

**THE HIGH COURT**

**COMMERCIAL**

**[2021] IEHC 628**

**[2018 No. 6540 P.]**

**BETWEEN**

**POINT VILLAGE DEVELOPMENT LIMITED**

**PLAINTIFF**

**AND**

**DUNNES STORES UNLIMITED COMPANY**

**DEFENDANT**

**JUDGMENT of Mr. Justice David Barniville delivered on the 1st day of October, 2021**

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### **1. Introduction**

1. This is my judgment in the latest set of proceedings, which by my reckoning is the fifth set of proceedings, between these parties concerning the development of a shopping centre at the Point Village on North Wall Quay in Dublin 1. The plaintiff company, Point Village Development Ltd (“PVDL” or the “plaintiff”), is in receivership. In April and May, 2013 Paul McCann and Stephen Tennant were appointed as joint receivers and joint statutory receivers (“the Receivers”) in respect of all of the assets of PVDL and certain assets of Mr. Harry Crosbie (“Mr. Crosbie”). The defendant is Dunnes Stores Unlimited Company (“Dunnes”). There has been a litany of previous proceedings between the parties concerning the Point Village development. In her judgment in one of the earlier sets of proceedings in November, 2012, Laffoy J. in the High Court described those proceedings as “*the latest episode in a long running saga*”. Nine years later, the saga continues. The parties have been to the High Court, to the Court of Appeal and to the Supreme Court in respect of various aspects of the disputes between them which were the subject of the earlier proceedings.

2. The issue with which this judgment is concerned is whether Dunnes is in breach of certain provisions of the contractual arrangements agreed between PVDL, Mr. Crosbie and Dunnes and subsequently amended by the parties, in circumstances described in more detail below, concerning the fit out of the anchor store in the Point Village development such that the court should grant specific performance to the plaintiff to compel Dunnes to comply with its contractual obligations under those provisions. Ultimately, the resolution of that issue

turns on quite a net issue of contractual interpretation affecting a relatively small number of provisions in the various agreements made by the parties.

3. While that is the principal issue which requires to be determined by the court, the plaintiff has raised a number of other issues which may or may not require to be determined by the court depending on the outcome of the construction issue.

4. The plaintiff contended that Dunnes should not be permitted to advance the argument which it sought to advance on the disputed issue of contractual interpretation on the grounds that (a) the issue was *res judicata* or the subject of an issue estoppel based on the judgment of Laffoy J. in the High Court in proceedings commenced by PVDL and Mr. Crosbie against Dunnes in 2011 (the “2011 proceedings”) and on the judgment of Costello J. in the High Court (as subsequently upheld by the Court of Appeal) in proceedings brought by PVDL (in receivership) against Dunnes in 2016 (the “2016 proceedings”) and (b), in the event that the issue was not *res judicata*, it was a breach of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 for Dunnes to seek to advance the argument which it sought to advance on the basis that it could have made, but did not make, that argument in defending the 2011 proceedings and/or in defending the 2016 proceedings. The plaintiff maintained that, without prejudice to its principal argument on the proper construction of the relevant provisions of the agreements between the parties, Dunnes was precluded from making the case which it sought to make under the rule in *Henderson v. Henderson*. Dunnes did not accept that the particular issue of contractual interpretation raised by it in its defence of the current proceedings was decided either in the judgment of Laffoy J. in the High Court in the 2011 proceedings or in the judgment of Costello J. in the High Court in the 2016 proceedings. It further contended that there was no impediment to it raising that issue in defence of the plaintiff’s claim in the present proceedings.

## **2. Summary of Decision**

5. For reasons set out in detail in this judgment, I have concluded that, by applying the relevant principles of contractual interpretation to the facts which are relevant to the issue, the construction of the relevant provisions of the contractual documents advanced by the plaintiff is the correct one and that the construction put forward by Dunnes is incorrect. I am satisfied that on the correct interpretation of the relevant contractual provisions, Dunnes is and was under a contractual obligation to take the various steps in connection with the fit out of the anchor store in the Point Village development, that in breach of contract Dunnes failed to take those steps, that Dunnes continues to be in breach of contract in respect of the steps required to be taken and that the court should make an order directing Dunnes to take those steps. I have concluded, therefore, that it is appropriate to grant certain orders of specific performance to the plaintiff, the details of which are discussed later.

6. Having reached that conclusion on the interpretation of the relevant contractual provisions, it seems to me that it is not strictly necessary for me to decide whether the construction issue raised by Dunnes was *res judicata* or barred by issue estoppel or whether Dunnes was otherwise precluded from raising the issue by virtue of the rule in *Henderson v. Henderson*. However, for completeness, I have decided to deal briefly with those issues in the judgment.

7. I have concluded that Dunnes was not precluded from advancing the arguments which it advanced or from making the case which it sought to make on the interpretation of the relevant contractual provisions by reason of the doctrines of *res judicata* or issue estoppel or by reason of the rule in *Henderson v. Henderson*. I am satisfied that while the earlier judgments of Laffoy J. and Costello J. (as upheld by the Court of Appeal) did touch on closely related matters, neither judgment expressly dealt with the particular issue of contractual interpretation which Dunnes raised in these proceedings. Nor am I satisfied that Dunnes ought to have been precluded from raising that issue pursuant to the rule in

*Henderson v. Henderson*. In my view, it would be an overly strict application of the rule in *Henderson v. Henderson*, and an incorrect exercise of my discretion, to conclude that Dunnes ought to be prevented from raising the contractual interpretation issue in defending the proceedings. However, my conclusions on the issues of *res judicata*, issue estoppel and the rule in *Henderson v. Henderson* should be seen very much as subsidiary to the principal conclusions I have reached on the correct construction of the contractual provisions at issue. I am satisfied that the plaintiff is clearly entitled to succeed on those issues of contractual interpretation.

### **3. Structure of Judgment**

8. I will start by setting out the relevant (and extensive) factual background to these proceedings. That will inevitably require me to refer to the other proceedings between the parties and some of the judgments in those other proceedings. I will then set out what appear to me to be the relevant provisions of the contractual arrangements between the parties for the purpose of these proceedings. I will then describe in more detail the issues addressed in the judgments of Laffoy J. in the 2011 proceedings and of Costello J. in the 2016 proceedings (as upheld by the Court of Appeal). Next, I will identify the relevant facts for the purposes of the issues I have to decide in these proceedings. I stress relevant facts as many of the factual matters which the parties sought to ventilate in the course of the hearing, including in the course of cross-examination of the two witnesses called, were not, in my view, relevant to the issues which the court had to decide in these proceedings. I will then proceed to deal with the issues, commencing with the issues of contractual interpretation. I will then, on the basis just outlined, relatively briefly consider the issues of *res judicata*, issue estoppel and the rule in *Henderson v. Henderson*.

### **4. General Factual Background**

**9.** As these proceedings follow on from the 2016 proceedings (*Point Village Development Ltd (In Receivership) v. Dunnes Stores 2016/126 SP*) which were determined in the High Court by the judgment of Costello J. delivered on 14<sup>th</sup> November, 2017 (which judgment was upheld by the Court of Appeal in a judgment delivered for that court by Whelan J. on 30<sup>th</sup> July, 2019), there seems little point in me reciting in great detail the general factual background to those proceedings. I gratefully adopt the description of the background and of the contractual arrangements between the parties in connection with the Point Village development contained in the judgment of Costello J. in the 2016 proceedings. For ease of reference, however, I should provide a brief summary of the relevant background.

**10.** In February, 2008, Mr. Crosbie agreed to sell to Dunnes a unit referred to as the anchor site in the Point Village development by means of a Long Lease (for 250 years)(the “long Lease”) for the sum of €5 million. The long lease for the anchor site was executed by Mr. Crosbie and Dunnes on 28<sup>th</sup> November, 2008. On 27<sup>th</sup> February, 2008, PVDL and Dunnes executed a Development Agreement for the anchor site at Point Village (the “Development Agreement”), with Mr. Crosbie participating in order to consent to the provisions of that agreement. Under the Development Agreement, PVDL agreed (amongst other things) to develop a shopping centre (the “Centre”) at Point Village which included the development of a substantial anchor unit on the anchor site which Dunnes would fit out, occupy and trade from as a retail store.

**11.** The Point Village development (the “Development”) is located beside the concert or event venue known as the “Three Arena” and includes a 800 space carpark, a 252 bed hotel, 100,000 square feet of office space and a public plaza known as “Point Square”. The Centre was to comprise approximately 35 retail units together with the anchor unit and a cinema. It was agreed in the Development Agreement that the development would include various other elements, including the Watchtower (which was to be an iconic high rise building) and the

U2 Experience Museum. However, PVDL/Mr. Crosbie decided not to proceed with those parts of the development and Dunnes brought proceedings against them in June, 2009 (the “2009 proceedings”). Those proceedings were settled between the parties in July, 2010 on terms set out in “Terms of Settlement” dated 7<sup>th</sup> July, 2010 (the “Settlement Agreement”). The Settlement Agreement made significant amendments to the Development Agreement, some of which are relevant to the construction issue which arises in these proceedings. In very broad terms, the parties agreed that the contract sum which Dunnes was to pay to PVDL under the Development Agreement would be reduced from €46 million to €31 million with provision for the payment of monies by Dunnes into a nominated account and for the release of those monies in accordance with an agreed structure which was set out at clause 11 of the Settlement Agreement. There were also other amendments to critical terms of the Development Agreement.

**12.** There were further disputes between the parties in relation to the implementation of the Settlement Agreement which were resolved by “Supplemental Terms of Settlement” signed by the parties on 1<sup>st</sup> November, 2010 (the “Supplemental Settlement Agreement”).

**13.** Dunnes paid the full sums due under the Settlement Agreement (as amended) into the relevant nominated account. Clause 11 of the Settlement Agreement amended the payment mechanism under the Development Agreement and provided that the monies lodged to the nominated account would be released to PVDL in four stages on PVDL and Mr. Crosbie satisfying certain conditions.

**14.** There were then further disputes between the parties which led to PVDL and Mr. Crosbie commencing proceedings against Dunnes in July, 2011 (the “2011 proceedings”). I deal in greater detail later with what was in issue in the 2011 proceedings and what was determined by Laffoy J. in her judgment in those proceedings which was delivered on 15<sup>th</sup> November, 2012. Briefly stated here, PVDL and Mr. Crosbie sought specific performance of

the Development Agreement (as amended and varied by the Settlement Agreement and the Supplemental Settlement Agreement) and an order directing Dunnes to commence and complete certain fit out works under the Development Agreement within a certain period. The main issue in the 2011 proceedings was the proper construction and interpretation of clause 14 of the Settlement Agreement and also whether PVDL had failed to comply with certain obligations with respect to the development of Point Square. Laffoy J. decided the construction issue against PVDL and Mr. Crosbie and the other issue in their favour. By reason of her conclusions on the construction issue, specific performance was not ordered.

**15.** Mr. Tennant and Mr. McCann were appointed as the Receivers in April and May, 2013. They were not, therefore, involved in the 2009 proceedings or in the 2011 proceedings. However, further proceedings were brought following their appointment. A dispute arose concerning the development of the public space forming part of the development known as Point Square. An issue arose in the latter part of 2014 as to whether or not Point Square had been completed in accordance with the Development Agreement. The Receivers referred that dispute to an independent architect in accordance with clause 11(d) of the Settlement Agreement and the terms of the Development Agreement. In the course of the expert determination process, an issue arose between the parties as to the proper construction and interpretation of another provision of the Development Agreement, namely clause 7.7.2. Dunnes commenced proceedings against the Receivers and PVDL in late 2014 (the “2014 proceedings” or the “Point Square proceedings”). The issues in those proceedings are not particularly relevant for present purposes. I note, however, that Dunnes succeeded before Binchy J. in the High Court but lost in the Court of Appeal (judgment delivered for the court by Hogan J. on 23<sup>rd</sup> July, 2018: [2018] IECA 238). Dunnes’ appeal to the Supreme Court was dismissed by that court in January, 2020 (judgment delivered by Dunne J. on 22<sup>nd</sup> January, 2020: [2020] IESC 1).



**16.** In the meantime, PVDL, acting through the Receivers, contended that it had satisfied the requirements of clauses 11(b) and 11(c) of the Settlement Agreement and that, in accordance with those provisions, Dunnes was obliged to release two payments from the nominated account in the respective sums of €500,000 (clause 11(b)) and €15 million (clause 11(c)) plus accrued interest. Dunnes disputed the Receivers' claim. The dispute with respect to clause 11(b) is not relevant for present purposes. The dispute with respect to clause 11(c) is relevant and it will be necessary to consider in more detail the case made by the Receivers in support of their claim to be entitled to release of the €15 million pursuant to clause 11(c) of the Settlement Agreement and the defence put forward by Dunnes to resist the Receivers' claim.

**17.** In a very detailed judgment delivered on 14<sup>th</sup> November, 2017, Costello J. in the High Court held that the requirements of clause 11(c) of the Settlement Agreement had been complied with in full by the Receivers once Dunnes had received the Receivers' solicitors' letter of 29<sup>th</sup> February, 2016 confirming that binding agreements for leases had been exchanged with tenants in respect of nine of the ground floor units, four at least of which were internal units. Having so concluded, the court held that Dunnes was required forthwith to release the €15 million plus accrued interest to the Receivers from the nominated account. The conclusions reached by Costello J. in the High Court with respect to clause 11(c) are highly relevant to the issues which arise in these proceedings, as I will explain in more detail later. Most significantly, the "Access Date" under the Development Agreement, which is central to the obligations of Dunnes with regard to the fitting out of the anchor unit was, by virtue of clause 14 of the Settlement Agreement, to be determined by reference to the date of receipt by Dunnes of the certificate or confirmation from the Receivers' solicitors under clause 11(c) of the Settlement Agreement. Costello J. held that that certificate was received by Dunnes on 29<sup>th</sup> February, 2016. Under clause 14 of the Settlement Agreement, the

“Access Date” was 30 days after that date which was 30<sup>th</sup> March, 2016. The present case is concerned with the obligations of Dunnes under the Development Agreement (as amended by the other agreements) once the “Access Date” was reached.

**18.** Dunnes appealed to the Court of Appeal from the judgment and consequent order of Costello J. in the 2016 proceedings. At the time these proceedings were heard by me, the appeal had been heard by the Court of Appeal and judgment was awaited. Judgment was delivered by the Court of Appeal (Whelan J.) on 30<sup>th</sup> July, 2019. In a detailed judgment, the Court of Appeal dismissed the appeal. Dunnes sought leave to appeal to the Supreme Court. However, the Supreme Court refused to grant such leave in a determination given on 10<sup>th</sup> March, 2020 ([2020] IESCDET 40). Therefore, while there was some debate between the parties in the hearing before me as to the approach which the court should take, in circumstances where the judgment of Costello J. was under appeal to the Court of Appeal which had heard but not yet delivered judgment on the appeal, that fact ceased to have any relevance (on the assumption that it was relevant at all) once the Court of Appeal gave judgment.

**19.** In these proceedings, PVDL, acting through the Receivers, seeks specific performance by Dunnes of certain obligations under clause 11 of the Development Agreement (as amended by the other agreements) concerning the fitting out of the anchor unit. In order to understand more fully the plaintiff’s claim, it is necessary at this point to set out the relevant terms of the Development Agreement and the Settlement Agreement.

**5. Relevant Provisions of Development Agreement (as Amended and Varied by other Agreements)**

**20.** These proceedings are principally concerned with the alleged obligations on Dunnes under the Development Agreement (as amended and varied by the Settlement Agreement) to commence, carry out and complete the fit out of the anchor store. The most relevant

provisions are contained in clause 1 (which contains the definitions, including, at Cl. 1.38 the definition of “Fit Out Works”) and clause 11 of the Development Agreement and clauses 11, 14 and 15 of the Settlement Agreement.

