required Dunnes, subject to compliance by Holtglen and/or the surety if applicable with the provisions of the agreement, to pay €37,250,000 together with VAT thereon and a further €1,025,000 together with VAT thereon to Holtglen in the manner

prescribed under clause 17. In essence, that clause provided for stage payments to be made on foot of architect's certificates. The first four such payments were to be made on the date of commencement of works, the completion of the ground floor slab, the completion of the roof of the store and completion of the first floor slab of the store. These payments were made and thus were not in issue before the arbitrator.

22. It was the payments prescribed at clauses 17.1.5, 17.1.6 and 17.1.8 that were in dispute. They provided for 20% of the sum to be paid on the date of store practical completion; 20% of the sum to be paid on the date of centre practical completion; and 2.5% of the sum to be paid twelve calendar months after the date of store practical completion. Store practical completion occurred on 10th June, 2009. Centre practical completion occurred on 28th July, 2009 and so the final sum became payable on 10th June, 2010 being twelve months after the date of store practical completion.

23. he only other provision of clause 17 which is relevant is 17.6 where it is stated:-

> *"The Developer (Holtglen) warrants that sufficient funds including bank finance are in place and approved for this purpose and all terms and conditions of such finance will be complied with prior to commencement of and during the construction of the building works."*

24. Clause 22 of the agreement is the other clause of relevance. It deals with default and termination. It provides as follows:-

> *"22.1 It is hereby agreed that the company (Dunnes) shall have full right liberty and power (without prejudice to any other right or remedy and without being obliged so to do) in case:-*
>
> > *(a) The Developer or the Surety shall materially fail to perform or observe any covenant or agreement on its part contained in this Agreement and fails to commence to remedy the breach of such covenant or agreement within 30 days after notice in writing specifying the breach and requiring it to be remedied is given by the Company to the Developer or as the case may be the Surety or fails to diligently remedy such breach within a reasonable period of time (but not exceeding 60 days) having regard to the nature of such breach;*
> >
> > *(b) The Developer or if more than one either of them or the Surety is unable to pay its debts as they fall due within the meaning of s. 214 of the Companies Act 1963 or shall have a receiver appointed over any of its assets or undertaking or shall enter into liquidation whether compulsory or voluntary (except liquidation for the purposes of reconstruction) or an examiner is appointed or it shall compound or arrange with creditors or shall suffer its goods to be taken in execution; or*
> >
> > *(c) The Centre Opening Date or the Date of Centre Practical Completion is not achieved within the Development Period.*
>
> *To determine this agreement on giving notice to the Developer without prejudice to any right or remedy of the Company whether for the recovery of any money due to it or in respect of any breach, non performance or non observance of the terms and conditions of this Agreement or otherwise.*
>
> *22.2 Notwithstanding the foregoing provisions the Company shall not without first giving the funder not less than 60 (sixty) days previous notice in writing (the "Company's Notice") exercise any right it may have (i) to terminate this Agreement or to treat this Agreement as having been repudiated by the Company; or (ii) seek to exercise any right it may have against the surety under this Agreement. The Company's Notice shall specify the grounds upon which the Company claims it is entitled to terminate this Agreement or seek to exercise any right it may have against the Surety (as appropriate). The Company's right to terminate this Agreement or seek to exercise any right it may have against the Surety (as appropriate) shall cease if before the expiry of the period stated in the Company's Notice:-*
>
> > *(a) The Funder (Bank of Ireland) gives notice in writing to the Company substituting the Funder for the Developer as Developer under this agreement (a "Notice of Substitution"); or*
> >
> > *(b) The breach or breaches specified in the Company's Notice insofar as they would entitle the company to terminate this Agreement or seek to exercise any right it may have against the Surety (as appropriate) have been remedied.*
>
> *Upon but not before the giving of a Notice of Substitution the Company shall accept the instructions of the Funder to the exclusion of the Developer and/or the Surety as appropriate in respect of the performance of this Agreement upon the terms and conditions of this agreement.*
>
> *All obligations of the Company to the Developer under this Agreement whether in respect of matters arising before or after the giving of a Notice of Substitution shall be deemed to be obligations to the Funder as if it had at all relevant times been a party to this Agreement in place of the Developer. All obligations of the Developer to the Company under this agreement whether in respect of matters arising before or after the giving of a Notice of Substitution shall be deemed to the obligations of the Funder as if it had at all relevant times been a party to this Agreement in place of the Developer.*
>
> *22.3 If this agreement shall be determined under the provisions of clause 22.1, and if a Notice of Substitution is not validly and properly given in accordance with the provisions of clause 22.2 prior to the expiry of the Company's Notice, the licence herein granted to the Developer in respect of the Site shall also determine and the Company may without prejudice to any other right or remedy resume possession of the Store and the Store Building Works together with all buildings, erections, materials and things thereon with power to hold and dispose thereof as absolute owner as if this Agreement had not been entered into and without making to the Developer any compensation or allowance for the same and without being liable to make any further payment to the Developer."*

The First Award
25. Dunnes alleged that Holtglen had been guilty of four breaches of the development agreement and as a result it was entitled to terminate it.

