



AN CHÚIRT ACHOMHAIRC
THE COURT OF APPEAL

Court of Appeal Record Number: 2025 308
High Court Record Number: 2018/6540 P
Neutral Citation Number: [2026] IECA 136

APPROVED – NO REDACTION NEEDED

Whelan J.
Butler J.
Collins J.

BETWEEN/

POINT VILLAGE DEVELOPMENT LIMITED

APPELLANT/PLAINTIFF

- AND -

DUNNES STORES UNLIMITED COMPANY

RESPONDENT/DEFENDANT

JUDGMENT of Mr. Justice Anthony M. Collins delivered on the
20th day of July 2026

I. Scope of the Appeal

1. This appeal is the latest chapter in a protracted contractual dispute that seems to have manifested almost as soon as the ink had dried on the parties' signatures to the Development Agreement in February 2008. The latest instalment commenced formally by the appellant issuing a motion on 17 May 2022 which seeks, *inter alia*, a declaration that the respondent was in contempt of court by reason of its failure to comply with the Orders in the manner described in the Schedule to that motion. By order of 19 November 2025, the High Court (Sanfey J.) refused to grant the relief sought in the appellant's motion and varied the Orders to extend the time within which the respondent was to execute and complete the proposed Fit Out Works to the Store as defined in the Development Agreement to 27 July 2022. By Notice of Appeal filed in the Office on 16 December 2025 the appellant appeals from that order. In the event the appeal is allowed, it does not ask the Court to impose the sanctions for contempt requested in the Notice of Motion.

2. The judgment uses the following terms throughout.

'Clause 11': of the Development Agreement, the relevant provisions of which are set out at paras. 13 to 16 of the first judgment.

'Development Agreement': of 27 February 2008, as amended by the Terms of Settlement of 7 July 2010 and the Supplemental Terms of Settlement of 1 November 2010, the relevant provisions of which paras. 20 to 43 of the judgment for specific performance summarise.

‘Fit Out Guide’: the “*Fit Out Guide – Point Village District Centre*” in Schedule 5 of the Development Agreement.

‘Fit Out Plans’: “*the plans and specifications for Dunnes Works to be submitted to by Dunnes to the Developer in accordance with the provisions of this Agreement;*”

‘Fit Out Works’: “*such fitting out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the Store;*”

‘the appellant’: Point Village Development Ltd.

‘the first judgment’: the High Court judgment delivered on 10 April 2025 (Sanfey J., [2025] IEHC 212) which dismissed the appellant’s motion to find the respondent in contempt of the Orders.

‘the judgment for specific performance’: the High Court judgment of 1 October 2021 (Barniville J., [2021] IEHC 628), affirmed by an *ex tempore* judgment of this Court of 28 January 2022 (Noonan J., [2022] IECA 39).

‘the Orders’: the High Court order of 20 October 2021 (Barniville J.) made on foot of the judgment for specific performance, as amended by order of this Court of 28 January 2022.

‘the respondent’: Dunne’s Stores Unlimited Company.

‘the second judgment’: the High Court judgment delivered on 4 September 2025 (Sanfey J., [2025] IEHC 480) that declined the appellant’s application to clarify the effect of the Orders and to make further directions and extended the time for the respondent to execute and complete the aforesaid works.

‘the Store’: “*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 the following target Gross Internal Areas at the levels specified.”

3. Paragraph 2 of the Notice of Appeal is against the High Court’s refusal:

- a) to find the respondent in contempt of court by reason of its failure to fit out the entire Store;
- b) to find the respondent in contempt of court by reason of its failure to carry out, complete or commence any work by 10 June 2022 and to retrospectively grant a further extension of time for compliance; and
- c) of the appellant’s alternative application for orders to clarify the meaning of the Orders and to direct compliance therewith.

4. The Notice of Appeal identifies three errors in the first judgment: a failure to correctly interpret the Orders, the conclusion it reached that the Orders were ambiguous, and the permission afforded to the respondent to assert a new interpretation of the Development Agreement and the Orders that had not been raised previously. It also contests the finding in the second judgment that the appellant sought to raise new issues in its alternative application to clarify the meaning of the Orders.

5. The appeal raises two issues. Was the High Court correct in its approach to the interpretation of the Orders? If that approach was incorrect, is the appellant entitled to the relief it seeks?