**21.** Clause 11 of the Development Agreement is headed “Fit Out Works”. Clause 11.1 provides as follows:-

*“Dunnes shall prior to commencement of the Fit Out Works at its own expense prepare and submit to the Developer the Fit Out Plans which shall, in all material respects, be in accordance with the Fit Out Guide. It is acknowledged that the Fit Out Plans may be varied by Dunnes provided that any such variation is, in all material respects, in accordance with the Fit Out Guide. Dunnes hereby confirms that the Fit Out Works shall be carried out to a standard of quality equivalent to the fit out of Dunnes Store at Henry Street, Dublin.”*

**22.** Clause 11.1 contains a number of defined terms. The “Developer” is PVDL (now in receivership and acting through the Receivers). Clause 1.38, on which Dunnes places great reliance, defines “Fit Out Works” as:-

*“Such fitting out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the Store;”*

**23.** The “Store” is defined in clause 1.66 as meaning *“that part of the Centre to comprise a retail anchor store and service yard together with the Plant Area, ancillary works, services and facilities to be constructed on the Store Site as shown on or described in the Store Plans in accordance with this agreement and to include...”*. Clause 1.68 defines “Store Plans”. Clause 1.69 defines “Store Site”. The “Centre” is defined in clause 1.7 as being the *“shopping centre (including the Store and the Car Park) and multi-screen cineplex to be constructed on the Centre Site as shown on or described in the Site Plan;”*. The “Centre Site” is marked on the Site Plan (clause 1.10). Essentially, the “Store” is the anchor store itself

(together with the other areas referred to in the definition in clause 1.66). The proper interpretation of the term “Fit Out Works” in clause 1.38 is at the heart of the dispute between the parties to these proceedings.

**24.** The term “Fit Out Plans” referred to in clause 11.1 is defined in clause 1.37 as meaning “*the plans and specifications for Dunnes Works to be submitted to (sic) by Dunnes to the Developer in accordance with the provisions of this Agreement;*”. The term “Dunnes Works” is not expressly defined in the Development Agreement or in the subsequent agreements between the parties. However, at para. 8 of her judgment in the 2011 proceedings, Laffoy J. noted that, while the term was not defined, “*it clearly means the Fit Out Works, as defined, to the Store*”. I agree with that. Neither party suggested that the inclusion of a superfluous “*to*” in the definition in clause 1.37 affected its meaning in any way. It was clearly a typographical error.

**25.** The term “Fit Out Guide” referred to in clause 11.1 is defined in clause 1.35 as “*the document entitled ‘Fit Out Guide – Point Village District Centre’, a copy of which is contained in schedule 5;*”. Schedule 5 is the “Fit Out Guide” for the “Point Village District Centre”. That document contains certain specifications for the individual units in the Centre, including the anchor store. It is not to be confused with the “Store Specification” which is defined at clause 1.70 and contained the specification required by Dunnes in respect to the anchor store to be built by the PVDL.

**26.** The plaintiff seeks specific performance of the obligation on Dunnes under clause 11.1 to prepare and submit to the Receivers the “Fit Out Plans”. As we shall see, Dunnes maintains that it does not have a contractual obligation to do so as, having regard to the definition of the term “Fit Out Works”, it does not require any works to be carried out at this stage and has not formed the intention to use and enjoy the anchor store.

**27.** Clause 11.2 of the Development Agreement contains two subclauses, the first of which (clause 11.2.1) is relevant. Clause 11.2.1 provides as follows:-

*“Dunnes shall at its own expense use its reasonable endeavors to obtain the Fit Out Consents including a fire safety certificate for the Fit Out Works (if same is required) provided however that this obligation shall not apply to the extent that the Revised Fire Safety Certificate to be obtained by the Developer pursuant to clause 3 extends to the Fit Out Works;”*

**28.** The term “Fit Out Consents” is defined in clause 1.34 as meaning:-

*“All permissions, consents, approvals, licenses, certificates and permits in legal effectual form as are necessary lawfully to commence, carry out, maintain and complete Fit Out Works;”*

**29.** The plaintiff seeks specific performance of the obligation which it maintains is on Dunnes under clause 11.2.1 to obtain the *“Fit Out Consents including a fire safety certificate for the Fit Out Works (if same is required)”*. Dunnes ties its defence to the plaintiff’s claim for specific performance of this provision to its case that it has no obligation to carry out “Fit Out Works” on the basis of the construction of the definition of that term in clause 1.38 which it has advanced in the defence of its proceedings.

**30.** Clause 11.4 of the Development Agreement is one of the provisions relied upon by the plaintiff as imposing an obligation on Dunnes to carry out and complete the “Fit Out Works”. Clause 11.4 provides as follows:-

*“From the Access Date but subject to obtaining a fire safety certificate as set out in clause 11.2 (if same is required), Dunnes shall procure that the Fit Out Works are designed, carried out and completed:*

*11.4.1 In a good and workmanlike manner and in accordance with good building practice;*

11.4.2 *With good, new and suitable materials;*

11.4.3 *In substantial compliance with the Fit Out Consents, the Fire Safety*

*Certificate, the Revised Fire Safety Certificate (if issued) and the Planning Acts;*

11.4.4 *In substantial compliance with all statutes, statutory orders and regulations made under or deriving validity from them and any requirements and codes of practice of local authorities and competent authorities affecting the Fit Out Works;*

11.4.5 *In accordance with the Fit Out Guide and to the standard of quality referred to in clause 11.1;*

11.4.6 *With reasonable skill, care and diligence;*

11.4.7 *In accordance with the requirements of the construction regulations; and*

11.4.8 *In compliance with this agreement.”*

**31.** The plaintiff seeks specific performance of the alleged contractual obligation on Dunnes to procure that the “Fit Out Works” are “*designed, carried out and completed*” in a manner set out in clause 11.4. Dunnes denies that it is under any contractual obligation to do so at present, again tying that defence to its interpretation of the term “Fit Out Works” in clause 1.38.

**32.** The obligation on Dunnes to procure that the “Fit Out Works” are designed, carried out and completed as set out in clause 11.4, whatever that obligation is found ultimately to be, commences on the “Access Date” (but that is, of course, subject to obtaining a fire safety certificate, if required, as provided for in clause 11.2). The term “Access Date” is, therefore, critical. That term was originally defined in clause 1.2 of the Development Agreement. However, it was completely changed by clause 14 of the Settlement Agreement which provided as follows:-

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

The term “existing contracts” is defined in the introductory section of the Settlement Agreement as meaning the *“Development Agreement, the Contract for Sale and the Lease”*. Therefore, although clause 1.2 of the Development Agreement defined the term “Access Date”, that definition was completely changed by clause 14 of the Settlement Agreement. Following that change, the “Access Date” was to be 30 days after Dunnes received the certificate referred to in para. 11(c) of the Settlement Agreement. In her judgment in the 2016 proceedings, Costello J. held that Dunnes received the certificate referred to in clause 11(c) of the Settlement Agreement on 29<sup>th</sup> February, 2016. The Court of Appeal dismissed Dunnes’ appeal and the Supreme Court refused to grant leave to further appeal. Therefore, having regard to Costello J.’s judgment, the “Access Date” was 30<sup>th</sup> March, 2016, being 30 days from the date of receipt by Dunnes of the relevant certificate.

**33.** Clause 11.5 of the Development Agreement provides as follows:-

*“Subject to obtaining a fire safety certificate if same is required in respect of the Fit Out Works, Dunnes shall with effect from the Access Date diligently procure the execution and completion of the Fit Out Works within the Fit Out Period provided however...”*

The obligation on Dunnes to *“diligently procure the execution and completion of the Fit Out Works within the Fit Out Period”*, whatever that obligation is ultimately found to be, arises *“with effect from the Access Date”*. As noted above, the “Access Date” was 30<sup>th</sup> March, 2016. The “Fit Out Period” is defined in clause 1.36 as being *“26 weeks from the Access Date subject however to clause 11.5;”*. 26 weeks from 30<sup>th</sup> March, 2016 was 28<sup>th</sup> September, 2016. The “Fit Out Period” expired on that date, subject to what clause 11.5 stated with

respect to the obtaining of a fire safety certificate, if required, in respect of the “Fit Out Works”.

**34.** The plaintiff seeks specific performance of Dunnes’ obligations under clause 11.4 and clause 11.5 and maintains that the correct interpretation of those clauses means that Dunnes was required to procure that the “Fit Out Works” were designed, carried out and completed in the manner set out in clause 11.4 and to diligently procure the execution and completion of the “Fit Out Works” under clause 11.5, by the end of the “Fit Out Period” which was 28<sup>th</sup> September, 2016. Dunnes denies that it is under those contractual obligations at present, having regard to the interpretation which it has advanced of the definition of “Fit Out Works” in clause 1.38.

**35.** While the provisions of clause 11 in respect of which the plaintiff seeks specific performance against Dunnes are those set out above, there are some other relevant provisions in clause 11 to which I should refer at this stage and they are, in my view, relevant to the disputed issue of contractual interpretation between the parties.

**36.** Clause 11.2.2 imposes an obligation on Dunnes to pay sums due to any statutory or local authority pursuant to the “Fit Out Consents” unless they are due under other provisions of the Development Agreement and to indemnify the plaintiff against such sums. Clause 11.3 contains a number of obligations on Dunnes with respect to the calculation of the “Insurance Contribution” being the sum payable by Dunnes to reimburse the plaintiff in respect of the costs of arranging and maintaining certain insurance policies in respect of the “Fit Out Works”. Several of the subclauses of clause 11.3 state that Dunnes “*shall*” do certain things.

**37.** Clause 11.7 states that Dunnes “*shall keep*” the plaintiff “*generally informed of*” certain matters, namely:-

“11.7.1            *The progress of the Fit out Works; and*

11.7.2            *Any material problems or delays affecting the Fit Out Works.”*



Clause 11.7 also states that without prejudice to the generality of those provisions:-

*“Dunnes shall as soon as reasonably possible after receipt by Dunnes of a request for same supply to the Developer a programme for the Fit Out Works and shall advise the Developer in writing if the Fit Out Works are likely to be delayed beyond the 26 week Fit Out Period.”*

**38.** Clause 11.8 states (amongst other things) that Dunnes *“shall comply with its obligations under the construction regulations in all respects”* with respect to the “Fit Out Works”.

**39.** Clause 11.9 provides that Dunnes *“shall at all reasonable times during the carrying out of the Fit Out Works permit the Developer and anyone authorised by it on reasonable prior notice to inspect Fit Out Works...”* subject to certain conditions.

**40.** Clause 11.10 provides that Dunnes *“shall keep the Developer indemnified”* against certain matters, claims, demands and proceedings.

**41.** Clause 11.11 provides that Dunnes *“shall comply with the Fit Out Guide and shall observe and perform”* certain stipulations which are set out *“at all times in relation to the Fit Out Works from the Access Date until completion of the Fit Out Works”*. Those stipulations are set out in clauses 11.11.1 to 11.11.14. They are all stipulations imposed upon Dunnes.

**42.** Clause 11.12 originally imposed certain obligations on Dunnes to commence trading to the public from the store by a particular date, subject to certain provisos. However, that clause was significantly altered by clause 15 of the Settlement Agreement which states that:-

*“Dunnes shall have no obligation to open the store until*

- (a) at least seven of the ground floor units marked X on the annexed ground floor plan have opened to the public for trade, four of which shall be internal units;*
- (b) Compliance with clauses 11(a) and 11(d) above has occurred.”*

43. These appear to me to be the most relevant terms of the contractual arrangements between the parties for the purposes of the issues in these proceedings.

**6. 2011 Proceedings and 2016 Proceedings: Judgments of Laffoy J. and Costello J.**

44. The plaintiff has placed considerable reliance in these proceedings on the judgments delivered by Laffoy J. in the 2011 proceedings and by Costello J. in the 2016 proceedings. The plaintiff has done so for a number of reasons. First, the plaintiff submitted that the disputed issue of contractual interpretation concerning Dunnes' obligation to commence and complete the "Fit Out Works" was effectively decided by Laffoy J. and by Costello J. in their respective judgments in those earlier proceedings, such that the issue is *res judicata* or subject to issue estoppel and that it is not open to Dunnes to seek to reopen the relevant findings in these proceedings. Second, the plaintiff asserted that if the issue is not *res judicata* or subject to issue estoppel, Dunnes could have advanced, but did not advance, in those earlier proceedings, the interpretation of the relevant contractual provisions (including clause 1.38 of the Development Agreement) for which it contends in these proceedings and that Dunnes' failure to raise that issue in those proceedings means that it should now be precluded from doing so under the rule in *Henderson v. Henderson*. Third, the plaintiff maintained that the interpretation of the relevant contractual terms (including clause 1.38) for which Dunnes contends in these proceedings is inconsistent with the position it adopted in the 2011 proceedings and in the 2016 proceedings. These contentions are all hotly disputed by Dunnes.

45. In order properly to assess the validity of these contentions made by the plaintiff, it is important to ascertain what was in issue in the 2011 proceedings and in the 2016 proceedings and what was actually decided in the judgments of Laffoy J. and Costello J. in those two sets of proceedings.

**(a) 2011 Proceedings**

**46.** In the 2011 proceedings, PVDL and Mr. Crosbie contended that, in accordance with clause 14 of the Settlement Agreement, the “Access Date” for the purposes of clause 11 of the Settlement Agreement had occurred 30 days after 7<sup>th</sup> September, 2010 and that, accordingly, the “Fit Out Period” for the execution and completion of the “Fit Out Works” to the anchor unit expired on 7<sup>th</sup> April, 2011. They contended that Dunnes failed to comply with its obligations in relation to the carrying out of the “Fit Out Works” under clauses 11.5 and 11.7. They sought an order of specific performance of the Development Agreement (as amended by the Settlement Agreement and the Supplemental Settlement Agreement) and an order requiring Dunnes to commence forthwith the “Fit Out Works” and to complete them within the “Fit Out Period” as defined in the Development Agreement, as well as other reliefs which are not relevant for present purposes. The plaintiffs in those proceedings sought those reliefs based on their interpretation of clause 14 of the Settlement Agreement (which was in handwriting) and their contention that that clause referred to clause 11(a) rather than clause 11(c) of the Settlement Agreement. Dunnes defended the case on the basis that the “Access Date” had not yet occurred, that clause 14 of the Settlement Agreement referred to clause 11(c) and not clause 11(a) of the Settlement Agreement and that until the relevant certificate/confirmation had been provided by PVDL’s solicitors under clause 11(c), which had not happened, the “Access Date” had not occurred and the “Fit Out Period” had not yet started to run (paras. 3(a) to (d) of the defence). Dunnes did not expressly refer to the definition of “Fit Out Works” in clause 1.38 of the Development Agreement and did not advance the interpretation and meaning of that provision which it has sought to advance in these proceedings. Dunnes raised a second defence which is not relevant to the issues in these proceedings which was that Dunnes was entitled to rely on the failure by PVDL to execute and complete the works to Point Square as a defence to the specific performance sought by the plaintiffs in the 2011 proceedings.

**47.** Witness statements were exchanged between the parties but, ultimately, because of an agreement between the parties as to how the case was to proceed, the witnesses did not give evidence. Nonetheless, the plaintiff in these proceedings relied on parts of the witness statements of Stephen Murray and Margaret Heffernan on behalf of Dunnes to make the case here that the interpretation of the relevant contractual issues which Dunnes has sought to rely in these proceedings is inconsistent with the case which it made in the 2011 proceedings. However, while the witness statements exchanged in the 2011 proceedings were appended to the witness statement of Mr. Tennant in these proceedings and while the parties did agree that all of the documents could be relied on and admitted into evidence, subject to the right of the other side to challenge the contents of the relevant documents, it seems to me that very little weight (if any) should be attached to what was said in the witness statements in the 2011 proceedings in circumstances where those witnesses did not give evidence and were not cross-examined due to the agreement between the parties as to how the case would be run. I accept that in accordance with the agreement reached by the parties in this case, it is permissible to refer to the fact that witness statements were provided by Dunnes which contained the relevant words at paras. 7 and 13 of Mr. Murray's statement and at paras. 27 and 28 of Ms. Heffernan's statement (and reproduced at para. 73 of the plaintiff's written submissions). However, as the disputed issue of construction which Dunnes has sought to rely in this case did not form part of the case being made by either side in the 2011 proceedings, I do not believe that significant weight can be placed on what was said in those witness statements. They are certainly not determinative of any issue which I have to decide in this judgment.