26. Those alleged breaches can be summarised as follows:-

> (i) Holtglen's failure to use *"all reasonable endeavours"* to procure Centre Practical Completion by 31st October, 2008 as required by clause 9.4 of the agreement;
>
> (ii) Holtglen's failure to use *"reasonable endeavours"* to let retail units in the centre and to have as many retail units open on the Centre Opening Date as was reasonably possible as required by clause 13.11 of the agreement;
>
> (iii) Holtglen's delay in achieving Store Practical Completion so as to defer the twenty week period within which the centre had to be open for trade to the public as provided for in clause 9.7 of the agreement; and
>
> (iv) Holtglen's failure to have sufficient funds including bank finance in place and to comply with the terms and conditions of such finance as required by clause 17.6 of the agreement.

27. It is not necessary to set out in detail the arbitrator's findings in respect of these complaints save to record, as I have already done, that the bulk of them resulted in a finding in favour of Dunnes. But the arbitrator found that such breaches had been remedied and therefore Dunnes was not entitled to terminate.

28. His findings in respect of the complaint concerning the breach of clause 17.6 bear examination. In that regard, he said as follows at paras. 87, 88 and 90 of his first award:-

> *"87. The obligations of Holtglen under clause 17.6 can be broken down as follows. First, there is an obligation to have sufficient funds in place and approved for 'this purpose', which in context must mean for the purpose of meeting architect's certificates. Secondly, there was an obligation to ensure that all terms and conditions of bank finance would be complied with prior to commencement of and during the construction of the building works.*
>
> *88. From in or about mid July 2008, or possibly slightly earlier, Holtglen did not have sufficient funds in place for the purpose of enabling it to meet architect's certificates. This continued to be the position as and from the date of service of the notice of 28th October, 2008. On the other hand, the only breach of a term or condition of bank finance that can realistically be alleged is the failure on the part of Holtglen to meeting the loan value ratio covenant in the facility letter of 13th July, 2007. The evidence did not establish that there was, on the balance of probabilities, such a breach. It amounted at the most to an expression of a perception on the part of Bank of Ireland that there may have been such a breach. Nevertheless, I was satisfied on the evidence that there had been a breach of clause 17.6 from mid July 2008 or perhaps somewhat earlier and that that was continuing as of 28th October, 2008, because Holtglen did not in fact have at that time sufficient funds in place for the purpose of enabling it to meet architect's certificates. Furthermore, this was a material breach, if only because of the length of time for which it had continued, and because it had the serious consequence of bringing work on the development almost to a halt.*
>
> *90. However, while Holtglen was in material breach of contract as of the 28th October, 2008, the evidence discussed above establishes clearly that it remedied that breach by the 22nd December, 2008. By that time, there were sufficient funds in place for the purpose of enabling it to meet architect's certificates. That is within the period of 60 days permitted by clause 22.1. That being so, Dunnes Stores is not entitled to rely upon this breach in order to justify termination of the Development Agreement."*

The Counterclaim
29. Having found against Dunnes on the claim, the arbitrator proceeded to deal with the counterclaim.

30. The counterclaim made by Holtglen was for the payment of sums due under clause 17.1.5, 17.1.6. and 17.1.8 of the agreement. There was also a claim for sums due under clause 17.3 involving monies relating to works which prior to the execution and exchange of the agreement had been added to store building works. Holtglen contended that 85% of those monies had become payable. There was also a claim for a further sum arising out of clause 12.5 of the agreement.

31. The evidence which was led in respect of these claims on behalf of Holtglen was not subjected to any cross examination. That being so, the arbitrator expressed himself as satisfied that the various requirements that had to be met by Holtglen under the relevant clauses had been met.

32. Thus, at that stage of the arbitration hearing, Dunnes had failed in their claim and Holtglen had satisfied the arbitrator of its entitlement to recover the monies on foot of its counterclaim.