II. Approach to the Interpretation of the Orders

a) The first judgment

6. Paragraph 70 of the first judgment notes the parties' agreement that the object of proceedings for civil contempt is primarily coercive and that the onus is on the appellant to show that the respondent breached the Orders. Paragraphs 71 to 78 of the first judgment describe the parties' disagreement as to whether it was sufficient that the appellant establish beyond a reasonable doubt that the respondent had in fact breached the Orders or did it also have to show that the respondent intended to do so. Paragraphs 79 to 91 of the first judgment address the respondent's submissions that the Orders were ambiguous in two respects. First, the requirement in para. 1(a) of the Orders that the Fit Out Plans accord with the Fit Out Guide "*in all material respects*" "*imports an element of subjectivity into the Orders such that the point at which one ceases to be in compliance with the Orders is not clear*". Second, whilst the Orders required the respondent to fit out the Store, they did not define the extent of that fit out.

7. Paragraphs 92 to 134 of the first judgment, headed up "*Discussion*", commence with the statement that the applicable legal principles are contained in *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown* [2022] IECA 170. At para. 104 of her judgment, Whelan J. cited with approval the statement in *Competition Authority v. Licensed Vintners Association* [2010] 1 I.L.R.M. 374, 384 per McKechnie J. that "... *there are several cases which make it quite clear that the relevant standard is beyond reasonable doubt, and that this applies to all matters at issue in the*

case, both factual and legal". Paragraph 100 of the first judgment described the proposition that a party alleging civil contempt must establish beyond a reasonable doubt that an alleged contemnor intended to breach a court order as "*far-reaching*". Paragraph 102 of the first judgment suggested that the intent of an alleged contemnor would, in practice, be self-evident from his/her actions. Where an order requires a person to perform a positive action, it must be expressed in clear and unambiguous terms; if it does not, an applicant is unlikely to be able to establish beyond a reasonable doubt that a breach of the order has occurred, much less that that breach was intentional.

8. The first judgment proceeded to consider whether the Orders were ambiguous. Having examined the context in which they had been made, paras. 107 and 108 held it was not apparent from the judgment for specific performance that the question as to what constituted an 'anchor unit' had been at issue in those proceedings. Since the High Court had not been asked to decide that question, the first judgment expressed the view that it was not apparent from the definition of the Fit Out Works whether they were to be carried out across the entire area leased by the respondent or in a smaller area that it might select. Relying upon the Development Agreement and the judgment for specific performance, the appellant submitted that 'anchor unit' was synonymous with the Store. It was clear from the correspondence summarised at paras. 30 to 34, below, that the parties had proceeded on that basis and that at no time prior to March 2022 had the respondent suggested it was otherwise. Paragraph 110 of the first judgment identified the issue as being whether the Orders, in particular the requirement that the

respondent procure the execution and completion of Fit Out Works of ‘the anchor unit’, were ambiguous such that they could not be enforced in civil contempt proceedings. The High Court could not determine the point at which a tenant in a shopping centre could be taken to unarguably comply with the criteria to be considered as an anchor tenant, in particular whether in order to do so it was required to fit out the entirety of a store it had leased. Paragraph 112 of the first judgment concluded that, in the absence of an express contractual commitment, there was a lack of clarity as to exactly what was meant by the execution of Fit Out Works for an ‘anchor unit’.

9. Paragraphs 113 to 117 of the first judgment dismissed the appellant’s reliance upon para. 5 of the Statement of Claim and para. 8.1 of the Defence as demonstrating “*an admitted understanding*”, by reason of which the judgment for specific performance did not need to define the term ‘anchor unit’. At para. 120 the first judgment finally observed that the evidence did not go so far as to show that the premises could be regarded as an anchor store.

10. In conclusion, paras. 125 to 129 of the first judgment held that for a court to be satisfied beyond a reasonable doubt that a breach of an order has occurred it must be absolutely clear what constitutes compliance with that order. In the High Court’s view, ‘anchor unit’ connoted a store that, by virtue of its size and commercial reputation, generated footfall of benefit to other tenants in a shopping centre. A range of economic circumstances might justify the fit out of a smaller unit than that originally intended which nonetheless retained the essential characteristics of an ‘anchor unit’.