**48.** Laffoy J. delivered a comprehensive judgment in the 2011 proceedings on 15<sup>th</sup> November, 2012. She described the issues dealt with in her judgment at para. 40. First, there was an issue as to the proper construction of clause 14 of the Settlement Agreement; and

second, there was an issue as to whether the alternative defence in relation to failure to complete the works at Point Square was an answer to the plaintiff's claim for specific performance. As noted above, the second issue is not relevant for present purposes. I merely observe here that Laffoy J. concluded that, if it were determined that the plaintiffs were entitled to a decree of specific performance against Dunnes in the proceedings, this alternative defence could not disentitle the plaintiffs to such a decree.

**49.** The relevant parts of Laffoy J.'s judgment for present purposes are those dealing with the disputed issue as to the proper construction of clause 14 of the Settlement Agreement. Laffoy J. discussed the applicable legal principles on the construction of contracts (paras. 42 to 48). She held that clause 14 of the Settlement Agreement linked the "Access Date" to compliance with clause 11(c) and not clause 11(a) of the Settlement Agreement as the plaintiffs had contended. She held that to construe clause 14 in the manner for which Dunnes contended:-

*"...on a plain reading of the text results in internal consistency with the Settlement Agreement itself and also with the Development Agreement, as varied by the Settlement Agreement in conjunction with the Supplemental Agreement. It also points to a development implementation process which is both logical and commercially sensible."* (para. 54)

**50.** Laffoy J. rejected the contention that, properly construed, clause 14 of the Settlement Agreement should be read as linking the "Access Date" to the certificate referred to in clause 11(a). She rejected the plaintiffs' contention that the reference to clause 11(c) in clause 14 of the Settlement Agreement was erroneous. She reached that conclusion based on an objective consideration of the text of the Development Agreement (as amended and varied by the Settlement Agreement and the Supplemental Settlement Agreement) when construed "*in the overall context*" of the three documents, and without regard to evidence of what happened

since last of the three documents were concluded (para. 60). Laffoy J., therefore, ruled against the plaintiffs and with Dunnes. The effect of the court's conclusion on the construction issue was that the "Access Date" had not yet occurred since the relevant certificate or confirmation required under clause 11(c) had not yet been provided.

51. In the course of her judgment, Laffoy J. did make reference to the definition of "Fit Out Works" in clause 1.38 of the Development Agreement (para. 9) and made various comments concerning the relevance of the "Access Date" to various stages and aspects of the development. At para. 24 of her judgment, having referred to clause 14 of the Settlement Agreement and the reference to the "Access Date" being 30 days after receipt by Dunnes of the certificate referred to in clause 11(c) of the Settlement Agreement, Laffoy J. described the "Access Date" as a "*crucial point in time in relation to the respective obligations of the Developer and Dunnes under the Development Agreement*" (para. 24). Laffoy J. continued:-

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

(para. 24) (emphasis added)

52. Later, at para. 51 of her judgment, Laffoy J. stated:-

*“The significance of the ‘Access Date’ in the context of the Development Agreement in its original form, was, first, that it triggered the obligation of Dunnes, subject to obtaining a fire safety certificate, to commence the Fit Out Works. The Access Date was linked to the certification of Practical Completion as to part only of the Building Works... As the expression implies, the objective of defining the ‘Access Date’, was to fix a point at which Dunnes would have access to the Store so that the carrying out of the Fit Out Works would be feasible...”* (para. 51)

53. Laffoy J. then considered the manner in which the “Access Date” was varied by the Settlement Agreement when construed in conjunction with the Supplemental Settlement Agreement, noting the acknowledgement of Dunnes (at para. (j)(i) of the Supplemental Settlement Agreement) that practical completion had been achieved on 7<sup>th</sup> September, 2010 so that the “Access Date” would now postdate practical completion of the relevant works (excluding the works to Point Square).

54. However, while referring to the “Access Date” as being the starting point of the “Fit Out Period” and the “trigger” for Dunnes to commence the fit out, the court did not mention any dispute concerning the definition of “Fit Out Works” in clause 1.38 and, in particular, the issue of construction which Dunnes has raised in these proceedings. The reason the court did not mention that issue is, of course, because it was not raised by Dunnes and did not form part of the argument between the parties. The obvious reason for that was because, on Dunnes’ case, the “Access Date” had not yet occurred since the relevant certificate or confirmation referred to in clause 11(c) had not yet been received by it. Laffoy J. agreed with the defendants on that issue. The disputed issue concerning the construction of clause 1.38 simply did not arise in that case and was not determined by Laffoy J. in her judgment. It is a different question as to whether the issue ought to have been raised by Dunnes so that it could

have been decided. I address that briefly later in the judgment when considering the plaintiffs' submission based on the rule in *Henderson v. Henderson*.

**(b) 2016 Proceedings**

**55.** The 2016 proceedings were commenced by special summons in April, 2016. By that stage, the Receivers had been appointed and the proceedings were brought in the name of PVDL acting through the Receivers. It was expressly stated at para. 8 of the special endorsement of claim to the special summons that the proceedings related to “*two tranches of the consideration to be released to PVDL*” under the Development Agreement as amended by the Settlement Agreement and the Supplemental Settlement Agreement. The two tranches were €500,000 (plus accrued interest) under clause 11(b) (which is not relevant for present purposes) and €15 million under clause 11(c). With respect to clause 11(c), the plaintiff contended that the relevant certificate or confirmation confirming that binding agreements for lease had been exchanged with the tenants in respect of nine of the ground floor units identified in clause 11(c), with at least four of those being internal units, was furnished by the Receivers' solicitors to Dunnes on 29<sup>th</sup> February, 2016. The plaintiffs contended, therefore, that Dunnes was obliged to release the sum of €15 million plus accrued interest within five working days of receipt of that confirmation or certificate. However, Dunnes did not release that sum. The plaintiff sought a declaration that Dunnes was obliged forthwith to release the €15 million (plus accrued interest) from the nominated account and an order directing Dunnes to give effect to such declaration.

**56.** There were no further pleadings apart from the special summons. The parties did, however, exchange affidavits.

**57.** In its replying affidavits, Dunnes alleged that the plaintiff had not complied with the terms of clause 11(c) in that the plaintiff had not secured high quality tenants in fitting with the overall tenant mix envisaged for the Point Village Centre. It contended that the plaintiff



had not secured the appropriate tenant mix and also that there was no evidence that binding agreements for lease had been exchanged as required by clause 11(c). Dunnes further alleged that the plaintiff had not complied with the requirements of clause 6 of the Settlement Agreement by not engaging meaningfully with Dunnes concerning the proposed tenant mix. Various other points were made which are not relevant for present purposes.

**58.** In his second affidavit (sworn on 12<sup>th</sup> June, 2017), Thomas Sheridan, Dunnes' company secretary, referred to the 2011 proceedings. At para. 17 of that affidavit, he asserted that *"the objective on the part of PVDL in the 2011 proceedings was to compel Dunnes Stores to commence the fit out of the Dunnes Stores unit"*. He contended that that was also the plaintiff's objective in the 2016 proceedings.

**59.** Mr. Sheridan devoted a section of that affidavit to the *"fit out of the Dunnes Stores unit"*. At para. 40, he referred to correspondence exchanged between the Receivers and Dunnes in which the Receivers were contending that the requirements of clause 11(c) of the Settlement Agreement had been satisfied and that the "Access Date" under the Development Agreement would fall 30 days following delivery of the purported clause 11(c) certificate. Mr. Sheridan stated that the Receivers *"further contend that Dunnes Stores is required to fit out its unit within 26 weeks of the Access Date"*. He noted that Dunnes had disputed the Receivers' contention and referred to the correspondence exchanged between the parties. At para. 41, Mr. Sheridan stated:-

*"It is now quite clear that a key motivation and intention behind the 2016 proceedings is to compel Dunnes Stores to complete the fit out of its unit at a cost of several million euro..."*

**60.** At para. 44 of the same affidavit, Mr. Sheridan asserted that the 2016 proceedings did not simply concern clause 11(c) of the Settlement Agreement but, rather, those proceedings called into question *"the true construction and interpretation of the Development Agreement"*

*and the Settlement Agreement in terms of what was actually agreed between the parties in relation to the state of the Point Village Centre, and Point Village Development as a whole, come the point in time at which Dunnes Stores might be called on to complete the fit out of the Dunnes Stores unit”* (para. 44). At para. 45, Mr. Sheridan stated that the Receivers had *“drawn a correlation between the 2016 proceedings and the Access Date under the Development Agreement, and further associated the 2016 proceedings with the obligation on Dunnes Stores to fit out the Dunnes Stores unit”*. Various other affidavits were sworn on behalf of Dunnes in those proceedings which are not relevant for present purposes.

**61.** There was no mention in Mr. Sheridan’s affidavit of the definition of “Fit Out Works” in clause 1.38 of the Development Agreement or of the circumstances in which the obligation on Dunnes Stores to commence and complete the fit out of the anchor store would arise. The construction issue raised by Dunnes in these proceedings was not raised in the 2016 proceedings. That is perhaps understandable having regard to the plaintiff’s description of the proceedings in the special summons and the reliefs which the plaintiff was seeking. However, it was Dunnes who were seeking to draw in the link between the certificate under clause 11(c), the “Access Date” and the circumstances in which it would be obliged to commence and complete the fit out of the anchor store, as can be seen from the paragraphs of Mr. Sheridan’s affidavit to which I have just referred.

**62.** The plaintiff made reference in its written submissions in the present case, and at the hearing, to certain passages in the transcripts of the hearing before Costello J. to support its contention that the court was in fact considering in the 2016 proceedings the consequences of a decision that Dunnes had received a certificate in compliance with clause 11(c), not only in relation to the release of the €15 million from the nominated account, but also in terms of Dunnes’ obligation to commence and complete the fit out of the anchor store. The plaintiff contended in its submissions in this case that there was in effect an acknowledgement by

Dunnes in the 2016 proceedings that if the certificate provided by the plaintiff's solicitors was received by Dunnes in compliance with clause 11(c) of the Settlement Agreement, that triggered Dunnes' obligation to commence and complete the fit out of the anchor store and that no case was made at that stage by Dunnes that its obligations were in some way conditional on the formation of an intention by Dunnes to use and enjoy and trade from the anchor store.

**63.** It is true that, at the hearing before Costello J., the plaintiff's counsel did state on a number of occasions that the clause 11(c) certificate was significant not only in terms of the release of the €15 million from the nominated account, but that it was also the trigger for Dunnes' obligation to commence and complete the fit out of the store (see, for example, transcript Day 1 (10<sup>th</sup> October, 2017), pp. 16-17, 21-23; Day 2 (11<sup>th</sup> October, 2017), pp. 26, 35, 45-47). Reliance was also placed by the plaintiff on some references to Dunnes' counsel's submissions to similar effect (for example: Day 3 (12<sup>th</sup> October, 2017), pp. 63, 83-84 and 123). However, it seems to me that those observations must be read in the context of the case actually made by the plaintiff in the 2016 proceedings and the issues actually determined by Costello J. in her judgment. I have referred earlier to the special summons issued in the 2016 proceedings which did not seek any relief in relation to the fit out of the anchor store but only sought relief in relation to the release of the respective sums of €15 million and €500,000 from the nominated account. Dunnes obligation to fit out the store was not an issue in that case on the pleadings.

**64.** Costello J. delivered a very detailed judgment in the 2016 proceedings on 14<sup>th</sup> November, 2017. She identified the dispute between the parties at paras. 18 and 19 of her judgment. It is clear from her description of the dispute at para. 18 that the issue between the parties was whether Dunnes was required to release the two sums of money from the

nominated account. That is also clear from the court's description of the issues to be determined. At para. 20 of her judgment, Costello J. stated:-

*“This Court must determine what is required to satisfy the provisions of Clause 11 (c) of the Settlement Agreement and Clause 6 of the Settlement Agreement. This Court must then determine whether, in fact, the plaintiff has met those requirements. If so, is the defendant obliged to release the sum of €15 million plus accrued interest from monies deposited in a nominated account? I shall consider the separate issue of compliance with Clause 11 (b) at the end of the judgment.”*

That was the dispute and those were the issues which Costello J. indicated she was deciding in the judgment. Clearly, they do not include the construction of the term “Fit Out Works” in clause 1.38 of the Development Agreement and how that construction affected the obligations of Dunnes under clause 11 in terms of the commencement and completion of those “Fit Out Works”. However, it is undoubtedly the case that, in the course of her judgment, Costello J. did make reference to the connection between the issues she had to decide and the obligation on Dunnes to commence fit out of the anchor store.

**65.** Having addressed the relevant principles applicable to the construction of contracts, Costello J. turned to consider clause 11(c). At para. 29 of her judgment, she stated that that clause reflected the mechanism chosen by the parties to determine when the €15 million was to be released from the nominated account. Costello J. continued:-

*“It also determined when the defendant was contractually required to commence fit out of the store in the Centre. Clause 14 of the Settlement Agreement stated that the Access Date shall be 30 days after the date of receipt by the defendant of the clause 11 (c) certificate. Under the Development Agreement the defendant was required to commence fit out of the Store on the Access Date. Therefore this was 30 days after the date of receipt by the defendant of the confirmation specified in clause 11 (c). Both*

*sides agree that this was commercially very significant. In resolving their dispute the parties carefully chose a mechanism to determine when this commercially significant event would occur.*” (footnotes in the original omitted) (emphasis added)

66. At para. 32 of her judgment, Costello J. stated:-

*“The purpose of the confirmation [i.e. the certificate/confirmation in clause 11(c)] is to act as a trigger for the release of certain monies in the nominated account and to trigger the obligation of the defendant to commence fit out of the Store...”*

67. Costello J. decided the issues in the 2016 proceedings in favour of the plaintiff. She held that the certificate provided by McCann FitzGerald, the Receivers’ solicitors, to Dunnes on 29<sup>th</sup> February, 2016 was in compliance with the requirements of clause 11(c) of the Settlement Agreement and that Dunnes was not entitled to look behind that confirmation. The court held that Dunnes could not do so in the absence of fraud (which had not been alleged) or manifest error. The court concluded that there was no manifest error and that the plaintiff had complied with clause 11(c) and clause 6 of the Settlement Agreement. The court agreed with the construction of clause 11(c) of the Settlement Agreement advanced by the plaintiff and rejected the construction advanced by Dunnes. At para. 122 of her judgment, Costello J. stated that there was no reason to construe the word “tenant” in clause 11(c) *“as meaning anything other than its natural and ordinary meaning”* and that that was consistent with the language used by the parties in the contract they negotiated, as well as reflecting the purpose of the clause. The court further held that the construction of the term for which the plaintiff was contending was *“entirely consistent with all of the contracts entered into by the parties”*. The court rejected the contention that the term “tenant” had to be construed as a “high quality tenant”. In light of those conclusions, the court held that the requirements of clause 11(c) of the settlement agreement were complied with in full by the plaintiff on receipt by Dunnes of the letter from the Receivers’ solicitors of 29<sup>th</sup> February, 2016 and that Dunnes was required

forthwith to release the €15 million plus accrued interest to the plaintiff from the nominated account (para. 123). The court also found that there was no real dispute between the parties concerning the release of the €500,000 in accordance with clause 11(b) and ordered that sum to be released also.

**68.** The order made by the court to give effect to the judgment reflected the issues in the case as identified by Costello J. in the judgment. The order reflected the fact that Dunnes was obliged forthwith to release the two sums at issue and to take all necessary steps to do so.

**69.** While obviously having implications in terms of other obligations of Dunnes under the various agreements, the judgment of Costello J. in the 2016 proceedings and the order made on foot of that judgment did not decide or direct that Dunnes was obliged to commence and complete the “Fit Out Works”, which is the central issue in these proceedings. Nor was any argument addressed by Dunnes or by the plaintiff as to the correct construction of the term “Fit Out Works” in clause 1.38 and how that term was to be construed in the context of the obligations on Dunnes under clause 11 of the Development Agreement. While Costello J.’s judgment in the 2016 proceedings is very relevant to the central issue to be determined in these proceedings and while Dunnes are stuck with the interpretation of clause 11(c) of the Settlement Agreement and the court’s conclusion that the certificate provided by the plaintiff’s solicitors was in compliance with clause 11(c), the actual construction issue to be decided in this case was not decided in the 2016 proceedings. The position that Dunnes took in its defence in the present case on this question was that, if the Court of Appeal was to overturn the judgment of Costello J., then the “*fundamental premise*” grounding the present case would “*no longer operate thereby rendering the within proceedings misconceived and bound to fail*” (para. 2 of Dunnes’ defence in this case). As noted earlier, however, the Court of Appeal upheld the judgment and order of Costello J. in comprehensive terms and dismissed Dunnes’ appeal. The Supreme Court refused to grant Dunnes leave to appeal.