33. Dunnes then raised a further issue in defence of the principal sums claimed by Holtglen in the counterclaim. Dunnes relied upon a contention that Holtglen was insolvent and sought to argue that that insolvency constituted a failure on Holtglen's part to comply with the provisions of the agreement having regard to the meaning of certain introductory words to clause 17. The consequence of that, argued Dunnes, was that Holtglen was precluded from claiming the monies due. Dunnes contended that this insolvency argument was sufficiently encompassed in the original pleadings but Holtglen disagreed.

34. Dunnes maintained its contention that it was not necessary to amend its pleadings so as to raise this issue of insolvency but, notwithstanding that, made an application on the opening day of the hearing on the counterclaim for liberty to make an amendment to the reply and defence to counterclaim. The arbitrator heard argument on that issue on 7th September, 2011, and delivered his ruling on 7th October, 2011.

35. The parties agreed that the question of whether the proposed amendment would, if factually established, benefit Dunnes was entirely a matter of construction of the agreement. They also agreed that such was a question of law which could be decided on a

ruling just as well as it could following the making of an amendment and the receipt of evidence. Thus, the arbitrator records this led the parties:-

> *"…during the course of argument, to adopt the entirely sensible approach of agreeing that I should determine on the legal merits the question of whether the proposed amendment would, if factually established, preclude Holtglen from claiming the sums due or any of them. Thus, the question on the ruling was not the one that might normally arise on an amendment application, namely that of whether there was a statable argument that the amendment could assist the party seeking it, but rather as a matter of law it would actually do so.*
>
> *If that question was decided against Dunnes Stores, then there was no need to go any further, because nothing could have been gained by permitting the amendment. If it was decided in favour of Dunnes Stores, that it would have been necessary to go on to consider the other arguments that were raised in favour of and against permitting the amendment. It was therefore logically the first issue that fell to be considered."*

36. That extract from the arbitrator's award makes it clear that although he was technically deciding upon an application for an amendment to the pleadings he was, by the agreement of the parties, deciding on whether such an amendment could be of any benefit to Dunnes having regard to the true construction of the agreement.

37. It is quite clear, therefore, that the task undertaken by the arbitrator was to discern the proper construction of the relevant parts of the agreement.

Dunnes Case on Insolvency

38. The arbitrator set out the case made by Dunnes on the issue before him. It fell under five headings summarised by him as follows:-

> *"(a) Under clause 22.1(b) of the Development Agreement, Dunnes Stores was entitled to terminate the Development Agreement in the event of Holtglen falling insolvent. Its entitlement in that regard was subject to the provisions of clause 22.2, providing for service of a step-in notice.*
>
> *(b) With the exception of a relatively small claim under clause 12, Holtglen was advancing its claim pursuant to the provisions of clause 17, but entitlement to payment under that clause was subject to the proviso in its opening words.*
>
> *(c) While it accepted that it was not expressly provided that the insolvency of Holtglen was a breach of the Development Agreement, Dunnes Stores argued that the Development Agreement must be interpreted to mean that such insolvency is to be treated within the meaning of clause 17, as being a failure by Holtglen to comply with the provisions of the Development Agreement. Furthermore, it contended that this failure is in context, a highly material one. It argued that it followed that insolvency on the part of Holtglen was therefore such as to disentitle it from obtaining payments to which it might otherwise be entitled under clause 17.*
>
> *(d) Dunnes Stores argued that there is nothing illogical about an interpretation whereby insolvency gives rise to a right to terminate but provides certain protections against that consequence for Holtglen, while also giving rise to an entitlement to refuse to make payments that it might otherwise have been obliged to make. The consequences of termination under clause 22 on the one hand, and entitlement to refuse to pay under clause 17 on the other hand, were quite different.*
>
> *(e) Dunnes Stores pointed out that this approach made commercial sense in the context of the Development Agreement. It argued that there were numerous continuing contractual obligations that would remain to be fulfilled by Holtglen in the future where the Development Agreement had not been terminated. If Holtglen was in fact insolvent, then Dunnes Stores could be faced with the prospect of making very substantial payments to Holtglen, under circumstances where it is very likely indeed that Holtglen would not be able to fulfil its obligations in the future."*

Holtglen's Arguments

39. The arbitrator identified the central arguments advanced by Holtglen on the interpretation of the agreement in the following way. He said:-