In the absence of an unequivocal contractual definition or a judicial interpretation of ‘anchor unit’ the respondent could not be certain as to exactly what it had to do to comply with the Orders. Orders that were so ambiguous that one could not say definitively what constituted compliance therewith did not contain a standard against which compliance could be measured. It followed that the appellant had not established beyond a reasonable doubt that the respondent was in contempt of the Orders.

b) The existence of a requirement to show intent

11. Paragraphs 98 to 102 of the first judgment do not rule conclusively on the respondent’s argument that a party alleging civil contempt must establish beyond a reasonable doubt that the alleged contemnor intended to breach the court order, notwithstanding the admission at para. 100 thereof that the weight of judicial dicta suggests that argument is incorrect. The Respondent’s Notice submits that argument is an additional ground upon which to affirm the order under appeal and the parties exchanged written and oral submissions on the issue.

12. In *Competition Authority v. Licenced Vintners Association* [2010] 1 I.L.R.M. 374, 382, McKechnie J. held that “*A party who is the subject matter of an undertaking must strictly comply with its terms. The lack of intent, the absence of motive or the want of negligence will not exempt a party who otherwise breaches an undertaking.*” Whilst the existence of that principle appears to have been uncontested, McKechnie J. took the precaution of distilling it from his consideration of *Stancomb v. Trowbridge UDC* [1910] 2 Ch. 190, 194 per Warrington J., *Heatons Transport (St. Helens) Ltd.*

v. Transport and General Workers' Union [1973] A.C. 15, 109 per Roskill LJ and *Re Supply of Readymix Concrete (No. 2)* [1995] 1 A.C. 456, 481 per Lord Nolan, *i.e.* he did not base his conclusion upon a dictum delivered in a single judgment, as the respondent's written submissions imply. The respondent cites *Irtelli v. Squatriti* [1993] Q.B. 83 as authority to the contrary but accepts that judgment has not met with universal approval, as is clear from, *inter alia*, para. 54 of the judgment of the Court of Appeal of England and Wales in *Varma v. Atkinson* [2020] EWCA Civ. 1602 to which the appellant referred. It follows that the respondent has not shown that the aforecited passage from *Competition Authority v. Licenced Vintners Association* does not reflect the law in this jurisdiction.

13. In what amounts to little more than bare assertion, the respondent contends that, by reference to the Constitution of Ireland, this Court must read into the proofs to establish civil contempt a requirement that the alleged contemnor be shown to intend not to comply with a court order. That submission did not address a number of pertinent questions, including how such a requirement might be consonant with the offences of strict liability that the Oireachtas has created and the fact that the prosecution is usually not required to show that an accused person knew an act constitutes a criminal offence in order to establish his or her guilt.

14. For these reasons I dismiss the additional grounds the respondent relies upon to affirm the order under appeal.

c) *The approach to the interpretation of the Orders*

15. It is common case that the onus lies on the appellant to establish the meaning of the Orders it seeks to enforce in these proceedings. Once that has been done, if the Orders are reasonably open to another interpretation, that most favourable to the respondent applies: *Competition Authority v. Licenced Vintners Association* [2010] 1 I.L.R.M. 374, 386 per McKechnie J. That exercise is to be approached in the same manner as a court would interpret any document. As a matter of simple logic, the first step is to ascertain what the Orders mean, as it is otherwise impossible to decide whether they might have another meaning. At para. 49 of the judgment in *Fennell v. Corrigan* [2021] IECA 248, Murray J. observed that:

In the course of her submissions counsel for the defendant contended that the application of the contra proferentum rule required either the conclusion that the mortgage deed mandated express reference to an appointment as receiver and manager, or that the deed of appointment failed to appoint the plaintiff as receiver and manager. I cannot accept this contention. The contra proferentum principle operates where, and only where, a provision is capable of more than one meaning. However this principle does not mean that the court looks for ambiguities, inadvertencies or doubtful alternative meanings (per Gannon J. in Re Arbitration between Gaelcrann and Payne [1985] I.L.R.M. 109, 113). The maxim should not be used to create an ambiguity which it is then employed to resolve (per Kearns J. in Emo Oil Ltd. v. Sun Alliance and London Insurance plc [2009] IESC 2 at p. 5). In order to decide that there is such ambiguity, the document must first be interpreted by reference to the established methods of construction. It is only if after that exercise is undertaken there are two or more meanings that the instrument can be said to be ambiguous, and only then, that the issue of contra proferentum arises. This is why it has been said that it is not possible to find an agreement ambiguous in the abstract (per MacMenamin J. in

O'Reilly v. Irish Life Assurance plc [2005] IEHC 449 at para. 87). *The correct position was, in my view, expressed by Auld L.J. in McGeown v. Direct Travel Insurance [2004] 1 All E.R. (Comm.) 609 (at p. 615):*

‘A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the *contra proferentum* rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part. Too early recourse to the *contra proferentum* rule runs the danger of “creating” an ambiguity where there is none.’

