THE HIGH COURT

COMMERCIAL

[2016 No. 126 SP]

BETWEEN:

POINT VILLAGE DEVELOPMENT LIMITED [IN RECEIVERSHIP]

PLAINTIFF

-AND-

DUNNES STORES

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 15th day of September, 2017.

1. This is a motion brought by the defendant, Dunnes, applying to this Court for an order against the plaintiff, Point Village, to produce for inspection six agreements for lease entered into by Point Village with six third party lessees ('the six agreements for lease').

2. The order for inspection is being sought pursuant to Order 31, rule 18(1) of the Rules of the Superior Courts.

3. The background to this motion for an order for inspection is that Point Village issued proceedings seeking damages of €15 million from Dunnes arising from an alleged breach of the terms of a Settlement Agreement dated 7th July, 2010, between Dunnes, Point Village and Harry Crosbie. Clause 11(c) of that Settlement Agreement provides that:-

> "The sum of €15,000,000 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes solicitors of confirmation from William Fry 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 leases or leases may contain a clause that it is a precondition to the tenant being obliged to enter into the lease that Dunnes should have commenced the fit out of the store."

Discovery under Order 31, rule 12

4. Dunnes previously sought orders for discovery of the six agreements for lease under Order 31, rule 12 of the Rules of the Superior Courts. Rule 12(3) states that:-

> "An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

5. These discovery orders were refused by the High Court (McGovern J., *ex tempore* judgment dated 4th July, 2016) and, on appeal, by the Court of Appeal (*Point Village v. Dunnes Stores* [2017] IECA 159.

Inspection under Order 31, rules 15-18

6. The motion for an order for inspection before this Court was brought pursuant to Order 31, rules 15 to 18. It is relevant to note that rule 18(3) in relation to an order for inspection is in the exact same terms as rule 12(3) in relation to discovery, so that an order for inspection cannot be made by this Court if it is not necessary for disposing fairly of the matter.

7. In grounding its entitlement to an order for inspection in this case, counsel for Dunnes laid some emphasis on the language of rule 15, namely the phrase "*every party to a cause or matter shall be entitled at any time*". However, it is relevant to note that the entitlement to seek an inspection of documents under Rule 15 is just that, a right to seek the inspection of documents ("*shall be entitled at any time……to give notice to any other party….to produce*"), it is not an entitlement to the documents.

8. As regards the consequences of failure to comply with a notice to produce documents for inspections (as occurred in this case when the Point Village refused to produce the six agreements), it is relevant that rule 15 of Order 31 sets out the penalty for such a failure, since it provides that any party failing to comply with the notice to produce documents for inspection is not permitted to put any such documents into evidence.

9. The substantive hearing of the action regarding the breach of the Settlement Agreement is due to be heard shortly in the Commercial Court and in advance of that hearing, Dunnes is seeking to inspect the agreements for lease which they have been denied on discovery, pursuant to the right to seek an inspection under Order 31, rule 18(1).

10. For its part, Point Village argues that under the express terms of the Settlement Agreement which it is alleging has been breached, all that Dunnes is entitled to is a "*confirmation*" from solicitors acting for the Point Village that "*binding agreements for lease have been exchanged with tenants*" and there is no entitlement on the part of Dunnes to see the agreements which lie behind this confirmation as part of its *inspection* of documents, just as it had no such entitlement to such agreements as part of its *discovery* of documents.

11. In particular, Point Village argues that since the High Court and the Court of Appeal held, in light of the wording of Clause 11(c) of the Settlement Agreement, that the discovery of these same six agreements to Dunnes was not necessary for the fair disposal of the matter, it follows that the *inspection* of these six agreements is not necessary for the fair disposal of the matter, particularly as the wording of rules 12(3) regarding discovery and 18(3) regarding inspection are identical since they apply the same test, namely whether the documents in question are necessary for the fair disposal of the matter. Point Village says that this should be the end of this application and they rely on the transcript of McGovern J.'s *ex tempore* judgment of 4th July, 2016, regarding Category C of the documents which were sought to be discovered by Dunnes namely, the six agreements for lease:-

> "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 [Point Village] to [Dunnes]. So I am going to refuse Category C as

being unnecessary or irrelevant."

12. For its part, Dunnes, in making this application for an order for inspection, argues that a letter dated 4th July, 2017, from McCann Fitzgerald contains such a manifest error, that in order for there to be a fair disposal of this matter, it is necessary for an inspection of the six agreements for lease to be ordered. The background to this letter is that McCann Fitzgerald issued the letter of confirmation to Arthur Cox (the solicitors for Dunnes) on the 29th February, 2016 pursuant to Clause 11(c) of the Settlement Agreement which letter states, insofar as relevant :

> "In accordance with clause 11(c) of the Terms of Settlement we hereby confirm that binding agreements for lease/leases have been exchanged with tenants in respect of nine of the ground floor units marked "X" on the ground floor plan annexed to the Terms of Settlement, at least four of which are internal units."