> *"(a) It argued that insolvency on its part was simply not a breach of, or a failure to comply with, the provisions of the Development Agreement. The Development Agreement does not so provide.*
>
> *(b) Holtglen argued that this becomes clear when one looks at clause 22. Clause 22.1(a) sets out the consequences that flow when there is a breach of the Development Agreement on the part of the Developer. Clause 22.1(b) deals with insolvency, and provides for quite different consequences to flow from that. The fact that breaches were specifically addressed in clause 22.1(a), and that insolvency was also specifically addressed but does not fall within that sub-clause, demonstrates that insolvency is not a breach.*
>
> *(c) Holtglen suggested that, in arguing on these grounds that it was entitled not to make payments which clause 17 provides, Dunnes Stores was seeking to obtain advantages that would not have been open to it if it had simply terminated for insolvency in accordance with clause 22.1(b). Holtglen argued that, following termination under clause 22, the consequence of clauses 22.3 and 22.4 was that Dunnes Stores would have been entitled to avoid making any further payments, but it would have remained liable to make payments that had already fallen due under clause 17 as of the date of termination. Furthermore, if there had been an attempt to terminate under clause 22.1(b) for insolvency, it was likely that the Funder would have exercised its right to set in (sic). Holtglen pointed out that Dunnes Stores had accepted that it could not refuse to pay under clause 17 in reliance on material but cured breaches but at the same time sought to rely for present purposes on breaches that might not even be material without giving any opportunity to cure.*
>
> *(d) Holtglen argued that the Development Agreement deals expressly in clause 17.6 with the circumstances in which funding issues would give rise to a breach. That being so, it was suggested, the Development Agreement could not be interpreted so as to apply to funding issues other than those specifically addressed in clause 17.6.*

(e) Holtglen argued that, if one accepts that insolvency could be a failure to comply within the meaning of clause 17, then the logical consequence of the argument that had been advanced by Dunnes Stores was that any breach would entitle it to refuse to pay, no matter how minor the breach, unless perhaps it was de minimis. It was suggested that that could not be the proper interpretation of clause 17, which, it was suggested was intended merely to preserve the right of Dunnes Stores to counterclaim for breaches rather than simply to refuse to pay in the event of a breach. Emphasis was laid on the fact that Dunnes Stores had neither sought to terminate nor claimed damages in respect of loss suffered by it as a consequence of the alleged breaches, and on the fact that Dunnes Stores was intending to hold Holtglen to the continuing obligations imposed on it under the Development Agreement while at the same time arguing that it was not obliged to make any payments thereunder.

(f) Finally, Holtglen argued that, even if insolvency was a breach of contract that could give rise to an entitlement to avoid payment only if the contract could be interpreted as requiring entire performance as a condition precedent to payment. It suggested that this would be a commercially absurd result, and reliance was placed in that regard on Analogue (sic) Devices B.V. v. Zurich Insurance Co. [2005] 1 I.R. 274 as demonstrating that contracts should not be interpreted so as to give words meaning which the parties could never have intended that they should have. More importantly, reliance was placed on Hoenig v. Isaacs [1952] 2 All E.R. 175 as demonstrating that the courts would not easily interpret contracts so as to provide that entire performance was a condition precedent of payment."

Dunnes' Response

40. Dunnes response to the foregoing was summarised by the arbitrator as follows:-

"(a) It argued that it was unreal to say that, simply because clause 22.1(a) dealt specifically with breaches of the Development Agreement, the circumstances of insolvency described in clause 22.1(b) could not constitute a failure to comply.

(b) It argued that Hoenig v. Isaacs was not of real assistance. It was clear from the judgments in that case that the real question was always that if whether, on its true construction, entire performance was a condition precedent to payment. The issue here was one of the interpretation of the particular contractual provision in question.

(c) It was emphasised that Dunnes Stores did not argue that every failure to comply gave rise to an entitlement to avoid payments for which clause 17 might otherwise provide. However, if a failure to comply was material and not trivial then there was such a right.

(d) Finally, it argued that the proper interpretation of clause 22.3 and 22.4 meant that, following termination for insolvency, Holtglen would be a great deal worse off that it would be under the interpretation of clause 17 put forward by Dunnes Stores. In the same way, there was no relevance to the fact that there was an opportunity to cure a breach on which reliance was placed upon clause 22.1(a), because the consequences of termination were different from those of non-payment of sums due under clause 17."

The Arbitrator's Conclusions

41. In the final part of the award, the arbitrator stated his conclusions as follows:-

"21. It was not really in dispute that Dunnes Stores could succeed on its argument as to the proper meaning of clause 17 only if an act of insolvency was to be interpreted as a failure to comply with the provisions of the Development Agreement. There is certainly no express positive obligation to be or to remain solvent, and a failure to be or to remain solvent was not expressly stated to be a breach. This is not determinative of the outcome to this question, because one could no doubt, if it was appropriate to do so, interpret any agreement as inferring or implying an obligation that was not made express.