16. Once a court has ascertained the meaning of a document it may be invited to consider whether it may bear a competing or other meaning. If a document may reasonably be interpreted as bearing a meaning or meanings other than that which a court understands it to have, that court may conclude that document is open to more than one interpretation. A document that is reasonably open to more than one interpretation may be ambiguous, by reason of which it is unenforceable in civil contempt proceedings. That is made clear by para. 57 of the judgment of Kunc J. in *Bathurst Real Estate Pty Ltd v. Fairbrother* [2022] NSWSC 351, which both parties relied upon in the High Court and this Court and is cited at para. 85 of the first judgment, where the learned trial judge concluded his summary of the relevant Australian authorities as follows:

- (1) *An undertaking must be given a sensible meaning if possible.*
- (2) *Identifying whether an undertaking is ambiguous so as to preclude a finding of contempt can only be done by determining the proper construction of the undertaking.*
- (3) *The tasks of construction and identification of any ambiguity are to be approached with a caution that recognises the consequences for breach may be*

punishment. This calls for an approach similar to that applied to penal statutes and is why “plain meaning” assumes particular importance. Given the consequences for breach, an order should be interpreted recognising that its meaning should be clear on its face to the person bound, who should not be expected to need recourse either to lawyers or to subtleties such as implications or inferences (reasonable or otherwise).

- (4) The proper construction of the undertaking is to be done in accordance with the familiar canons of the construction of legal instruments: an objective determination of meaning giving primacy to the text, but read in the light of the context including the purpose of the undertaking and the surrounding circumstances known to the parties.*
- (5) There can be no ambiguity if, as in Pang, the undertaking could have only one meaning to avoid being meaningless or nonsensical.*
- (6) However, there can be no contempt if the meaning of the undertaking is ambiguous.*
- (7) The requisite ambiguity that will prevent a finding of contempt will exist if the Court is satisfied that, in a respect which is relevant to the particular charge of contempt, there are clearly or reasonably arguable alternative contentions for the constructional choices required to be made to ascertain the meaning of the undertaking. While they may largely overlap, “clearly” and “reasonably” are not coextensive in this context. However, not every difficulty of construction raised by an alleged contemnor will meet this threshold.*

17. Courts are asked to interpret documents with a view to giving them a meaning and, thereby, an effect. An approach whereby one seeks to identify how many meanings a document can reasonably bear and in the event there is more than one such meaning, deem that document ambiguous, and thus unenforceable, is an invitation to undermine, rather than to uphold, the validity and effectiveness of agreements that parties objectively intend to enter into and to be bound by. The danger Auld L.J. identified in the passage from

McGeown v. Direct Travel Insurance, which Murray J. accepted as correct in *Fennell v. Corrigan*, of creating ambiguity where it might otherwise not exist, is real.

18. The prescribed approach towards the interpretation of documents is thus more than a matter of form or procedure, instead having the character of a rule of substantive law. A court faced with the interpretation of contractual documents may be asked to ascertain the intention of two or more authors, each with different notions of what they had agreed to. In so doing, a court seeks to resolve such ambiguities as are present in those documents, thus reducing the scope for the existence of genuine differences as to their meaning. A court called upon to interpret a court order made on foot of such an interpretation has the comparatively straightforward task of ascertaining the intention of a single author by reference to a record of the reasons as to why that order was made. That is the case here.

19. Having not ruled conclusively on the respondent's argument that a party alleging civil contempt must establish beyond a reasonable doubt that the alleged contemnor intended to breach the court order, the first judgment decided the Orders were "*truly ambiguous*" without having first ascertained their meaning by reference to their terms or the judgment upon which they were grounded. That approach to the interpretation of the Orders was erroneous as a matter of law.