70. It seems to me that the consequences of the judgment and order of Costello J., as upheld by the Court of Appeal, are that the certificate provided by the plaintiff's solicitors to Dunnes on 29<sup>th</sup> February, 2016 complied with the requirements in clause 11(c) of the Settlement Agreement. Therefore, under clause 14 of the Settlement Agreement, the "Access Date" was 30 days after the date of receipt by Dunnes of that certificate. It is not disputed that the certificate was received on 29<sup>th</sup> February, 2016 or that 30 days from then was 30<sup>th</sup> March, 2016. None of that could be disputed by Dunnes as a consequence of the judgments of Costello J. and of the Court of Appeal. What remains open for determination, however, is, subject to the plaintiff's submission based on *res judicata*/issue estoppel and the rule in *Henderson v. Henderson*, is the proper construction of the relevant parts of clause 11 of the Development Agreement and Clause 1.38 in terms of Dunnes' obligation to commence and complete, and to take the other steps required with respect to, the "Fit Out Works" by the "Fit Out Period". I do not believe that that issue is *res judicata* or subject to an issue estoppel (for reasons I explain briefly later in this judgment). Nor do I believe that Dunnes were precluded from raising the construction issue in these proceedings under the rule in *Henderson v. Henderson* (again for reasons I explain briefly later). As I have concluded that the construction of the relevant provisions of clause 11 of the Development Agreement, including the construction of the term "Fit Out Works" in clause 1.38 of that agreement, is the construction for which the plaintiff contended, it is, in my view, preferable that I address the construction issue first and set out my reasons for concluding that the plaintiff must succeed on this issue rather than deciding first whether Dunnes should be precluded from even making their arguments on that issue.

### **7. Relief Claimed in these Proceedings**

**71.** The plaintiff seeks an order of specific performance by Dunnes of certain obligations under clause 11 of the Development Agreement (as amended by the Settlement Agreement and the Supplemental Settlement Agreement), in particular:-

- (1) An order requiring Dunnes to prepare “Fit Out Plans” (as defined in the Development Agreement) and to submit them to the plaintiff, in accordance with clause 11.11 of the Development Agreement.
- (2) An order requiring Dunnes at their own expense, to use reasonable endeavours to obtain the “Fit Out Consents” (as defined in the Development Agreement), in accordance with clause 11.2 of the Development Agreement.
- (3) An order requiring Dunnes to procure that the “Fit Out Works” (as defined in the Development Agreement) are designed, carried out and completed, in accordance with clause 11.4 of the Development Agreement.
- (4) An order requiring Dunnes to procure the execution and completion of the “Fit Out Works” of the anchor store or unit within the “Fit Out Period”, in accordance with clause 11.5 of the Development Agreement.

**72.** Initially, the plaintiff also sought damages in lieu of specific performance and damages for breach of contract. However, the plaintiff withdrew its claim for damages and an amended plenary summons, and an amended statement were served on 22<sup>nd</sup> January, 2019, seeking the above reliefs.

**73.** Dunnes resisted the plaintiffs’ claims on a number of grounds. First, it maintained a preliminary plea and objection to the effect that the judgment of Costello J. in the 2016 proceedings was the subject of a pending appeal to the Court of Appeal, that the “fundamental premise” grounding these proceedings, namely, that the “Access Date” was determined to fall on 20<sup>th</sup> March, 2016, would no longer operate in the event that Dunnes



were successful in its appeal and that, therefore, the proceedings were misconceived. Without prejudice to that plea, Dunnes sought to rely on the terms of the Development Agreement, the Settlement Agreement and the Supplemental Settlement Agreement. At para. 8.3 of the defence, Dunnes set out the principal basis on which it was defending the proceedings.

Dunnes pleaded as follows:-

*“8.3.1 The purported obligation on Dunnes to fit out the anchor unit, and consequential obligations thereon, is, according to the definition of ‘Fit Out Works’ per the Development Agreement, prefaced on Dunnes first electing the works it may require to be carried out in connection with the intended use and enjoyment of the Anchor Unit. As Dunnes does not presently intend to use and enjoy the Anchor Unit as a retail store there are no works required to be carried out. Accordingly, Dunnes is not in breach of the Development Agreement for not having procured the completion of the ‘Fit Out Works’ within the ‘Fit Out Period’, given that it does not presently require any ‘Fit Out Works’.*

*8.3.2 The Lease affords Dunnes the right to occupy the Anchor Unit, but does not oblige it to do so.*

*8.3.3 Given the absence of a ‘keep open’ provision in the lease, Dunnes is not under any obligation to trade from the Anchor Store, nor does it intend to do so at present.”*

**74.** At para. 8.4 of the defence, Dunnes sought to raise again the alleged obligation on the plaintiff, to ensure that the tenants in respect of which the binding agreements for lease had to be secured under clause 11(c) of the Settlement Agreement were tenants of “*high quality*

*commensurate with the status of the Point Village Centre as a whole*” and that the plaintiff failed to comply with that obligation. That issue, however, was decided against Dunnes by Costello J. and her decision in that regard was upheld by the Court of Appeal. It can no longer be an issue in the proceedings. Dunnes sought to make a similar case in relation to the alleged noncompliance by the plaintiff clause 11(c) of the Settlement Agreement, at para. 11 of its defence. However, again that issue was conclusively determined against Dunnes by Costello J. and by the Court of Appeal in the 2016 proceedings.

**75.** In its reply, the plaintiff sought to raise pleas of *res judicata*, issue estoppel, abuse of process and the rule in *Henderson v. Henderson* and pleaded that it was not open to Dunnes to:-

- (1) argue that the plaintiff had failed to comply with its obligations under clause 11(c) of the Settlement Agreement;
- (2) dispute the validity or legal effect of the certificate/confirmation by McCann FitzGerald of 29<sup>th</sup> February 2016;
- (3) dispute that the “Access Date” fell on 30<sup>th</sup> March, 2016; and
- (4) argue that the obligation to commence the “Fit Out Works” is dependent on Dunnes’ intention to use the store as a retail premises.

**76.** The plaintiff pleaded that the High Court (Costello J.) had already determined (in the 2016 proceedings) that the confirmation given by the plaintiff’s solicitors in the letter and certificate dated 29<sup>th</sup> February, 2016 was valid and effective for the purposes of clause 11(c) of the Settlement Agreement. The plaintiff also pleaded that the High Court determined that there was no manifest error. The Court of Appeal upheld the High Court’s judgment on those issues.

**77.** Finally, the plaintiff rejected the contention that Dunnes’ obligations to fit out the anchor unit were “*prefaced on Dunnes first electing the works it may require to be carried*

*out in connection with the intended use and enjoyment of the anchor unit*". The plaintiff pleaded that the Development Agreement (as amended) and, in particular, clause 11, makes clear that Dunnes' contractual obligations to fit out the anchor unit are not contingent on Dunnes' own subjective desire to use and occupy the anchor unit.

**78.** In a rejoinder, Dunnes disputed the pleas and assertions contained in the plaintiff's reply.

**79.** Arising from the pleadings, therefore, the issues to be determined are:-

- (1) The proper construction of Dunnes' contractual obligations under clause 11 including the defined terms in clause 1 and, in particular, the term "Fit Out Works" in clause 1.38.
- (2) Whether Dunnes is precluded by virtue of (a) *res judicata* and/or issue estoppel or (b) the rule in *Henderson v. Henderson* from raising the issue that its obligation to commence the "Fit Out Works" is dependent on its intention to use the store as a retail premises and that it does not have to take any of the steps in clause 11 of it unless it wishes to trade from the store.

As I have explained earlier, I propose to deal with the construction of the relevant provisions of clause 11 of the Development Agreement first. In light of the conclusions I reach on that issue, I will then briefly consider the other issues.

**80.** Before doing so however, it is necessary for me to record what would appear to me to be the relevant facts for the purpose of these issues.

### **8. Relevant Facts**

**81.** Apart from the general factual background to the present dispute between the parties which I have set out earlier, the relevant provisions of the Development Agreement as amended by the Settlement Agreement and the Supplemental Settlement Agreement, which I also outlined above, and the matters which were at issue and decided in the 2011 proceedings

and in the 2016 proceedings, it is also necessary for me to record certain other facts, as found by me or as admitted by the parties, which are relevant to the construction issue and the other issues which fall for determination in this case.

**82.** A critical fact for the determination of the construction issue in these proceedings and, indeed, the other issues is that, on 29<sup>th</sup> February, 2016, the plaintiff's solicitors, McCann Fitzgerald, acting on behalf of the Receivers in place of William Fry who previously acted for the plaintiff prior to their appointment, wrote to Dunnes confirming that, in accordance with clause 11(c) of the Settlement Agreement, binding agreements for lease/leases had been exchanged with tenants in respect of nine of the ground floor units marked "X" on the ground floor plan annexed to the Settlement Agreement, at least four of which were internal units. They enclosed a certificate dated 29<sup>th</sup> February, 2016 highlighting the units in respect of which agreements for lease had been exchanged. The letter stated that as a result of that confirmation:-

- (a) The sum of €15 million (plus accrued interest to date) had to be released from the nominated account within five working days of the letter; and
- (b) In accordance with clause 14 of the Settlement Agreement, the "Access Date" was 30 days after the date of the enclosed certificate.

The letter requested Dunnes to instruct the transfer of the €15 million (plus accrued interest) from the nominated account to the receivers' account. In her judgment in the 2016 proceedings, Costello J. held that the confirmation/certificate was in compliance with clause 11(c) of the Settlement Agreement and that there was no manifest error. Her conclusions were upheld by the Court of Appeal.

**83.** On 27<sup>th</sup> May, 2016, the plaintiff's solicitors wrote to Dunnes' solicitors referring to their letter of 29<sup>th</sup> February, 2016 noting that the "Access Date" under the Development Agreement fell on 30<sup>th</sup> March, 2016. The letter referred to clauses 11.4 and 11.5 of the

Development Agreement and the “Access Date” and stated Dunnes was required to procure the design, carrying out and completion of the “Fit Out Works” within the “Fit Out Period”, being 26 days from the “Access Date”, subject to Dunnes obtaining a fire safety certificate and to clause 11.2 of the Development Agreement providing that Dunnes would use its reasonable endeavours to obtain a fire safety certificate, if such a certificate was required. The letter asserted, therefore, that from 30<sup>th</sup> March, 2016, Dunnes was and remained under an obligation to design, carry out and complete the “Fit Out Works” within the period of 26 weeks from 20<sup>th</sup> March, 2016 and to use its reasonable endeavours to obtain the necessary fire safety certificate. The letter stated that Dunnes was under those obligations, notwithstanding the approach which it was taking in the defence of the 2016 proceedings which had been commenced in April, 2016. The Receivers’ solicitors stated that it was a “*commercial imperative*” for the Receivers that Dunnes take possession of the anchor unit as expeditiously as possible as its failure to do so was making it difficult to attract other tenants to the Centre. They called upon Dunnes to provide certain information, including the “Fit Out Plans” in accordance with clauses 11.4 and 11.5, and confirmation that Dunnes had made an application for the necessary fire safety certificate as well as the programme for the “Fit Out Works” pursuant to clause 11.7 by 2<sup>nd</sup> June, 2016.

**84.** Dunnes’ solicitors replied on 8<sup>th</sup> June, 2016 stating that Dunnes disputed the fact that binding agreements for lease had been entered into within the meaning of clause 11(c) of the Settlement Agreement and disputed that a certificate to that effect had been provided on behalf of the plaintiff and that those issues were and remained to be determined in the 2016 proceedings. They rejected the plaintiff’s assertion that the “Access Date” fell on 30<sup>th</sup> March, 2016 and that, as a consequence, if Dunnes did not complete the “Fit Out Works” within 26 weeks from that date, it would be in breach of contract. Dunnes refused to provide the information requested, including the “Fit Out Plans” on the basis that the “Access Date” had

not at that stage arisen. The assertions made in that letter were subsequently rejected by Costello J. and by the Court of Appeal in the 2016 proceedings.

**85.** Costello J. gave judgment in the High Court in the 2016 proceedings on 14<sup>th</sup> November, 2017 and made an order on foot of that judgment on 24<sup>th</sup> November, 2017.

**86.** Following that judgment and order, the plaintiff's solicitors wrote to Dunnes' solicitors on 16<sup>th</sup> January, 2018 referring to the judgment, to the relevant provisions of clause 11 of the Development Agreement and to clause 14 of the Settlement Agreement. They noted that as a consequence of the judgment and those contractual provisions, the "Access Date" was 30 days from the date on which Dunnes received the plaintiff's solicitors' confirmation of 29<sup>th</sup> February, 2016 and was, therefore, 30<sup>th</sup> March, 2016. The letter stated that, subject to Dunnes' obligation to apply for and obtain a fire safety certificate for the "Fit Out Works", Dunnes had 26 weeks from 30<sup>th</sup> March, 2016 to complete the "Fit Out Works" of the anchor store at the Point Village Centre and that that deadline had expired on 28<sup>th</sup> September, 2016. The letter asserted that Dunnes had failed to apply for or obtain a fire safety certificate and had failed to complete the "Fit Out Works" by that date and that Dunnes was, therefore, in breach of the Development Agreement and the Settlement Agreement. The letter called upon Dunnes to outline in writing the steps it intended to take to remedy its breach and requested it to provide certain information, including copies of the "Fit Out Plans", a precise outline of the nature of the "Fit Out Works" that would be carried out, the date on which the "Fit Out Works" would be completed and confirmation that Dunnes had applied for a fire safety certificate as well as a copy of that certificate. That information was requested within fourteen days failing which it was stated that proceedings would be issued seeking (amongst other things) specific performance, damages and injunctive relief.

**87.** Dunnes' solicitors replied on 31<sup>st</sup> January, 2018 stating that Costello J.'s judgment was under appeal and that the matters referred to in the plaintiff's solicitors' letter had not,

therefore, been finally determined and they did not propose to engage with those issues. They did, however, propose a meeting between the principals. Clearly, those matters have since been determined by rejection of Dunnes' appeal and the subsequent refusal by the Supreme Court to grant Dunnes leave to further appeal to that court. No other reason was put forward by Dunnes in that correspondence as to why the contractual obligations with which it was apparently subject did not apply.

**88.** The plaintiff's solicitors wrote again to Dunnes' solicitors on 10<sup>th</sup> July, 2018 noting that their respective clients had met on four separate occasions since March, 2018 but the plaintiff had still not received Dunnes' "Fit Out Plans". Written confirmation was sought within seven days that Dunnes would (a) immediately commence the "Fit Out Works" and provide the plaintiff with precise details of those works and copies of the "Fit Out Plans" and (b) confirm that it had lodged an application for a fire safety certificate in respect of those grounds and provide a copy of that application, failing which proceedings would be issued. The information requested was not provided by Dunnes and the present proceedings were commenced on 18<sup>th</sup> July, 2018.

**89.** The parties exchanged witness statements for the purposes of the trial. Stephen Tennant, one of the Receivers, provided a witness statement on behalf of the plaintiff. Robert Heron, Dunnes' general counsel since January, 2014, provided a witness statement for Dunnes. Shortly before the hearing, Mr. Heron provided a supplemental witness statement to which Mr. Tennant replied. Many of the matters addressed in the witness statements are not relevant to the issues in these proceedings and are relevant in more general terms to the overall history of the Point Village development and the relationship between the parties which, as already noted, has given rise to at least five sets of proceedings. It is, therefore, only necessary for me briefly to refer to the evidence given in the witness statements. Mr. Tennant and Mr. Heron were cross-examined on their witness statements.

**90.** In his first witness statement, Mr. Tennant set out in some detail the history of the Point Village development, the previous sets of proceedings and the contractual terms on which the plaintiff relies in this case. He explained the basis on which it was being alleged by the plaintiff that Dunnes were in breach of their contractual obligations under the relevant provisions of clause 11 of the Development Agreement (as amended and varied by the subsequent agreements, including the Settlement Agreement). He also identified the relevant correspondence to which I have just referred.