22. In my view, it would not be appropriate to make such an inference or implication. The main reasons for my conclusion in that regard were as follows:-

'(a) First, the Development Agreement could easily have provided in a positive manner for there to be such an obligation. Equally, it could have provided that a failure to maintain solvency was a breach. The fact that it did neither must be of significance. In a negotiated agreement, one should be wary of unwarranted inference or implication.

(b) Secondly, it was of particular significance that the Development Agreement in clause 17.6 imposed obligations of a financial nature on Holtglen, but did not address the issue of solvency. The issue could have been addressed in this clause, but it was not.

(c) Thirdly, there are the provisions of clause 22, upon which both parties had laid considerable emphasis. If it were not for the fact that clause 22.1(b) provided for a right of termination following insolvency, there was really nothing in the Development Agreement to which Dunnes Stores could point as suggesting that insolvency should be treated as a failure to comply with its provisions. However, it seems to me that clause 22 is of quite the opposite tenor. It draws a specific distinction between failures to perform or observe covenants or agreements contained in the Development Agreement on the one hand which were addressed in clause 22.1(a), and insolvency on the other hand which is addressed in clause 22.1(b). They are addressed in different sub-clauses, and have different consequences. One must therefore assume that it was intended to draw some distinction between the two. There is nothing necessarily illogical or commercially senseless about providing that insolvency will give rise to a right to terminate, but it is not otherwise to be treated as a failure to comply so as to give rise (if such is the case) to a right to claim damages or to refuse to perform other obligations for which the Development Agreement provided. In any event, it did not seem to me that one could successfully rely upon a clause that drew a specific distinction between failures to perform on the one hand and insolvency on the other hand as being a reason to argue that the latter must be treated as being the former.

23. I therefore reached the conclusion that insolvency was not a failure to comply for the purposes of clause 17. Once I had done so, I did not need to consider the issues argued between the parties (and recorded above) as to the extent of the failure to comply that would have to be demonstrated, or as to the issue of whether clause 17 is or is not an entire performance clause or as to the wider issue of the consequences under clause 17 of a failure to comply with the provisions of the Development Agreement. Nor did I have to consider the other issues that arose for the purpose of the amendment application. If the insolvency of Holtglen was not a failure to comply with the provisions of the Development Agreement, that these issues did not arise.

24. It followed that I was obliged to refuse the application to amend. In doing so, there were two other points that I emphasised. First, I emphasised that I did so entirely on the basis of having decided on the legal merits that the insolvency of Holtglen could not be considered to be a failure to comply within the meaning of the introductory words to clause 17. As pointed out, this rendered it unnecessary to decide the other arguments against the amendment raised by Holtglen. However, without deciding the issues that did not therefore arise, I said that I would otherwise have been most reluctant to refuse Dunnes Stores the opportunity to make its case on the grounds of delay alone, particularly where the case as to prejudice made by Holtglen was so equivocal. I pointed out at the same time that Dunnes Stores had lost nothing by approaching the matter in the manner in which it had. If the amendment had been permitted, there would almost certainly have been a preliminary issue dealing with the same point. The result would have the same (sic), albeit reached in a more roundabout and expensive manner.

25. Secondly, I indicated that I was conscious that Dunnes Stores had put forward its amendment application only as a fallback to its argument that it was not obliged to seek such an amendment, because the issue was already sufficiently covered in the existing pleadings. I had not decided that issue, on the assumption that, in practical terms, the decision that the amendment could not avail Dunnes Stores meant that it equally could not profit from advancing the argument on the basis of un-amended pleadings. I indicated, however, that I was willing to decide that issue, if Dunnes Stores wished me to do so. It was indicated that Dunnes Stores did not require that matter to be decided.

26. In the light of that ruling, it was indicated on behalf of Dunnes Stores that there was no evidence that it wished to call. If the ruling had been to the opposite effect, it intended to call evidence from Liam Grant, Accountant, whose statement had been provided to the other side on 31st August, 2011."

42. The arbitrator then dealt with a number of matters which have no relevance to this case and held that Holtglen was entitled to succeed. He then dealt with an interest claim and the question of costs. The award concludes with the determination in favour of Holtglen for the amounts already indicated.

Principles of Construction

43. There is no dispute but that the arbitrator sought to construe the agreement in order to make the award.

44. There is no real dispute between the parties as to the appropriate principles of construction which govern such an exercise.