III. Construction of the Orders

20. The Orders issued in consequence of the judgment for specific performance. Any doubt as to their meaning is thus to be ascertained by reference to the reasoning of, and the findings made in, that judgment.

a) The judgment for specific performance

21. Paragraph 97 of the judgment for specific performance identified the issues the parties raised as regards the construction of the Development Agreement. Paragraphs 100 to 125 set out legal principles governing the construction of contracts that were not in dispute. Paragraphs 126 to 136 of the judgment for specific performance summarised the parties' respective submissions.

22. Paragraphs 137 to 155 of the judgment for specific performance construe the Development Agreement. Paragraph 141 thereof described the respondent's position as relying upon the definition of Fit Out Works in the Development Agreement as conferring an absolute discretion on the respondent as to whether it required the Fit Out Works to be carried out under Clause 11.1. Paragraph 142 of the judgment for specific performance dismissed that argument in the following terms:

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 acknowledgement 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”.

23. Paragraph 150 of the judgment for specific performance placed that interpretation of Clauses 1.38 and 11.1 of the Development Agreement in the context in which the latter had been concluded:

... 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 [as] 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.

24. Addressing the commercial rationale for the Development Agreement, paras. 152 and 153 of the judgment for specific performance held that:

152. ... 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. ... 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.

25. Paragraphs 154 and 155 of the judgment for specific performance concluded on this issue as follows:

154. ... 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 30th 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 28th 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.

26. Paragraph 180 of the judgment for specific performance holds that the appellant must succeed on the issue of the construction of the Development Agreement since:

... 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 [Agreement], 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.

27. In an *ex tempore* judgment delivered on 28 January 2022 dismissing the respondent’s appeal from the judgment for specific performance, this Court (Noonan J.) expressly adopted the reasoning in that judgment, stating at para. 16 that:

In placing great emphasis on its suggested literal meaning of Clause 1.38 Dunnes seeks to construe the clause in a vacuum, entirely outside the overall context of the agreement in which it appears. Such a literal construction would give rise to the absurd result of setting at naught the elaborate contractual provisions painstakingly negotiated by the parties. The very substantial obligations imposed on the parties, and indeed the entire project, could be cancelled at any time by Dunnes simply deciding that it did not wish to proceed. It hardly needs to be stated that it is simply inconceivable that any commercial entity would enter into a contractual business arrangement which in effect binds one party and not the other.

28. Notwithstanding the respondent's protestations to the contrary, the foregoing citations demonstrate that the judgment for specific performance articulates a clear, if not indeed firm, judicial assessment of what the Development Agreement, notably Clause 11, demands of the respondent. The judgment for specific performance rejected in what may be described as trenchant terms each of the submissions the respondent advanced before it as to the meaning of the Development Agreement. The Orders reflect those findings:

An Order for specific performance by the Defendant of its obligations under Clause 11 of the Development Agreement dated 27 February 2008 (the "Development Agreement"), as amended by the Terms of Settlement dated 7 July 2010 and the Supplemental Terms of Settlement dated 1 November 2010, and in particular:

- (a) An Order requiring the Defendant to, at its own expense, prepare and submit to the Plaintiff the Fit Out Plans (as defined in the Development Agreement) which shall, in all material respects, be in accordance with the Fit Out Guide (as defined in the Development Agreement), in accordance with Clause 11.1 of the Development Agreement.*
- (b) An Order requiring the Defendant to, at its own expense, use its reasonable endeavours to obtain the Fit Out Consents (as defined in the Development Agreement), in accordance with Clause 11.2 of the Development Agreement.*
- (c) An Order requiring the Defendant 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, subject to obtaining a fire safety certificate as set out in Clause 11.2 (if same as required).*
- (d) An Order requiring the Defendant to procure the execution and completion of the Fit Out Works of the Anchor Unit (as defined in the Development Agreement), in accordance with Clause 11.5 of the Development Agreement within 26 weeks of [10 December 2021],*

subject to obtaining a fire safety certificate as set out in clause 11.2 (if same is required).