**91.** In his initial witness statement, Mr. Heron (who joined Dunnes after the Development Agreement, the Settlement Agreement and the Supplemental Settlement Agreement were made) referred to the history of the involvement of Dunnes with the developers of the Point Village Centre. He set out Dunnes' concerns in relation to the failure by PVDL to attract tenants to the centre and referred to the tenants which had been secured as being of "*varying and largely poor quality*". He sought to refer to evidence given in that regard in the 2016 proceedings and described the store as being unviable by reason of the existing tenant mix. I do not regard Dunnes' concerns as to the quality of the tenant mix as being relevant to the issues which arise in these proceedings. Dunnes made its case in relation to the interpretation of "tenants" in clause 11(c) of the Settlement Agreement in the 2016 proceedings and failed. Mr. Heron explained that ongoing litigation with respect to the Development and, in particular, the Centre was a problem which could only be resolved in a cooperative manner. Mr. Heron set out the basis for Dunnes' belief that the obligation under the relevant agreements to comply with the fit out provisions had not yet arisen, although he correctly accepted that that was primarily a matter for legal submissions. He put forward three reasons in his witness statement for Dunnes' position, namely:-

- (a) Dunnes had not formed the "*requisite intention*" to use the store it bought for trading purposes and that that matter remained under regular review by



Dunnes in light of developments regarding the Centre and its view of the viability of its store in the Centre;

- (b) The fit out provisions did not arise until the “Access Date” and that date had not been reached (and that point has now been conclusively decided against Dunnes by Costello J. and by the Court of Appeal in the 2016 proceedings);
- (c) The works to Point Square had not been completed and were, at the time, the subject of further proceedings (that issue is not relevant to the issues in these proceedings and, in any event, was finally determined by the Supreme Court in January, 2020 in the Point Square proceedings).

**92.** Mr. Heron provided a supplemental witness statement shortly before the hearing which addressed an application for planning permission made in May, 2019 to change the use of part of the Point Village Centre from retail to leisure use which he said represented a significant development as demonstrating an acknowledgement by the plaintiff that the Centre was no longer viable as a retail destination as allegedly represented to and relied upon by Dunnes in executing the Development Agreement and subsequently. Mr. Heron relied on a document prepared on behalf of the Receivers by Savills dated 13<sup>th</sup> May, 2019 which was lodged as part of the planning application and which set out the rationale for applying for a change of user of part of the Centre from retail to leisure use. Mr. Heron stated that the Savills’ report confirmed that the Centre was no longer viable as a retail destination. Mr. Heron relied on certain statements in the Savills’ report, including that the retail market had *“completely and irrevocably changed since the centre was originally developed”*, that *“Point Square as a retail destination has fallen out of the consciousness of both the consumer and occupier market”*, that *“since the initial launch... the original fashion-led target mix is no longer relevant or achievable”* and that the market had *“completely changed”* with *“effectively no desirable retailers in the market”* who would occupy the medium space units

in the upper mall (the Dunnes anchor unit being principally on the ground floor and not on the upper mall).

**93.** Mr. Tennant put in a short supplemental witness statement in response noting (amongst other things) that (a) the planning application related to only to approximately 12% of the total area of the Centre (excluding the hotel); (b) the overall proposition at the Centre remained unchanged from the perspective of Dunnes; and (c) that Mr. Heron had made inaccurate suggestions concerning the timing of the planning application. With regard to that latter point, subsequent correspondence between the parties appeared to remove that as an issue between the parties, in that, in a letter dated 9<sup>th</sup> July, 2019, Dunnes' solicitors confirmed that Dunnes was aware in 2018 of the view of the plaintiff's letting agents that leisure offerings should be pursued for part of the Centre and that Dunnes was aware in advance of the hearing in the Court of Appeal in the 2016 proceedings in May, 2019 of the plaintiff's intention to propose a change of use for part of the centre from retail to leisure use, although it was not aware of the timing and content of the planning application or of the views expressed by Savills. It was also not aware of further planning application apparently made on 25<sup>th</sup> June, 2019 to change the user of unit 24 to a gym. I should say that I do not regard the timing of the planning application or Dunnes' awareness of it as being in any way relevant to the issues in this case. It was a complete distraction from the real issue in the case

**94.** Both Mr. Tennant and Mr. Heron were cross-examined on their respective witness statements. Most of what they said was not relevant to the issues in this case. The following may potentially be relevant: Mr. Tennant accepted that the change of user sought in the planning applications would have a small impact on what Dunnes would do in terms of works to fit out its store and accepted that how Dunnes fitted out the store was a matter for it. Mr. Tennant accepted that the Point Village Centre would not be at its best if it were

“*predominantly just a fashion-led centre*” as a result in the change in the market since the Supplemental Settlement Agreement.

**95.** Mr. Heron stated in his evidence that, although Dunnes would very much like to trade from the store in the Centre, it had not yet formed the intention of doing so and that it would be its intention to open the store if it believed that it would be commercially viable to do so. He stated that it was Dunnes’ view that it was not obliged to carry out the “Fit Out Works” (although that was obviously a matter for the court to determine). He explained that the Savills report “*chimed*” with the concerns which Dunnes had in relation to the viability of its store in the Centre. He thought that it would be Dunnes’ intention to open the store if it believed that it would be commercially viable to do so but said that the only way to resolve the issue was by negotiating an approach with the Receivers. As matters stand, he said, Dunnes were not convinced of the viability of the Centre. He explained that consideration had been given to how Dunnes might lay out the store and how it might design it but was not aware of whether there were any plans in existence and did not think that Dunnes had applied for a fire safety certificate. As regards his evidence that Dunnes had not formed the “*requisite intention*” to trigger the obligation to fit out the store, he said that was based on the definition of “Fit Out Works” contained in clause 1.38 of the Development Agreement and that it was a view which Dunnes had formed based on reading the contract documents. Mr. Heron could not recall when he or Dunnes first formed the view that clause 1.38 meant that the trigger to commence the “Fit Out Works” did not arise unless Dunnes decided that it intended to open the store. He could not explain why Dunnes had never advanced that point of view before save to observe that its position was also based on external advice.

**96.** It seems to me that the only relevant facts to emerge from the cross-examination of the two witnesses are that (1) some changes were proposed from the user of the Centre envisaged in 2008 and 2010 which were the subject of the application for change of user for a

small part of the Centre from retail to leisure use in May, 2019 and in June, 2019 and (2) whatever the correct contractual interpretation of the relevant provisions, Dunnes has not formed the subjective intention to trade from the store on the basis of concerns about the viability of the Centre and of its store in the Centre. Whether or not either of those facts have any bearing on the outcome of the case will depend on the application of well-established legal principles to the construction of the relevant contractual terms. It is to that issue which I will now turn.

## **9. The Construction Issue**

### ***(a) General***

**97.** The relevant provisions of clause 11 of the Development Agreement, in respect of which specific performance is sought by the plaintiff, together with the definitions of the relevant defined terms used in clause 11, including the definition of “Fit Out Works”, have been identified and set out in full earlier in this judgment. The dispute between the parties primarily concerns the proper construction of clauses 11.1, 11.2, 11.4 and 11.5 together with the definition of defined terms such as “Fit Out Works” (clause 1.38), “Fit Out Period” (clause 1.26), “Fit Out Consents” (clause 1.34), “Fit Out Guide” (clause 1.35) and “Fit Out Plans” (clause 1.37).

**98.** There is and can be no dispute now as regards the happening of the “Access Date” under clause 14 of the Settlement Agreement in light of the judgment of Costello J. as upheld by the Court of Appeal. The issue, therefore, is what obligations, if any, in terms of the fit out of the anchor store are on Dunnes once the “Access Date” has occurred, which was on 30<sup>th</sup> March, 2016, having regard to the judgment of Costello J. and of the Court of Appeal in the 2016 proceedings. At the heart of the construction issue is whether Dunnes is obliged to take the various steps with regard to the submission of the “Fit Out Plans”, the obtaining of the “Fit Out Consents”, the design, carrying out and completion of the “Fit Out Works” under

clause 11.4 and the execution and completion of the “Fit Out Works” within the “Fit Out Period” which was 26 weeks from 30<sup>th</sup> March, 2016, namely 28<sup>th</sup> September, 2016 or whether, as Dunnes contend, they are under no such obligations as they do not presently intend to use and trade from the store and, therefore, require no works to be carried out in respect of the fitting out of the store. The plaintiff maintains that the proper construction of the relevant provisions of clause 11 together with the definitions of the defined terms in their natural and ordinary meaning, considered in the context of the Development Agreement (as amended) as a whole and in the wider context and, if necessary, giving the words a meaning which is consistent with business or commercial common sense, is that Dunnes is clearly subject to the obligations set out in the provisions of clause 11 of the Development Agreement in respect of which specific performance is sought. Dunnes maintains that adopting that approach ignores the natural and ordinary meaning of the words used in the definition of “Fit Out Works” in clause 1.38.

**99.** Before turning to consider the particular arguments advanced by the parties on the construction issue, it is necessary to identify and discuss briefly the relevant legal principles governing the construction of contracts in this jurisdiction.

***(b) Relevant Legal Principles governing Construction of Contracts***

**100.** There was no great dispute between the parties as to the applicable legal principles. Where the parties differed fundamentally was in the application of those principles, with each seeking to attach particular weight or significance to the application of certain of the principles over others.

**101.** In their judgments in the 2011 proceedings and in the 2016 proceedings, Laffoy J., Costello J. and Whelan J., in the Court of Appeal, discussed extensively the legal principles applicable to the construction of the terms at issue in those cases. I gratefully adopt the statements of principle set out in each of those three judgments. However, in order properly

to understand the submissions made by the parties with respect to the interpretation of the contractual provisions at issue in this case, it is necessary that I say little more in terms of the applicable legal principles. In doing so, however, I am not to be taken in any way as disagreeing with the statements of principle contained in any of those three judgments.

**102.** As stated by both Laffoy J. (at para. 43) and by Costello J. (at para. 21) of their respective judgments in the 2011 proceedings and in the 2016 proceedings, the starting point in terms of the role of the court was described by Keane J. in the Supreme Court in *Kramer v. Arnold* [1997] 3 IR 43 (“*Kramer*”) as follows:-

*“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.”* (per Keane J. at p. 55)

**103.** Those observations echo what had previously been said by Griffin J. in the Supreme Court (in the context of the interpretation of an insurance policy) in *Rohan Construction Ltd v. Insurance Corporation of Ireland Plc* [1988] 373 (“*Rohan Construction*”), where he stated:-

*“It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause.”* (per Griffin J. at p. 377)

(emphasis added)

**104.** The general principles applicable to the construction or interpretation of contracts under Irish law are well settled and have been the subject of several significant decisions of the Supreme Court. The relevant principles were set out by Lord Hoffman in his seminal judgment in *Investor Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 (at p. 912) and were expressly approved and applied in this jurisdiction by the Supreme Court in several cases, including *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274 (“*Analog Devices*”), *ICDL v. European Driving Licence Foundation* [2012] 2 IR 327 (“*ICDL*”) and *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 (“*MIBI*”). The five principles set out by Lord Hoffman are so well known that it is unnecessary to set them out again here.

**105.** The principles derived from the leading cases were helpfully drawn together and summarised in a recent judgment delivered by McDonald J. in the High Court in *Brushfield Ltd t/a The Clarence Hotel v. Arachas Corporate Brokers Ltd and AXA Insurance DAC* [2021] IEHC 263 (“*Brushfield*”), a case which concerned the interpretation of certain clauses in the business interruption section of an insurance policy in the context of closures and restrictions as a result of COVID-19. Although the judgment in *Brushfield* was delivered after the hearing in this case, the relevant principles are neatly summarised and I do not believe that either of the parties in this case would disagree with them. McDonald J. summarised the principles (at para. 110 of his judgment) as follows:-

- “(a) *The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;*
- “(b) *Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having*

*all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;*

- (c) *The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;*
- (d) *For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;*
- (e) *A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. As Lord Hoffmann explained in the Investors Compensation Scheme case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and it is also necessary to consider the relevant factual and legal context...*
- (f) *...*
- (g) *As O'Donnell J. made clear in the MIBI case, in interpreting a contract, it is wrong to focus purely on the terms in dispute. Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. said:-*



*‘It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.’; ...”*

**106.** The Supreme Court extensively considered and discussed the applicable legal principles on the construction of contracts in *MIBI*. Although the court was split on the outcome of the case, several members of the court adopted what has been described as the “*text in context*” approach to interpretation. Although he was in the minority on the outcome of the case, Clarke J. referred to this as being the “*modern approach*” to the construction of contracts (at para. 10.4). His observations on the “*text in context*” approach to interpretation did not differ substantially from those made by other members of the court, including O’Donnell J. who delivered the lead judgment. Clarke J. described the approach as follows:-

*“...It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its*

*proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.”*

**107.** At para. 10.5, Clarke J. observed that the “*main underlying principle*” is that such a document should be interpreted by the court:-

*“in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.”*

**108.** Clarke C.J. (as he had by that stage become) repeated those observations in his judgment in *Jackie Greene Construction Ltd v. Irish bank Resolution Corporation (In Special Liquidation)* [2019] IESC 2 (and they were referred to and applied by Whelan J. at para. 82 of her judgment in the Court of Appeal in the 2016 proceedings).

**109.** In his leading judgment for the majority in *MIBI*, O’Donnell J. made a number of important observations on the proper approach to interpretation of contracts. The parties referred to some of these in their submissions in this case. At para. 6 of his judgment, O’Donnell J. stated that the meaning of the relevant provision of an agreement as “*to be determined from a consideration of the Agreement as a whole*” and “*not an interpretation in which some aspects win out over others*”. He stated:-

*“Rather it is a case of providing an interpretation of the Agreement as a whole, which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that interpretation cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features... It is*

*important therefore to test any interpretation of a clause against the understanding of the agreement to be gleaned from what is said, and sometimes not said, elsewhere in the agreement.”* (per O’Donnell J. at para. 6)

**110.** At para. 8, O’Donnell J. referred to the *“importance of approaching the Agreement in a holistic way rather than having immediate resort to case law”*.

**111.** At para. 12 of his judgment, O’Donnell J. referred to the complexity of language and of the business of communication which might throw up issues which are not anticipated or precisely considered when the relevant agreement was made. He continued:-

*“It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement, and in complex cases, a court must consider all of the factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate...”* (per O’Donnell J. at para. 12)

**112.** Later, at para. 14, O’Donnell J. observed:-

*“It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised. It is necessary therefore to see the*

*agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.”* (per O’Donnell J. at para. 14)

**113.** Finally, at para. 30, O’Donnell J. expressed the view that the majority in the Court of Appeal had elevated the “*ordinary meaning of the words to a position which is not perhaps entirely merited*”, although he did agree that “*since in any agreement words are used to convey meanings and to express agreement, very considerable weight must be given to them...*” (per O’Donnell J. at para. 30).

**114.** The importance of context can also be seen in the observations of Fennelly J. in the Supreme Court in *ICDL* where he stated:-

*“Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words.”* (per Fennelly J. at para. 70, p. 352)

**115.** It will be recalled that in their judgments in the 2011 proceedings and the 2016 proceedings, both Laffoy J. and Costello J. considered the context of the agreements between the parties to confirm the construction of the provisions at issue which they had arrived at, for example, paras. 59 and 60 of the judgment of Laffoy J. and paras. 94 and 114 of the judgment of Costello J.

**116.** The significance of context can also be seen in some of the leading English cases to which both parties referred in their submissions. For example, in *Arnold v. Britton* [2015] AC 1619, Lord Neuberger stated that the meaning of the relevant words in the contract at issue (in that case certain leases) had to be considered in their “*documentary, factual and commercial context*”. He continued:-

*“That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions...”*

(per Lord Neuberger at para. 15, pp. 1627-1628)

**117.** One of the matters to be considered, according to Lord Neuberger, is *“commercial common sense”*. He stressed, however, that this is not to be invoked retrospectively and observed that:-

*“The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.”* (per Lord Neuberger at para. 19, p. 1628)

**118.** Lord Clarke had mentioned, in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 (*“Rainy Sky”*), in the context of his description of the unitary process of construction, that:-

*“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.”*

(per Lord Clarke at para. 21)

That remains the position in English law following *Arnold*: (see: *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 (*“Wood”*), per Lord Hodge at paras. 8-15 (cited with approval by Whelan J. at para. 81 of her judgment in the Court of Appeal in the 2016 proceedings)).