The reason this confirmation was from McCann Fitzgerald, rather than William Fry, was because Point Village had gone into receivership and the solicitors to the receivers were McCann Fitzgerald and thus it was McCann Fitzgerald which issued the confirmation under Clause 11(c).

13. The year after this confirmation from McCann Fitzgerald that binding agreements for lease were in place, one of the tenants (Martino's) got into financial difficulty and subsequently went into liquidation and was replaced by another tenant (Freshii). As a result of this change, Dunnes argued that this called into question the issue of whether the agreements for lease were in fact "binding" at all. In replying to this argument, McCann Fitzgerald stated in a letter dated 4th July, 2017 to Arthur Cox that:-

> "You have asked us to explain how it is possible for the Receivers to replace Martino's with Freshii. You seem to suggest that the proposed replacement casts some doubt over whether the Receivers ever had a "binding" agreement for lease with Martino's at all. The explanation is really quite straightforward – it is possible to terminate this contract, like all others, by agreement of the parties. Such termination clearly would not mean that the contract was not binding before then."

14. Dunnes argues that this letter evidences a manifest error on the part of McCann Fitzgerald regarding the meaning of a 'binding' agreement. As such, it is argued that this justifies this Court in going behind the confirmation and ordering Point Village to grant Dunnes access to the six agreements for lease, which previously McGovern J. and the Court of Appeal had decided was not necessary for a fair disposal of the matter. In a letter to McCann Fitzgerald dated 7th September, 2017, Arthur Cox puts the matter as follows:-

> "it is, in fact, the apparent interpretation of "binding" in your letter dated 4 July 2017 which casts considerable doubt over the validity of the purported confirmation given for the purposes of Clause 11(c) of the Settlement Agreement, and which raises the concern that there has been a manifest error in respect of the interpretation of "binding".

15. In arguing that this alleged manifest error justifies the making of an order for inspection, Dunnes relies on the fact that although its application for discovery was rejected by the Court of Appeal, that court did so in a way that suggested that if there was fraud or manifest error, it might not have been rejected. At page 7 of the judgment of the court, Hogan J. states:-

> "Under the terms of the [Settlement Agreement], the allegation to pay was triggered by the provision of the confirmation from [Point Village'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.
>
> 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 two, 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."

16. On this basis, Dunnes argues that the statement by McCann Fitzgerald in its letter of 4th July, 2017, amounts to a manifest error, as envisaged by Hogan J. and thus justifies this Court in looking behind the confirmation and ordering the inspection of the six agreements for lease.

17. This Court does not find this argument persuasive. In this Court's view there is nothing illogical in the statement by McCann Fitzgerald that at any stage during the term of a legally binding agreement between two parties, both parties to that agreement can agree to terminate that agreement, in which case the agreement ceases to be legally binding, but that this termination does not result in the agreement being deemed to never having been legally binding in the first place. Thus, this Court does not accept that the statement by McCann Fitzgerald on the 4th July, 2017 amounts to a manifest error by that firm regarding the law of contract.

18. For this reason, this Court cannot conclude that a manifest error has occurred as envisaged by Hogan J. so as to justify this Court in looking behind the confirmation issued by McCann Fitzgerald that the agreements for lease are binding.

19. On this basis, this Court can find no reason to diverge from the judgment of McGovern J. or the judgment of the Court of Appeal that the sight and/or possession by Dunnes of the six agreements for lease is not necessary for the fair disposal of this matter and therefore that an order for inspection is not necessary.

20. Indeed it is worth noting that even if this Court had concluded that McCann Fitzgerald was guilty of a manifest error as alleged by Dunnes, it is also clear from the second paragraph of the quoted extract from Hogan J.'s judgment that discovery of the six agreements for lease would not serve any purpose, since the issue at stake in the dispute between the parties is not whether the agreements for lease are binding, but rather the issue is whether, on a construction of Clause 11(c) of the Settlement Agreement, Dunnes owes €15 million to Point Village. Hogan J. points out that for this purpose the beliefs or alleged errors of McCann Fitzgerald are irrelevant. While Hogan J. was of the view that *discovery* of the six agreements would not serve any purpose even if there were manifest error, it is this Court's view that since the *discovery* of a document and the *inspection* of a document will lead to the same result, namely Dunnes having knowledge of the terms of the agreements for lease, it must also be the case that even if there was a manifest error on the part of McCann Fitzgerald that inspection of the six agreements would also not serve any purpose,.

21. For these reasons, the Order will not be granted.