29. I thus accept the appellant's submission that the Orders, when read in the context of the judgment for specific performance, aim at compelling compliance with, mirror the terms of, and expressly cross-reference the respondent's obligations under Clause 11 as elucidated in the judgment for specific performance. In ruling upon the appellant's motion it was not open to the High Court, nor is it open to this Court, to revisit that exercise. Nor do I understand the respondent's submissions to go that far. They instead appear to be premised upon an interpretation of the Orders in the light of circumstances that it seems to assert arose after the Orders had been made. To determine whether the appellant is entitled to the relief it seeks in this appeal, it is thus necessary to consider the course of events post the delivery of the judgment for specific performance and the Orders made on foot thereof.

b) Events after delivery of the judgment for specific performance

30. Correspondence put before the High Court on affidavit discloses that, by letter of 21 January 2022, *i.e.* a week prior to the Court's dismissal of the appeal from the judgment for specific performance, the appellant's solicitors wrote to the solicitors for the respondent complaining of the latter's failure to reply to letters of 15 December 2021, 23 December 2021, 10 January 2022 and 17 January 2022. By letter of even date, the solicitors for the respondent replied, *inter alia*, that since 2018 their client had been working on the development of the concept and fit out of its anchor store in the Point Village development. The Fit Out Plans required

a high level of detail and technical specification to comply with the Fit Out Guide and could not be put together lightly or quickly. The development of a concept and fit out plans for an anchor store was not a simple matter of taking “*off-the-shelf*” fit out plans or fit out plans in respect of another store and was further complicated by a number of factors, including the fact that the anchor store was split over different floors of the development. The letter further represented that it was not possible for the respondent to complete the Fit Out Works within 26 weeks as it estimated it would take 10 weeks to complete the Fit Out Plans, 16 weeks to obtain a fire safety certificate, 4 weeks to prepare tender documents for the Fit Out Works, 3 weeks to adjudicate upon the tenders received and to appoint a contractor and 4 weeks between the appointment of the contractor and the commencement of the Fit Out Works. Those works would take approximately 24 weeks to complete on-site, thus arriving at a total of 45 weeks to fully fit out the Anchor Store.

31. In its response of 26 January 2022, the appellant’s solicitors reminded the solicitors for the respondent that the Orders required the Fit Out Works to be completed by 20 April 2022. The respondent could neither rely on its own delays in preparing the Fit Out Plans as an excuse for breaching the Orders, nor could it rewrite the Development Agreement. On 16 February 2022, the appellant’s solicitors informed the solicitors for the respondent that, by reason of the variation of the Orders by the Court, their client was required to complete the Fit Out Works on or before 10 June 2022, and asked for an update and details in that respect. Having received no response, by letter of 28 March 2022, the appellant’s solicitors repeated the request for information in its letter of 16 February

2022. That letter stated that due to the passage of time, the multiple reminders it had issued and the fact that the respondent had taken no steps to comply with the Orders, it enclosed copies of them with penal endorsements marked thereon by way of service.

32. The correspondence between the parties from 15 December 2021 to 28 March 2022, notably the respondent's letter of 21 January 2022, can be understood only on the basis that the Fit Out Works the respondent anticipated would take 45 weeks to fully complete would be carried out over the entire area of what that letter described as "*the Anchor Store*".

33. Under cover of a letter of 31 March 2022, the respondent delivered to the appellant Fit Out Plans for the Point Village unit. In an eight page reply dated 22 April 2022, the appellant represented that those Fit Out Plans clearly breached the Orders for two reasons: they fell well short of the standard required by the Fit Out Guide and they applied to approximately 608m², or 6.7% of the area, of the anchor unit. The letter of 22 April 2022 identified in some detail why the appellant was of the view that the Fit Out Plans breached the Development Agreement, notably Clause 11. It described the respondent's approach as being "... *very similar to its previous argument that the reference to the intended use and enjoyment of the Store in the definition of "Fit Out Plans" should be interpreted as meaning that Dunnes has discretion as to whether to use or enjoy the Store at all. As you know, both the High Court and the Court of Appeal emphatically dismissed this argument as 'implausible' and 'untenable'. ...*" It particularised why the appellant was of the view that the respondent was in breach of the Orders, observing that

“[o]ver more than a decade of litigation, Dunnes has devised a series of increasingly far-fetched legal arguments in order to obstruct and delay PVDL’s efforts to hold Dunnes to its contractual bargain. The Draft Fit Out Plans are simply the latest example of this conduct.” The letter concluded by stating that steps would be taken without further notice to compel compliance with the Orders.