**119.** Since some reliance is placed by the plaintiff on the business common sense meaning of the disputed provisions of the Development Agreement, it is necessary to refer to a couple

of Irish cases which address the relevance of business or commercial common sense. In her judgment in the 2011 proceedings, Laffoy J. agreed with the plaintiffs' submission that "*when interpreting a commercial agreement, the court will endeavour to give it a commercially sensible construction*" (at para. 44). Laffoy J. referred with approval to the adoption by Clarke J. in the High Court in *BNY Trust Co (Ireland) Ltd v. Treasury Holdings* [2007] IEHC 271 ("*BNY*") of the passage from the judgment of Lord Diplock in *Antaios Compania Naviera SA v. Salen Rederierna A.B.* [1985] AC 191 (at p. 201) that:-

*"...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense."* (approved by Clarke J. in *BNY* at para. 4.4)

**120.** It should be noted, however, that in her judgment in the High Court in the 2016 proceedings, Costello J. referred to passages from the judgment of Lord Neuberger in *Arnold* (quoted above) and observed that while "*commercial common sense is a very important factor to be taken into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight*" (per Costello J. at para. 24). Costello J. had earlier referred to the judgment of McKechnie J. for the Supreme Court in *Marlan Homes Ltd v. Walsh* [2012] IESC 23 ("*Marlon Homes*") (on which Dunnes rely in this case) to the effect that the court should focus on the language adopted by the parties and that:-

*"It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned."*

(per McKechnie J. at para. 51, quoted by Costello J. at para. 23)

**121.** McKechnie J. approved the statement of Lord Mustill in *Charter Reinsurance v. Fagan* [1997] AC 313 that:-

*“...to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court...”*

(per Lord Mustill at p. 388, approved by McKechnie J. at para. 52 of *Marlan Homes* and quoted by Costello J. at para. 23)

**122.** McKechnie J. had referred to the fact that the application of the appropriate legal principles led to an *“unattractive result”* in that case considering the respective positions of the parties, and Costello J. observed that that *“underscores the limits of the role of the court in relying upon commercial common sense to construe a contract”*.

**123.** Another word of caution with regard to the use of commercial common sense in construing a contract was expressed by MacMenamin J. in his judgment (in the minority) in *MIBI*. He expressed concern that:-

*“...the application of ‘business commonsense’ can, in certain circumstances be difficult to distinguish from subsequent rectification of a contract. At what point does business commonsense end and rectification begin, albeit with the benefit of hindsight? Part of the attraction of a ‘contextual approach’ is that it can obviate injustice. But it can also create contractual uncertainty, or it can lead to an interpretation with the wisdom of hindsight.”* (per MacMenamin J. at para. 16)

**124.** MacMenamin J. approved of the limitations to the court’s reliance on commercial or business common sense discussed by Lord Neuberger in *Arnold* and agreed that it should not *“undermine the importance of the language and wording of the provision to be construed”* (per MacMenamin J. at para. 18).

**125.** There is, therefore, undoubtedly a role for commercial or business common sense in the interpretation of the provisions of a contract. The “*logic, commercial or otherwise*” is, according to O’Donnell J., one of the factors which must be considered. The reasonable person who is the touchstone for or guide to the interpretation of the agreement at issue must have, in addition to “*linguistic skills*”, a “sympathetic understanding of the commercial or practical context in which the agreement was meant to operate” (per O’Donnell J. at para. 12 of his judgment in *MIBI*). However, the court must also be conscious that business or commercial common sense is not used to fundamentally alter the meaning of the bargain or agreement made by the parties. The exercise required of a court in the circumstances was, in my view, best described by O’Donnell J. in para. 12 of his judgment in *MIBI* (quoted above). That is the approach which I propose to adopt in attempting to construe what the parties agreed in the relevant provisions of the Development Agreement (as amended and varied by the Settlement Agreement and the Supplemental Settlement Agreement). I will consider not only the words used in the particular provisions at issue but will do so by reference to other provisions in the agreements, the context of the agreements and, if appropriate, by reference to commercial or business logic and common sense.

*(c) Brief Summary of Parties’ Respective Submissions on the Construction Issue*

*(1) The Plaintiff’s Submissions*

**126.** The plaintiff submitted that the proper construction of the contractual provisions in clause 11 of the Development Agreement in respect which specific performance is sought can be clearly discerned from the application of the well-established principles of contractual interpretation which I have just summarised. It submitted that Dunnes is contractually obliged to take the actions referred to in clauses 11.1, 11.2, 11.4 and 11.5 of the Development Agreement on the proper construction of those provisions and that the term “*Fit Out Works*” in clause 1.38 had to be considered not just in its own terms but must also be read with the



relevant provisions of clause 11. The plaintiff maintained that the natural and ordinary meaning of the words used in clause 1.38 when read in the context of the relevant provisions of clause 11 and reinforced by the relevant background and context in commercial common sense is that once the “Access Date” occurred, Dunnes is required to take the various steps referred to in the relevant provisions of clause 11 in respect of which specific performance is sought.

**127.** The plaintiff submitted that the interpretation of the relevant provisions for which Dunnes contended, namely that it had a discretion as to whether or not to commence and carry out works on the fit out of the anchor store, and could decide not to, was based entirely on the definition of “Fit Out Works” in clause 1.38 and that that definition could not trump the proper interpretation of the relevant provisions of clause 11 with which that definition had to be read. It contended that Dunnes’ assertion that the proper interpretation of “Fit Out Works” in clause 1.38 was that it was not required to carry out works but merely had a discretion to do so if it intended to open the store for trading, and it had not yet formed that intention, is contrary to the express terms of the relevant provisions of clause 11 on which the plaintiff relies such as clauses 11.1, 11.2, 11.4 and 11.5 (and other provisions in clause 11), all of which use the word “*shall*” in connection with the steps to be taken by Dunnes under those provisions. In addition to being inconsistent with those provisions of clause 11, the plaintiff submitted that Dunnes’ interpretation was also inconsistent with the fact that, through the definition of “Fit Out Guide” in clause 1.35, schedule 5 of the Development Agreement contains general standards and specifications in respect of the works for the fit out of the anchor store. It contended that while Dunnes had an element of discretion as to the detail of the works to fit out the store, that discretion was subject to constraints, such as those contained in clause 11.1 that the works had to be in accordance with the “Fit Out Guide” and carried out to an equivalent quality standard to the Henry Street store. It submitted that there

would have been no point in specifying that Dunnes' obligations in connection with the fit out of the store in the sort of detail contained in the Development Agreement if the decision on whether to carry out any works was entirely within the discretion of Dunnes. The most obvious and sensible interpretation of the definition of "Fit Out Works" in clause 1.38 when read in conjunction with the relevant provisions of clause 11 and schedule 5 and the one which was consistent with commercial common sense, the plaintiff contended, is that Dunnes has the discretion to decide the detail of what works are needed for its use of the store subject to all of the other requirements for the "Fit Out Works" specified in clause 11 of the Development Agreement. Consequently, Dunnes has the right to take decisions on the specific details for the fit out of the store provided that the other requirements of clause 11 are met in respect of those works (such as the requirement that the works be equivalent in quality to the Henry Street store and comply with the specifications contained in schedule 5).

**128.** The plaintiff submitted that it was inconceivable that the parties would have entered into the various agreements, including the Development Agreement and the subsequent Settlement Agreement, providing for Dunnes to be the anchor tenant in the Centre, which was critical to the whole development of the Centre, if it were left to the discretion of Dunnes as to whether to do any works at all in the fitting out of the store. If that were the parties' intention, the plaintiff submitted, one would have expected to see it expressly provided for in the agreements.

**129.** The plaintiff contended that the interpretation advanced by it of the term "Fit Out Works" in clause 1.38, when read with the relevant provisions of clause 11 makes commercial sense in terms of Dunnes retaining discretion as to the detailed nature of the works (subject to the constraints already referred to) and that Dunnes' interpretation makes no commercial sense. It was, the plaintiff submitted, a key part of the complex agreements between the parties that Dunnes was contractually committed to fit out and open the store and

that it would be clear to any objective observer that, as a matter of commercial logic, the existence of a contractual commitment on the part of an anchor tenant to fit out and open the anchor store would be very important in terms of the developer's ability to attract other tenants to the Centre. The interpretation put forward by Dunnes would, the plaintiff contended, deprive the plaintiff of the benefit of one of the central elements of the Development Agreement, namely, Dunnes' contractual commitment to fit out and open the anchor store.

**130.** The plaintiff submitted, therefore, that the ordinary meaning of the words used in clause 1.38 and in the relevant provisions of clause 11 is clear and does not give Dunnes the discretion for which it has contended. It submitted that that meaning is reinforced by the context and by commercial common sense.

**(2) *Dunnes' Submissions***

**131.** Dunnes contended that the plaintiff afforded greater weight to the application of commercial common sense and to context, including other clauses in the Development Agreement, than to the natural and ordinary meaning of the words used in clause 1.38. It contended that the plaintiff's interpretation gave insufficient weight to the words used by the parties in defining the term "Fit Out Works" in the Development Agreement. While acknowledging that the context in which a contract comes into existence is relevant, Dunnes submitted that context cannot determine the proper construction of a contractual provision and cannot undermine the meaning of the words used by the parties. It contended that the primary task of the court in construing a contract is to ascertain the intentions of the parties which is ordinarily reflected in the words used and that the court should, therefore, construe the contractual intentions of the parties by reference to the natural and ordinary meaning of the words used. It submitted that the context in which the Development Agreement operates cannot be used in interpreting the relevant clause in a manner that alters the plain meaning of

the words used in the clause and that recourse cannot be had to commercial common sense if that would do violence to the plain meaning of the words used.

**132.** Dunnes submitted that the obligations in clause 11 of the Development Agreement on which the plaintiff relies are all referable to and conditioned by the term “Fit Out Works” in clause 1.38. It contended, therefore, that the proper construction of the clauses on which the plaintiff relies is dependent upon the proper construction of that defined term.

**133.** Dunnes asserted that on the plain literal meaning of the words used, clause 1.38 means that:-

- (a) the works to be carried in fitting out the store are those required by Dunnes and not by the plaintiff or by any other person;
- (b) meaning must be given to the use of the word “*may*” in clause 1.38 and the use of that word indicates a discretion on the part of Dunnes as to what it requires in terms of the works to be carried out;
- (c) the works to be carried out in fitting out the premises are those connected with the intended use and enjoyment of the anchor store; and
- (d) since such works are those which must be required Dunnes, the “*intended use and enjoyment*” of the store must be that of Dunnes and not of the plaintiff or of any other person.

**134.** Dunnes submitted that the plaintiff failed to address the plain literal meaning of the words used in clause 1.38 and fell into error in using the provisions of clause 11 in order to construe clause 1.38 rather than the other way around. Dunnes submitted that the plaintiff’s interpretation put undue weight on other provisions of the Development Agreement to the detriment of the plain and literal meaning of the words used in clause 1.38 and that the plaintiff was, in effect, putting the “*cart before the horse*”. Dunnes disputed the contention that clause 11 would be rendered redundant on the basis of its construction of clause 1.38. It

submitted that under clause 11 the various steps to be taken by Dunnes in carrying out and completing the works and fitting out the premises are only required to be taken once Dunnes requires such works to be carried out.

**135.** While disputing the need or appropriateness to have regard to commercial common sense and the entitlement of Mr. Tennant to give evidence as to the commercial context in which the Development Agreement and subsequent agreements were entered into between the parties, Dunnes nonetheless contended that its interpretation was more consistent with commercial common sense in that it would be Dunnes and not the plaintiff that would have to carry out the works as Dunnes is the owner of the anchor store, having paid the plaintiff to construct it and Mr. Crosbie to acquire the Long Lease. Therefore, as the store is owned by Dunnes, it is for Dunnes to do what it pleases in respect of the anchor store, subject to the terms of the Long Lease. Dunnes drew attention to the fact that there is no obligation on Dunnes under the Long Lease to keep the anchor store open for trade and that it would, therefore, be entitled to cease trading if it felt that it was no longer commercially viable to keep the store open. It contended that this entitlement should inform the interpretation of clause 1.38 advanced by it, in that if Dunnes is entitled to close the store if it is not commercially viable then, applying commercial common sense, it follows that Dunnes would unlikely to have incurred a contractual obligation to commence fitting out the premises if it was not commercially viable. Dunnes submitted that it is in the “gift” of Dunnes to decide whether it wishes to commence trading from the anchor store and that it had not yet formed the intention of doing so on the grounds that it was not convinced of the commercial viability of the store.

**136.** Dunnes’ principal contention was that the relevant provisions of clause 11 on which the plaintiff relies in the proceedings are all dependent on the proper construction of the term “Fit Out Works” in clause 1.38 and that that term must be interpreted by reference to the

plain and literal meaning of the words used in the clause and not by reference to, what Dunnes referred to as, the retrospective application of commercial common sense by the plaintiff by reference to the Receivers' current commercial objectives. That would not justify departure from the plain meaning of the words used in clause 1.38. Dunnes contended that, in interpreting the plain meaning of those words, the court must give effect to the use of the word "may" in clause 1.38 and that the plaintiff was, in effect, asking the court to interpret the word "may" as if it were "must". It disputed the application of commercial common sense and referred to some of the cases mentioned earlier which referred to the limitations and constraints on the extent to which recourse can be had to commercial common sense. Dunnes submitted that the obligations imposed upon it under clause 11 all presuppose that Dunnes has decided to trade from the anchor store and that the relevant "intended use and enjoyment" of the store is that of Dunnes. Once it has not formed that intention, the relevant obligations in clause 11 are not triggered, irrespective of whether the "Access Date" has occurred or not.

**(d) Decision on Construction Issue**

**137.** As I explained earlier, I have adopted the approach to the construction of the relevant provisions of the Development Agreement in respect of which the plaintiff seeks specific performance which was outlined and discussed by O'Donnell J. in his lead judgment for the Supreme Court in *MIBI* which also broadly reflects the "text in context" approach discussed by Clarke J. in that case. Adopting that approach, I have considered the words used by the parties, not just in clause 1.38 of the Development Agreement, but also in the relevant provisions of clause 11 on which the plaintiff relies. I do not accept the submission advanced by Dunnes that the extent of its obligations under clause 11 are to be ascertained solely or even primarily by reference to the words used in clause 1.38. While that provision contains the definition of the term "Fit Out Works", it must be read and construed in the context of the

substantive clause or clauses in which the defined term “Fit Out Works” is used. To determine the extent of the obligations on Dunnes in the context of fitting out the anchor store solely by reference to the words used in the definition of “Fit Out Works” in clause 1.38 and not to consider the terms of the relevant provisions of clause 11 which impose the substantive contractual obligations on Dunnes, in order properly to understand the extent of those obligations would, in my view, be a classic case of the “tail wagging the dog”. When construing a defined term, it is critical to examine the context in which the defined term is used in the agreement. The defined term cannot stand or be interpreted on its own or in isolation from the provisions of the agreement in which the defined term is used. In this case, the defined term “Fit Out Works” is used in each of the provisions of clause 11 in respect of which the plaintiff seeks specific performance.

**138.** Clause 11 of the Development Agreement imposes a series of cascading or sequential contractual obligations on Dunnes with respect to the fitting out of the store, the first of which is an obligation to prepare and submit to the plaintiff the “Fit Out Plans”. Dunnes’ obligation to do that arises prior to the commencement of the “Fit Out Works” and the plans themselves must *“in all material respects”* be in accordance with the “Fit Out Guide” which is in schedule 5 and contains general specifications for the units in the Centre. Each of the subsequent provisions of clause 11 in respect of which the plaintiff seeks specific performance, clauses 11.2, 11.4 and 11.5, and several other provisions of clause 11 which impose obligations on Dunnes in connection with the fitting out of the store, contain the defined term “Fit Out Works”. The nature and extent of the obligations imposed upon Dunnes under those provisions of clause 11 must be considered by reference to the words used not only in clause 1.38, which defines “Fit Out Works”, but also critically in the provisions of clause 11 which impose the obligations themselves.