45. All contractual construction has as its object the discernment of the intention of the parties to the contract. This is done by the interpretation of the terms of a written agreement in the context of its surrounding circumstances. This was succinctly described by Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43, where he said:-

"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."

46. That approach was further endorsed by the Supreme Court in *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511.

47. In *Analog Devices v. Zurich Insurance* [2005] 1 I.R. 274, Geoghegan J. quoted with approval the principles set out by Lord Hoffmann in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896 as follows:-

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax: see Mannai Ltd. v. Eagle Star Ass. Co. Ltd. [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:-

'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

48. These principles were also approved of the by the Supreme Court in *Emo Oil Limited v. Sun Alliance & London Insurance Plc.* [2009] IESC 2.

49. In interpreting the commercial agreement, a court or arbitrator ought to endeavour to give it a commercially sensible construction. This is clear from the views expressed by Lord Steyn in *Mannai Investments Limited v. Eagle Star Assurance Company Limited* [1997] 3 All E.R. 352, where he said:-

> *"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language."*

50. Lord Steyn's views having been approved of in this jurisdiction by Clarke J. in *BNY Trust Company (Ireland) Limited v. Treasury Holdings* [2007] IEHC 271.

51. The question of commercial commonsense has most recently attracted the attention of the United Kingdom Supreme Court in *Rainy Sky S.A. v. Kookmin Bank* [2011] 1 WLR 2900. The defendant bank sought to avoid payment on foot of advance payment bonds. It did so in circumstances where it claimed that the bonds true construction did not encompass the instalments in respect of which repayment was sought. Simon J. in the Commercial Court held that the construction contended for by the bank would give rise to a non-commercial result. His decision was reversed by a majority in the Court of Appeal. His order was restored by the Supreme Court. It held that where parties have used unambiguous language, irrespective of the question of commercial sense, the unambiguous language must be applied. If, however, there is an ambiguity then the court is entitled to construe the contract in the more commercially sensible manner.

52. Lord Clarke said:-

> *"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

53. Finally, in the particular context of this case, there is a passage from *Chitty on Contracts* (30th Ed: 2008) at para. 22-048 which is apposite. The author states:-

> *"The parties may expressly provide in their contract that either of them or one of them is to have an option to terminate the contract. This right of termination may be exercisable upon a breach of contract by the other party (whether or not the breach would amount to a repudiation of the contract) or on the occurrence of a specified event other than a breach or simply at the will of the party upon whom the right is conferred in principle."*

54. The principles enunciated above are the ones which the arbitrator was obliged to apply in making his award.

55. The thrust of the criticism made against him appears to be that he declined to interpret the agreement as containing or implying an obligation on the part of Holtglen to be and remain solvent. It is also suggested that the arbitrator's construction which led to the award failed to make business commonsense.

56. It is in this context that I turn to a consideration of these criticisms and my findings in respect of them.

Criticisms and Findings

57. For the purpose of the exercise conducted by the arbitrator, the insolvency of Holtglen was accepted or assumed. There is, in fact, no dispute on this. The contention that was made was that Holtglen's insolvency constituted a failure to comply with the agreement and thus, having regard to the terms of clause 17, Holtglen had no entitlement to enforce it against Dunnes. Thus, Dunnes were to be relieved of paying the monies provided for at clause 17 in respect of the work done by Holtglen.

58. It was submitted to the arbitrator that this consequence flowed from the opening words of clause 17. Those words provide as follows:-

> *"Subject to compliance by the Developer and/or Surety if applicable with the provisions of this Agreement the Company shall pay the Sum and the Further Sum to the Developer or the Surety if applicable in the following manner…"*

59. Clause 17 is headed *"Payments by the Company"* i.e. Dunnes.

60. The argument made by Dunnes is that it has no liability to make the payments specified under clause 17 because of the insolvency of Holtglen. It's insolvency is alleged to amount to a failure by Holtglen to comply with the provisions of the agreement. The difficulty with this submission from the point of view of Dunnes is, as was pointed out by the arbitrator, the agreement does not place any obligation on Holtglen to remain solvent. As was also pointed out by the arbitrator, the agreement could easily have provided in a positive manner for there to be such an obligation. Equally, it could have provided that a failure to maintain solvency was a breach. But the agreement did neither. The arbitrator pointed out that in a negotiated agreement, such as this one, one should be wary of unwarranted inference or implication. In my opinion, he was perfectly correct on these issues.