**139.** In addition to looking at the words used in the relevant provisions of clause 11 in respect of which the plaintiff seeks specific performance and in clause 1.38 of the Development Agreement, I am also required to consider the other terms of the Development Agreement (as amended and varied), any other relevant terms of the agreements between the parties made all at the same, the context in which the agreements were made and the logic, commercial or otherwise, of the agreement (para. 12 of the judgment of O'Donnell J. in *MIBI*). I acknowledge that there are some restrictions on the court having recourse to commercial logic or commercial common sense, as discussed in the case law, in that such recourse cannot be used effectively to rewrite the agreement or to remake the bargain reached between the parties. I am quite satisfied that interpreting the words used by the parties in clause 11 and in clause 1.38 in the context of the agreement as a whole leads the court inexorably to the conclusion that the interpretation of the relevant provisions put forward by the plaintiff is clearly correct and is also consistent with commercial logic and common sense. In my view, the interpretation advanced by Dunnes is inconsistent with the ordinary meaning of the terms used in the relevant contractual provisions which are not just clause 1.38 but also include the relevant subclauses of clause 11 and is not supported by the context of the Development Agreement itself, or the wider context, or by commercial logic and common sense.

**140.** The undisputed evidence and the previous judgments in the 2011 proceedings and in the 2016 proceedings disclose that the Development Agreement was heavily negotiated, revised, varied and amended by two significant commercial entities. It contains detailed terms setting out in considerable detail the extent of the plaintiff's obligation to carry out certain building works including works on the construction of the anchor store (under clause 4) for which Dunnes was required to pay under clause 9 (as varied by the Settlement Agreement) as well as Dunnes' obligation to carry out works in fitting out the store on the terms set out in



clause 11. The Development Agreement was clearly carefully worked out, negotiated and then amended and varied by the parties in circumstances summarised earlier and explained in more detail in the judgments of Laffoy J. in the 2011 proceedings and of Costello J. in the 2016 proceedings.

**141.** I must start with the consideration of the words used by the parties. However, contrary to Dunnes' contention, I must first look at the words used in clause 11, referring back in the case of defined terms to the words used in the relevant provisions of clause 1 which contains those defined terms. Each of the subclauses of clause 11 in respect of which the plaintiff seeks specific performance contains an obligation on Dunnes to take certain steps in connection with the fit out of the store. Each contains the word "*shall*" in the context of the obligation on Dunnes to take the particular step. For example, in clause 11.1, it was agreed that Dunnes "*shall prior to commencement of the Fit Out Works... prepare and submit to the Developer the Fit Out Plans...* ". The "Fit Out Plans" must, in all material respects, be in accordance with the "Fit Out Guide". There is acknowledgement that the "Fit Out Plans" may be varied by Dunnes but any such variation must still be in accordance with the "Fit Out Guide". Clause 11.1 notes Dunnes' confirmation that the works "*shall*" be carried out to an equivalent standard in terms of quality to the Henry Street store. Dunnes maintains that since clause 1.38 defines "Fit Out Works" as meaning such works "*as Dunnes may require to carry out in connection with the intended use and enjoyment of the Store*", it is entirely within the discretion of Dunnes as to whether it requires any works at all, that it is a matter for Dunnes to form the intention to use and enjoy the store and that if it does not form intention it does not have to carry out any "Fit Out Works" as it does not require them or take any of the other steps referred to in clause 11.1.

**142.** I do not accept that that is an interpretation which is open to the court on the plain meaning of the words used in clause 11.1 and, with respect to the defined term, in clause

1.38. Clause 11.1 on its terms imposes an obligation on Dunnes. To interpret the clause in the manner suggested by Dunnes would be to completely undermine and remove the obligation altogether by reference to Dunnes' subjective intention as to whether it wishes to use and enjoy the store. I do not accept that that construction is open to the court reading clause 11.1 with the defined term in clause 1.38 (as well as with the other relevant defined terms). It is not consistent with the use of the word "*shall*" in several places in clause 11.1 itself. In my view, the construction offered by the plaintiff is consistent with the words used by the parties. It allows for a discretion to Dunnes not as to whether to carry out the relevant works but as to the precise detail of those works, subject to the requirement that they be in accordance with the "Fit Out Guide" and of an equivalent quality standard to the Henry Street store. It is also consistent with the acknowledgment in clause 11.1 that the "Fit Out Plans" may be varied by Dunnes provided that any variation is in accordance with the "Fit Out Guide". Construing the provisions of clause 11.1 in the manner suggested by the plaintiff does, in my view, accommodate the type of discretion for Dunnes which is consistent with the provisions of clause 11.1 as a whole, while at the same time giving effect to the words used in clause 1.38.

**143.** Where clause 1.38 refers to such works as Dunnes "*may require to carry out in connection with the intended use and enjoyment of the store*", the plaintiff's construction acknowledges that the detail of the works which Dunnes "*may require*" may change depending on its precise requirements for the store. The plaintiff's construction also recognises that there is some degree of flexibility as to the precise "*intended use and enjoyment of the Store*" by Dunnes. The store is defined in clause 1.66 as including a "*retail anchor store*". I note that the permitted user of the premises by Dunnes under the Long Lease is the "*Permitted Business*" which is defined in clause 1.1.24 of the Long Lease in very wide terms as permitting a broad range of retail and related uses and envisaging changes which may be necessary depending on new trends. The plaintiff's construction, therefore, would

permit a situation where Dunnes might change its intention for the use and enjoyment of the store in terms of the nature of the retail business to be carried out from the store.

**144.** In my view, the plaintiff's construction of clause 11 fully accommodates the words used in clause 1.38. Dunnes' construction does not and would allow Dunnes to avoid its contractual obligation merely by deciding that it does not wish to trade from or use the store. I do not believe that that construction is open to the court on the basis of the words used in clause 11.1 when read with defined terms in clause 1, and, in particular, the defined term "Fit Out Works" in clause 1.38. I do not accept that that interpretation involves the court interpreting the word "*may*" in clause 1.38 as "*must*" as Dunnes contended at the hearing.

**145.** A similar analysis can be carried out in respect of the words used in the other subclauses of clause 11 on which the plaintiff relies. Clause 11.2.1 provides that Dunnes "*shall at its own expense use its reasonable endeavors to obtain the Fit Out Consents including a fire safety certificate for the Fit Out Works (if same is required)...*". This subclause on its terms imposes an obligation on Dunnes. That obligation would be fundamentally undermined and completely negated if Dunnes' construction were correct. I do not believe that it is correct. The plaintiff's construction allows for effect to be given to the words used in clause 11.2.1 and those used in clause 1.38 and acknowledges that Dunnes has a discretion as to the detail of the works required in fitting out the store rather the discretion as to whether those works will be carried out at all.

**146.** The same analysis applies in respect of clause 1.4. It will be recalled that under that provision, from the "Access Date" and subject to Dunnes obtaining a fire safety certificate, if required, Dunnes "*shall procure that the Fit Out Works are designed, carried out and completed*" in the manner specified in clauses 11.4.1 to 11.4.8. It will also be recalled that under clause 11.4.5, Dunnes must procure that those works are designed, carried out and completed "*in accordance with the Fit Out Guide and to the standard of quality referred to*

*in clause 11.1*". The words used in clause 11.4, including in clause 11.4.5, read with clause 1.38 and the other defined terms in clause 1, are not, in my view, consistent with the construction put forward by Dunnes. They are, on the other hand, consistent with the construction put forward by the plaintiff which, in my view, is the correct construction.

**147.** The same applies for clause 11.5 which, it will be recalled, provides that Dunnes "*shall with effect from the Access Date diligently procure the execution and completion of the Fit Out Works within the Fit Out Period...*". In my view, the words used in clause 11.5 when read with the words used in clause 1.38, on their plain and ordinary meaning, are strongly supportive of the construction put forward by the plaintiff and are fundamentally incompatible with the construction advanced by Dunnes. The obligation imposed on Dunnes by clause 11.5 to "*diligently procure the execution and completion*" of the "Fit Out Works" within the "Fit Out Period" must be read with the words used in the defined terms. The words used in the defined terms are not sufficiently clear to fundamentally undermine or negate the obligation contained in clause 11.5.

**148.** The same is true of various other of the subclauses contained in clause 11 on which the plaintiff relied (but in respect of which specific performance is not being sought, at this stage, at least), including clause 11.7 which provides that Dunnes "*shall keep the Developer generally informed of*" the progress of the "Fit Out Works" and any material problems or delays affecting them and imposes a further obligation on Dunnes to supply a programme for the "Fit Out Works". Clause 11.9 imposes an obligation on Dunnes to permit the plaintiff to inspect the "Fit Out Works". Clause 11.11 imposes an obligation on Dunnes to comply with the "Fit Out Guide" and to observe and perform certain stipulations. Finally, clause 11.12, which was varied by clause 15 of the Settlement Agreement, imposes an obligation on Dunnes to open the store provided that it has no obligation to do so until the conditions contained in clause 15(a) and (b) of the Settlement Agreement are fulfilled.

**149.** In summary, therefore, the words used in the relevant provisions of clause 11 when read with the defined terms, including the term “Fit Out Works” defined in clause 1.38, are strongly supportive of the construction offered by the plaintiff and do not support the construction put forward by Dunnes. I agree with the plaintiff that if it had been the intention of the parties that Dunnes would retain the sort of discretion as to whether it would carry out any works to fit out the store, one would have expected that such would have been very clearly and expressly provided in the Development Agreement (or in the subsequent agreements between the parties). It was not. On the contrary, the parties went to the trouble of setting in some detail the extent of Dunnes’ obligations with respect to those works without clearly stating that Dunnes had no obligation to take any of the steps referred to in clause 11 if it decided that it did not wish to trade from the store.

**150.** I am also required to consider the context in order to determine or test whether the interpretation which appears to me to be most obvious by reference to the words used is correct or not. In my view, the context strongly supports the construction advanced by the plaintiff. I have referred earlier in this analysis to how the Development Agreement was structured. The plaintiff agreed to and did carry out the building works to construct the anchor store as well as the works to construct the Centre itself. Dunnes agreed to pay for the works for the construction of the store and a mechanism was initially agreed and then varied for the payment of the monies on a staged basis by reference to compliance with certain criteria. The parties agreed a detailed schedule for the works which the plaintiff agreed to carry out for the construction and completion of the anchor store under clause 4. The plaintiff was required to do so by reference to “Store Plans” listed in schedule 2 to the Development Agreement as well by reference to the “Store Specification” set out in schedule 1 (see, for example, clause 4 and the definitions contained in clauses 1.5 (“Building Works”), 1.68 (“Store Plans”), 1.70 (“Store Specification”) and 1.71 (“Store Works”)). The “Store

Specification” contained in clause 1 was entitled “Dunnes Stores Anchor Tenant Specification” and contained the particular requirements of Dunnes Stores in respect of the design and construction of the anchor store. I agree with the plaintiff that it is inconceivable that the parties would have gone to the trouble to agree such a specification were it the case that they were also agreeing that Dunnes would have the discretion as to whether to carry out any works whatsoever in fitting out the store and that it could simply decide not to do so.

**151.** In my view, that the context of the agreement as a whole is fundamentally inconsistent with Dunnes having such absolute discretion as to whether to go ahead with the works at all, having regard to the indisputable importance to the plaintiff, as the developer, of having Dunnes as the anchor tenant in the Centre in terms of its ability to attract other tenants.

**152.** While Dunnes contested the ability of Mr. Tennant to give evidence of the commercial rationale behind the Development Agreement, the court can readily assess and determine that rationale from the Development Agreement itself (and from the subsequent agreements which amended and varied it) and from the judgments given by Laffoy J. in the 2011 proceedings and by Costello J. in the 2016 proceedings. It is beyond argument that it would be critical for the plaintiff, as the developer, to have an anchor tenant in terms of attracting other tenants to the Centre. That objective would be completely and utterly undermined if the anchor tenant had the absolute discretion to decide not to use the store and, therefore, not to carry out any works in fitting out the store so that all that would be left would be the shell of the store. I acknowledge, of course, that Dunnes is the owner of the store on foot of the Long Lease but nonetheless it is subject to extensive contractual obligations in the Development Agreement, including the obligations to fit out the store and to take the other steps referred to in clause 11. A construction of those obligations in the manner advanced by Dunnes would fundamentally undermine the commercial interests and

objectives of the plaintiff/developer. If that were the intention of the parties, then one would have expected it to be clearly spelled out in the Development Agreement or in one of the subsequent agreements between the parties, rather than based on, what in my view is, an unnatural reading of the term “Fit Out Works” in clause 1.38 in isolation from the provisions of clause 11 which impose the contractual obligations on Dunnes.

**153.** Finally, I am also required to consider the “*logic, commercial or otherwise, of the agreement*” (per O’Donnell J. at para. 12 of *MIBI*). While I accept that there are constraints in having recourse to consideration of commercial common sense where doing so might lead to a conclusion which clearly contradicts the words used by the parties in the agreement and where it might be said that the court was rewriting the agreement, no such concerns arise in this case as, in my view, commercial logic and commercial common sense all point towards a construction of the disputed provisions which is entirely consistent with the construction which I have arrived at by reference to the plain meaning of the words used. It would, in my view, defy commercial logic and common sense were I to interpret the disputed provisions in the manner proposed by Dunnes. It would mean that the parties would have agreed detailed provisions concerning the contractual obligations on Dunnes with respect to the fit out of the anchor store but that Dunnes could decide it did not wish to trade from the store thereby avoiding the clear contractual obligations contained in clause 11. At the same time the plaintiff would have secured the requisite number of tenants in order to trigger the release of the €15 million under clause 11(c) and the occurrence of the “Access Date” under clause 14 of the Settlement Agreement, which also triggers the fit out obligations on Dunnes, in circumstances where Dunnes could decide that it did not wish to open the store and would, therefore, not have to carry out the relevant works. Apart altogether from the serious difficulties that would cause the plaintiff in terms of attracting other tenants to the centre, it is inconceivable that a commercial entity such as PVDL would have entered into an agreement

giving such discretion to Dunnes. The idea that two commercial entities would enter into an agreement which had the effect for which Dunnes contends is beyond belief and utterly implausible. Bearing in mind again that the proper interpretation of the agreement is to be guided by the reasonable objective person who, in addition to possessing linguistic skills, must also have or acquire a “*sympathetic understanding of the commercial or practical context in which the agreement was meant to operate*” (per O’Donnell J. at para. 12 of *MIBI*), it is, in my view, inconceivable that such a person would conclude that clause 11 of the Development Agreement should be interpreted in the manner suggested by Dunnes.

**154.** I am satisfied, therefore, that applying the approach to the construction of contracts outlined by O’Donnell J. in the Supreme Court in *MIBI* (and in the other cases discussed earlier), the interpretation of the disputed provisions of clause 11 of the Development Agreement advanced by the plaintiff is clearly the correct one and the interpretation advanced by Dunnes is clearly incorrect and must be rejected.

**155.** The consequence of that is that, on the proper construction of the relevant contractual terms, Dunnes is required to prepare and submit to the plaintiff the “Fit Out Plans” under clause 11.1. Dunnes is required at its own expense to use its reasonable endeavours to obtain the “Fit Out Consents” including a fire safety certificate for the “Fit Out Works”, if that is required, under clause 11.2.1. Furthermore, since the “Access Date” has occurred (on 30<sup>th</sup> March, 2016), subject to Dunnes obtaining a fire safety certificate, if that is required, Dunnes is required to procure that the “Fit Out Works” are designed, carried out and completed in the manner set out in clause 11.4. Finally, subject to obtaining the fire safety certificate, if required, in respect of the “Fit Out Works”, Dunnes is required under clause 11.5 to “*diligently procure the execution and completion*” of the “Fit Out Works” within the “Fit Out Period”, i.e. within 26 weeks of the “Access Date” which was 28<sup>th</sup> September, 2016. Dunnes is also subject to other contractual obligations with respect to the “Fit Out Works” set out in



clause 11. Dunnes has not complied with any of those contractual obligations. It follows that the fact that (a) the plaintiff sought a change of user for a very small part of the centre from retail to leisure use and (b) Dunnes has formed the subsequent intention that it does not wish, at this stage, at least, to trade from the store, are irrelevant to, and do not affect, the correct construction of the contractual terms at issue.

### **10. Res Judicata and Issue Estoppel**

#### ***(a) General***

**156.** In light of my conclusion on the construction issue, it is not strictly speaking necessary for me to consider and determine whether Dunnes ought to be precluded from raising the construction issue either by reason of the doctrine of *res judicata* or issue estoppel, by reason of the judgments of Laffoy J. in the 2011 proceedings and of Costello J. in the 2016 proceedings (as upheld by the Court of Appeal) or under the rule in *Henderson v. Henderson*. However, for completeness, I set out briefly my conclusions on these issues.

**157.** It seems to me that *res judicata* and issue estoppel have very limited relevance to these proceedings. Dunnes pleaded in its defence that if the judgment of Costello J. in the 2016 proceedings was overturned by the Court of Appeal, then the fundamental premise of the proceedings would no longer operate and that the proceedings would be rendered misconceived and bound to fail. Dunnes made clear in its written submissions that, subject to its appeal to the Court of Appeal in the 2016 proceedings, it was not disputing the findings of Costello J. in those proceedings which have the effect that the “Access Date” occurred on 30<sup>th</sup> March, 2016. However, it submitted that should the Court of Appeal overturn the findings of Costello J., the fundamental premise on which these proceedings were based would no longer operate and that the proceedings would be misconceived and bound to fail. In his oral submissions, Dunnes’ counsel made the same point. He confirmed that Dunnes was not making a collateral attack on the judgment of Costello J. and that, subject to Dunnes’

appeal to the Court of Appeal, the occurrence of the “Access Date” was not being challenged in these proceedings nor could it be (transcript Day 2, p. 22).

**158.** It is fair to say that the plaintiff did not strenuously press the issue of *res judicata* and issue estoppel arising from the judgments of Laffoy J. and of Costello J. and relied principally on the construction issue. Nonetheless, the issue was not withdrawn.

**(b) Relevant Legal Principles on Res Judicata and Issue Estoppel**

**159.** There was no dispute between the parties as to the relevant legal principles governing the doctrine of *res judicata*. The parties did not, however, address the separate but related question of issue estoppel in their written or oral submissions to the court.

**160.** The doctrine of *res judicata* is helpfully summarised by Biehler, McGrath and Egan McGrath in “*Delany and McGrath on Civil Procedure*” (4<sup>th</sup> Ed.) (2018) at para. 16-70 as follows:-

*The doctrine of... res judicata... provides that the final judgment of a traditional tribunal of competent jurisdiction is conclusive and, therefore, is precluded from relitigating the matters decided in the judgment or giving evidence to contradict it in subsequent proceedings. This doctrine of res judicata is recognised as encompassing two distinct branches, ‘cause of action estoppel’ and ‘issue estoppel’.*”

(para. 16-70, p. 700)

The doctrine of issue estoppel is closely related to but is wider than *res judicata*.

**161.** The parties were agreed that the judgment of Kelly J. in the High Court in *McConnon v. President of Ireland* [2012] 1 IR 449 sets out the four requirements which must be established in order for the doctrine of *res judicata* to operate. As outlined by Kelly J. in that case:-

*“In order to successfully rely on this doctrine, it must be shown that there was:-*

*(a) a previous decision of a judicial tribunal of competent jurisdiction;*

- (b) *that decision must have been a final and conclusive judgment;*
- (c) *there must be an identity of parties; and*
- (d) *there must be an identify of subject matter.”* (per Kelly J. at para. 15, p. 455)

**162.** In order to establish an issue estoppel, it is not necessary to establish that there is an exact identity of causes of action involved, merely an identity of issues. Apart from that, the requirements to establish an issue estoppel are pretty much the same as those required to establish a *res judicata*.

**163.** In *McConnon*, Kelly J. confirmed that a judgment is capable of raising a *res judicata* notwithstanding that there was an appeal pending from it to the Supreme Court (per Kelly J. at para. 24, p. 458). The fact, therefore, the judgment of Costello J. in the 2016 proceedings was under appeal to the Court of Appeal would not, if the other requirements listed in *McConnon* were satisfied, preclude the application of the doctrine of *res judicata* (or indeed also an issue estoppel).

**(c) *Decision on Res Judicata/Issue Estoppel***

**164.** As noted above, Dunnes did not seek to dispute the findings of Costello J. in the 2016 proceedings as to the validity of the certificate/confirmation of 29<sup>th</sup> February, 2016 or as to the occurrence of the “Access Date” on 30<sup>th</sup> March, 2016, subject to the possibility that it might succeed in its appeal to the Court of Appeal. Since the appeal failed, there is, and can be, no dispute that the findings of Costello J. in the 2016 proceedings (as upheld by the Court of Appeal) concerning the validity and effectiveness of the certificate/confirmation of 29<sup>th</sup> February, 2016 and of the occurrence of the “Access Date” on 30<sup>th</sup> March, 2016 are binding on the parties and cannot be reopened in these proceedings.

**165.** However, that conclusion does not resolve the question as to whether the doctrine of *res judicata* or of issue estoppel applies to prevent Dunnes from raising the construction issue concerning the interaction of the relevant provisions of clause 11 of the Development

Agreement with the definition of “Fit Out Works” in clause 1.38. Both Laffoy J. in her judgment in the 2011 proceedings and Costello J. in her judgment in the 2016 proceedings referred to the certificate/confirmation under clause 11(c) of the Settlement Agreement as being the “*trigger*” for Dunnes’ obligations to commence the “Fit Out Works” to the anchor store. However, as I pointed out in my consideration of those judgments, neither judgment decided the disputed issue of construction which Dunnes raised by way of defence to the plaintiff’s claim in these proceedings. The reason for that is that the construction issue was not an issue in either the 2011 proceedings or in the 2016 proceedings, as is clear from the description of the issues in those cases set out in both of those judgments. Since the construction issue was not an issue in either case, it was not raised by either side and was not considered or adjudicated upon by the court in either judgment.

**166.** Since neither Laffoy J. in the 2011 proceedings nor Costello J. in the 2016 proceedings decided the disputed issue of construction which Dunnes sought to raise in defence of the plaintiff’s claim in these proceedings, no *res judicata* or issue estoppel can arise. I am satisfied, therefore, that Dunnes was not precluded from raising the disputed issue of construction in its defence to these proceedings.

### **11. Rule in *Henderson v. Henderson***

#### **(a) *General***

**167.** The plaintiff’s alternative argument was that Dunnes should be precluded from raising the disputed issue of construction concerning the relevant provisions of clause 11 of the Development Agreement and their interaction with clause 1.38 in its defence of these proceedings on the basis that it was an argument which could and should have been raised by Dunnes in the 2011 proceedings and/or in the 2016 proceedings. Again, as with *res judicata* and issue estoppel, it is not strictly speaking necessary for me to decide this issue having

regard to my conclusions on the construction issue. However, on the same basis as before, I will briefly set out my conclusions on this issue.

**(b) Relevant Legal Principles on Rule in *Henderson v. Henderson***

**168.** There was similarly no dispute between the parties as to the applicable legal principles which can be set out here in very short order.

**169.** In her judgment in the Supreme Court in *Re Vantive Holdings* [2009] IESC 69, Denham J. cited with approval the following summary of the rule stated by Sir Thomas Bingham MR in *Barrow v. Bankside Members Agency Ltd* [1996] 1 WLR 257:-

*“The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.”*

(per Sir Thomas Bingham MR at 260, quoted by Denham J. at para. 36)

**170.** The Supreme Court had previously considered the rule in *AA v. Medical Council* [2003] 4 IR 302 (“AA”). In his judgment for the Supreme Court, Hardiman J. cited with approval the following passage from the judgment of Lord Bingham (as he had become) in *Johnson v. Gore Wood & Co* [2002] 2 AC 1 where he said:-

*“...It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue, which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”*

(per Lord Bingham at p. 31; cited by Hardiman J. at p. 316)

**171.** Hardiman J. went on to state that the rule (or principle, as it has sometimes been called) in *Henderson v. Henderson* was not to be applied in an “*automatic or unconsidered fashion*” and that “*sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the Courts for the determination of his civil rights or liabilities*” (per Hardiman J. at p. 317).

**172.** Clarke J. (then in the High Court) considered the rule in *Henderson v. Henderson*, and the comments of Hardiman J. in AA, in *Moffitt v. Agricultural Credit Corporation Plc* [2007] IEHC 245. He referred to the court adopting a “*more broad based approach*” to its consideration of whether a party should be precluded from making a particular case and noted that in AA, Hardiman J. had determined that the public interest in the efficient conduct of litigation “*did not render the raising of a defence in later proceedings necessarily abusive where in all the circumstances the party was not misusing or abusing the process of the court*” (per Clarke J. at para. 3.19). Clarke J. continued:-

*“...where a party seeks to make a new and different case which, it might be said, ought to have been included in the earlier proceedings, the court enjoys a wider discretion to consider what the result should be having regard to the competing interests of justice.”*

**173.** These are the principles which I will adopt in considering and deciding this issue.

**(c) *Decision on Henderson v. Henderson Issue***

**174.** I am not satisfied that it was or would be an abuse of process for Dunnes to raise the construction issue concerning the interaction between the relevant provisions of clause 11 of the Development Agreement and clause 1.38 in these proceedings. As I have indicated earlier, the 2011 proceedings were brought by PVDL and by Mr. Crosbie and sought specific performance of the Development Agreement and an order requiring Dunnes to commence forthwith the “Fit Out Works” and to complete them within the “Fit Out Period”. They brought the case on the basis that clause 14 of the Settlement Agreement referred, and was intended to refer, to clause 11(a) and not clause 11(c) of the Settlement Agreement. Dunnes disputed that contention and were ultimately successful in defending the proceedings on that basis.

**175.** Adopting the approach referred to in the case law discussed above, I do not regard it as an abuse of process by Dunnes to raise the construction in this case when it was not raised in its defence in the 2011 proceedings. The 2011 proceedings were brought on an entirely different basis and, in my view, it was open to Dunnes to defend the case on the basis on which it did, and it was successful in that defence.

**176.** The 2016 proceedings were brought by PVDL, through the Receivers, and sought the release of €500,000 and €15 million from the nominated account. The plaintiffs in those proceedings were not seeking any orders in relation to the fit out of the anchor store. While it is true that in their submissions the parties did refer to the significance of the “Access Date”

in terms of Dunnes' obligations to carry out works in fitting out the anchor store, that was not an issue in the case and the court did not decide, in its judgment, that Dunnes was required to commence the works to fit out the store, although it did make some observation concerning Dunnes' obligation in that regard.

**177.** Adopting the approach set out in the cases just discussed, I do not consider it to be an abuse of process by Dunnes to seek to raise the construction issue in the present case when it did not do so in its defence of the 2016 proceedings. The 2016 proceedings were very much focused on the validity of the confirmation/certificate of 29<sup>th</sup> February, 2016. While it might have been preferable if the construction issue had been raised by Dunnes at that stage, I cannot conclude that it is an abuse of process for it not to have done so and to have sought to raise it in the present case.

**178.** Having considered the issues in both the 2011 proceedings and in the 2016 proceedings, I am satisfied that it was not an abuse of process for Dunnes to defend the present case on the basis of the construction issue concerning the proper construction of the relevant provisions of clause 11 and clause 1.38 of the Development Agreement. I have carefully considered the competing interests of the plaintiff and of Dunnes and the public interest with which the rule in *Henderson v. Henderson* is concerned in reaching this conclusion.

**179.** I am satisfied, therefore, that Dunnes was not precluded by the rule in *Henderson v. Henderson* from raising the construction issue in its defence of these proceedings.

## **12. Summary of Conclusions**

**180.** In summary, I have concluded that the plaintiff must succeed on the issue of construction raised in these proceedings. I am satisfied that the proper construction of the relevant provisions of clause 11 of the Development Agreement when read with the definitions contained in clause 1, including the definition of "Fit Out Works" in clause 1.38 is



that while Dunnes has an element of discretion or flexibility as to the detail of the fitting out works which it must carry out under clause 11 of the Development, subject to the constraints in respect of such works set out in clause 11.1 and schedule 5 of the Development Agreement. I have concluded that the construction of the relevant provisions, including clause 1.38, put forward by Dunnes is clearly wrong. I reject the case advanced by Dunnes that on the proper construction of clause 1.38 of the Development Agreement, Dunnes has a discretion as to whether it requires any works to be carried out in the fit out of the anchor store at Point Village Centre and that it is open to it to decide that it does not wish to “*use and enjoy*” the anchor store at the present time and, therefore, decide not to require any such works to be carried out. I have concluded that that construction is clearly wrong based on the well-established principles of contractual interpretation having regard to the plain meaning of the words used in the relevant contractual provisions, the relevant context and logic, commercial or otherwise, as well as commercial common sense. The construction put forward by Dunnes must fail by reference to all of these criteria. The idea that two commercial entities, such as PVDL and Dunnes, would reach an agreement on the basis contended for by Dunnes is beyond belief and utterly implausible. I am completely satisfied that they did not.

**181.** It follows from that principal conclusion, and from the earlier judgment of Costello J. in the High Court in the 2016 proceedings (as upheld by the Court of Appeal), that the “Access Date” under the Development (as amended clause 14 of the Settlement Agreement) has occurred and that Dunnes is subject to a number of contractual obligations with regard to the fit out of the anchor store under clause 11 of the Development Agreement. Dunnes is not entitled lawfully to avoid performing those contractual obligations on the basis of its subjective intention that it does not wish to “*use and enjoy*” the anchor store at this point or at all.

**182.** Although, in light of the conclusions I have reached on the principal issue, it was not strictly speaking necessary for me to consider the arguments advanced by the plaintiff that Dunnes ought to be precluded from raising the construction issue in defending the proceedings on the grounds of *res judicata*, issue estoppel or the rule in *Henderson v. Henderson*, I have briefly considered those issues. I have concluded that neither *res judicata* nor issue estoppel arises by virtue of the 2011 proceedings and/or the 2016 proceedings. I have also concluded that it was not an abuse of process for Dunnes to raise the construction issue in defending these proceedings by reason of the issues considered in the 2011 proceedings and in the 2016 proceedings and that Dunnes was entitled to raise the construction issue in these proceedings.

### **13. Reliefs to be Granted**

**183.** In light of the conclusions I have reached, it seems to me that the plaintiff is clearly entitled to the orders of specific performance sought in respect of Dunnes' contractual obligation (a) to prepare and submit to the plaintiff the "Fit Out Plans" under clause 11.1 of the Development Agreement and (b) to use its reasonable endeavours to obtain the "Fit Out Consents" including a fire safety certificate for the "Fit Out Works" (if such is required) under clause 11.2.1 of the Development Agreement.

**184.** Since Dunnes has not yet applied for and obtained a fire safety certificate (if such is required), I will leave over until I hear from counsel the question as to whether I should at this stage also order specific performance in respect of Dunnes' obligation to procure that the "Fit Out Works" are designed, carried out and completed in the manner set out at clause 11.4 of the Development Agreement and in respect of Dunnes' obligation to diligently procure the execution and completion of the "Fit Out Works" within the "Fit Out Period", as required under clause 11.5 (noting that the "Fit Out Period" expired on 28<sup>th</sup> September, 2016). I am satisfied that, subject to the outstanding issue concerning the possibility that a fire safety

certificate may be required, Dunnes is required to comply with the contractual obligations contained in clauses 11.4 and 11.5 of the Development Agreement. However, I will hear further from counsel as to whether I should also order specific performance at this stage of Dunnes' contractual obligations under those provisions.

**185.** Following delivery of this judgment, I will list the matter for mention and for the making of final orders on some convenient date in the first half of October, 2021.

**14. High Court Practice Direction HC 101**

**186.** Finally, in accordance with Practice Direction HC 101, I direct the parties to file the written submissions exchanged for the purposes of the trial of these proceedings (subject to any redactions that may be permitted or required under the Practice Direction) in the Central Office within 28 days from the date of the delivery of this judgment.