61. The arbitrator also pointed out, as a matter of particular significance, that the agreement in clause 17.6 imposed obligations of a financial nature on Holtglen, but did not address the issue of solvency. That issue could have been addressed in that clause but, as he pointed out, it was not.

62. In my view, no justifiable criticism can be made of the approach taken by the arbitrator as demonstrated at para. 22(a) and (b) of his award. I do not there perceive any error on the face of the record still less one which could be regarded as so fundamental to warrant this Court's intervention.

63. The arbitrator then proceeded to deal with clause 22 of the agreement. He, in my view correctly, pointed out that were it not for the fact that clause 22.1(b) provided for a right of termination following insolvency, there was nothing in the agreement which Dunnes could point to as suggesting that insolvency should be treated as a failure to comply with its provisions. The arbitrator then carefully analysed clause 22 and pointed out the specific distinction which is drawn in that clause between failures to perform or observe covenants or agreements contained in the agreement on the one hand, which are addressed in clause 22.1(a), and insolvency which is addressed in clause 22.1(b). As these are addressed in different sub-clauses and have different consequences, he pointed out one must assume that it was intended to draw some distinction between the two. He also pointed out that there is nothing necessarily illogical or commercially senseless about providing that insolvency will give rise to a right to terminate, but that it is not otherwise to be treated as a failure to comply so as to give rise to a right to claim damages or to refuse to perform other obligations for which the agreement provided. He went on to point out that one cannot successfully rely upon a clause that draws a specific distinction between failures to perform on the one hand and insolvency on the other as being a reason to argue that the latter must be treated as being the former.

64. Clause 22.1(a) deals with the breach by Holtglen of its obligations under the agreement. It provides what is to happen in such event. Clause 22.1(b) and (c) specify other circumstances which do not involve a breach of the agreement but where Dunnes is given an entitlement to terminate.

65. It is, I believe, quite clear that clause 22.1(a) deals with breaches by Holtglen whereas 22.1(b) and (c) do not. Under clause 22.1(a), a notice may be served whereby Holtglen is given a period within which to remedy the breach. It is only if it fails to remedy the breach that the right to terminate can be exercised. By contrast, the entitlement of Dunnes to terminate for insolvency under clause 22.1(b) arises upon the occurrence of an event of insolvency with no opportunity being made to cure that defect. It is because insolvency is not a breach of the agreement that no provision is made for that to be remedied by Holtglen. It is, however, to be noticed that in the event of Holtglen's insolvency, termination of the agreement is precluded in the event that the funder exercises its right of substitution.

66. As I have already pointed out in the passage from *Chitty on Contracts*, parties to a contract may agree that circumstances that do not involve any breach or default on the part of one of them can provide grounds for termination. The agreement here is a good example of such an exercise. But there is no necessary correlation between the existence of a ground for termination and a failure to comply with the provisions of a contract.

67. I am of the view that clause 22.1(b) is directed towards providing Dunnes with an entitlement to terminate in the event of an insolvency event. This enables Dunnes to avoid incurring any future liabilities to Holtglen. But it does not and cannot provide a means by which Dunnes can escape any liabilities previously incurred.

68. This view is, I believe, supported by the fact that the entitlement to terminate in the event of insolvency is not an absolute one. The funder may step in thus avoiding termination. This suggests that the whole object of the clause is to protect Dunnes against the consequences of insolvency into the future. It cannot have been intended to give Dunnes an entitlement to avoid paying for services provided and work done by Holtglen prior to its insolvency.

69. In my view, the criticisms made by Dunnes of the arbitrator are without foundation. The construction sought to be placed upon the agreement by Dunnes, amounts to the conflation of an entitlement to terminate under clause 22.1 and a defence to a claim for payment under clause 17 of the agreement. Clause 22.1 enables Dunnes to avoid incurring future liabilities to an insolvent Holtglen. It does not provide a route for Dunnes to escape liabilities previously incurred.

70. I am unable to accept the criticism made of the arbitrator that he either misinterpreted or had no regard for the commercial purpose underlying the agreement and flouted business commonsense in his award. He did neither.

71. The agreement required Holtglen to construct an anchor store for Dunnes. It did so. It was certified as practically complete as long ago as 10th June, 2009, but Dunnes have only paid a fraction of the sum due for this work. Holtglen's claim is in respect of monies owed for work done as long ago as 2008 and 2009. The logical outcome of Dunnes' argument is that it is not required to pay a sum of in excess of €20m even though all of the work the subject of the claim has been carried out and completed. That result is wholly unattractive from the point of view of business commonsense or commercial reality. If Holtglen was to be deprived of payment for the work done by it then very clear contractual language would have to be used to bring about such a result. There is nothing in the agreement supporting such an outcome.

72. In my view, the arbitrator has not been guilty of any error of law in the approach which he took to the construction of this agreement. Even if he erred, there is per O'Donnell J. a *"high tolerance for arbitral error"* on the part of the court and if there is such an error, it is not one so fundamental that the award cannot be allowed to stand.

Events Post Award

73. In affidavit evidence which was placed before the court, I was apprised that on 9th January, 2012, Dunnes served a notice on Bank of Ireland as the funder under the agreement pursuant to clause 22.2. By that notice, Dunnes asserted a right to terminate the agreement on the expiration of 60 days from the date of its service. It also notified the funder of its rights to step in for Holtglen as the developer under the agreement. Holtglen's loans with Bank of Ireland were transferred to the National Asset Management Agency (NAMA) on 28th October, 2010. A decision on whether or not to step in therefore fell to be taken by that agency.

74. On the evening of 13th February, 2012, (being the day before the original listing of this matter for hearing) National Asset Loan Management Limited (NALM) (a subsidiary of NAMA) served a notice of substitution pursuant to clause 22.2 of the agreement. The notice is in the following terms:-

> *"Holtglen Limited ('Holtglen')/Deerland Construction Limited ('Deerland')*
>
> *Development Agreement dated 13th June, 2007 between (1) Dunnes Stores; (2) Holtglen (Developer); (3) Deerland (the Surety)(hereinafter referred to as the 'Development Agreement')*

Ferrybank Shopping Centre, Ferrybank, Co. Kilkenny

Notice of Substitution issued pursuant to clause 22.2 of the Development Agreement

Dear Sirs

We refer to your letter dated 9 January 2012 address (sic) to the Governor and Company of the Bank of Ireland ('the Funder').

The credit facilities afforded by the Funder to Deerland and Holtglen and all related security rights, assets and interests have transferred to National Asset Loan Management Limited ('NALM'), being a subsidiary of the National Asset Management Agency pursuant to the National Asset Management Agency Act 2009 (the 'NAMA Act') and are hereby certified by NALM in accordance with section 108 of the NAMA Act as being 'acquired bank assets' for the purposes of the NAMA Act. The Funder has consequently passed to NALM a copy of your letter of 9 January 2012.

Having acquired the said bank assets, NALM is entitled to exercise all rights and powers of the Funder arising pursuant to the Development Agreement.

Accordingly as successor to the Funder and by virtue of section 99 of the NAMA Act, we hereby give notice pursuant to clause 22.2 of the Development Agreement substituting NALM for Holtglen as Developer under the Development Agreement.

Please note:

(a) Consequent on the service of this Notice of Substitution, Dunnes Stores is required to accept the instructions of NALM to the exclusion of Holtglen and/or Deerland in respect of the performance of the Development Agreement upon the terms and conditions of the Development Agreement.

(b) All obligations of Dunnes Stores to Holtglen under the Agreement, whether in respect of matters arising before or after the giving of this Notice of Substitution are deemed to be obligations to NALM as if it had at all times been a party to the Development Agreement in place of Holtglen.

(c) All obligations of Holtglen to Dunnes Stores under the Development Agreement whether in respect of matters arising before or after the giving of this Notice of Substitution shall be deemed to be obligations of NALM as if it had at all times been a party to the Development Agreement in place of Holtglen.

Please acknowledge receipt of this Notice of Substitution.

Executed under the common seal of National Asset Loan Management Limited."

75. Given the late service of that notice, I was asked to adjourn the hearing of this application so as to enable Dunnes to consider the implications of it. I did so and the matter proceeded to hearing on 17th February, 2012.

76. I am of the view that having regard to that notice and in particular what is contained at sub-paragraph (c) thereof that the whole question of the insolvency of Holtglen has now become an irrelevance. It also means that any concerns that Dunnes may have in relation to future obligations not being honoured have evaporated. Despite that, Dunnes insisted that the issues raised by them in this challenge to the award should proceed.

77. I have considered that challenge on its merits and without reference to the events which took place subsequent to the award being published. Dunnes have failed in that challenge.

78. Even if they had succeeded, I would have ordered the matter to be remitted for further consideration by the arbitrator. Were that to have occurred, it is clear from the terms of the NALM notice of 13th February, 2012, that no factual or practical issue of insolvency could arise for consideration by the arbitrator.

Result

79. The challenge of Dunnes fails. The application to set aside the arbitrator's award is dismissed.