34. In a five page letter in response dated 28 April 2022, the respondent’s solicitors represented that Clauses 1.38 and 11.1 of the Development Agreement, properly construed, supported the propositions that the respondent was under an obligation to complete the Fit Out Works, that the Fit Out Works were those the respondent required, that the word “*may*” gave the respondent a discretion as to what those works would consist of, the works were connected with the intended use and enjoyment of the Store by the respondent in accordance with the Development Agreement and that the respondent could vary the Fit Out Plans provided those variations complied with the Fit Out Guide. Correspondence of a formal nature was exchanged prior to the appellant filing the notice of motion of 17 May 2022.

c) The respondent’s defence

35. By way of defence to the motion, the respondent makes two submissions either of which, if accepted, might open the door to a finding that the Orders reasonably bear a meaning other than what the judgment for specific performance decided. The first of these arises from the first judgment’s consideration of what is an ‘anchor unit’. That definition appears to have taken on particular importance in the light of the nature and extent of the Fit Out Plans the

respondent submitted to the appellant in late March 2022. The second is the latest variation on a recurrent theme in this saga, the discretion the Development Agreement vests in the respondent to define the nature and the scope of the Fit Out Works.

d) 'Anchor unit'

36. Paragraph 1(d) of the Orders requires the respondent to procure the execution and completion of the Fit Out Works – such fitting out or other works as it may require to carry out in connection with the intended use and enjoyment of the Store – of the Anchor Unit as defined in the Development Agreement in accordance with Clause 11.5 thereof. Two issues may be said to arise as to the construction of para. 1(d) of the Orders. First, the meaning to be given to the words ‘of the Store’ and ‘of the Anchor Unit’. Second, do the words in parentheses – ‘as defined in the Development Agreement’ – apply to the Fit Out Works or to the Anchor Unit?

37. As for the first issue, the text of Clause 11.5, read together with Clause 1.38, provides that:

Subject to obtaining a fire safety certificate if same is required in respect of such fitting out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the Store, Dunnes shall with effect from the Access Date diligently procure the execution and completion of such fitting out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the Store within 26 weeks from 30 days after the date of receipt by Dunnes of the Certificate referred to in paragraph 11 (c) of the Settlement Agreement subject however to Clause 11.5.

38. Clause 11.5 refers exclusively to the intended use and enjoyment of the Store. It does not refer to an ‘anchor unit’. To make sense of para. 1(d) of the Orders, it must be read as a reference to works in connection with the intended use and enjoyment of the Store. The reference to the Store in the definition of Fit Out Works that is incorporated into Clause 11.5 thus overrides and renders superfluous the words “*of the Anchor Unit*” that appear in that provision. The observation in the judgment for specific performance that the Development Agreement and the correspondence between parties used ‘anchor unit’ and ‘store’ interchangeably supports that interpretation.

39. As for the second issue, since the Development Agreement does not define ‘anchor unit’, the words ‘as defined in the Development Agreement’ can refer only to the Fit Out Works and not to the Anchor Unit.

40. The pleadings also indicate the parties’ understanding of the meaning of ‘anchor unit’ in the Development Agreement. Paragraph 5 of the Statement of Claim pleads that: “*Pursuant to the Development Agreement, PVDL and Mr Crosbie agreed to, inter alia, develop a shopping centre at the Point Village to the specifications set out therein (the “Point Village Centre”), to include a substantial anchor unit (the “Anchor Unit”) which Dunnes would fit-out, occupy and trade as a retail store. ...*” In direct response, para. 8.1 of the Defence admits that pursuant to the Development Agreement, the appellant and Mr. Crosbie agreed to develop the Point Village, “*to include the Anchor Unit*”, before denying at para. 8.2 that the respondent was “*...under an obligation*

to fit out, occupy and trade from the Anchor Unit as a retail store". As a matter of ordinary language, the reference at para. 8 of the Defence, in reply to para. 5 of the Statement of Claim is to "*the Anchor Unit*" defined in the Statement of Claim. The parties also appear to have shared that understanding after the Orders had been made. As late as 21 January 2022, the solicitors for the respondent commenced their response to the appellant's solicitors' letter of 15 December 2021 as follows:

Our client has been working on the development of the concept and fit-out of its anchor store in the Point Village development (the "Anchor Store") at different points over a number of years - since 2018. As confirmed in our letter dated 7 December 2021, our client is currently in the process of preparing the Fit-Out Plans.

41. Since on any objective view of the evidence it was clear the parties well understood that "*the Anchor Unit*" was "*the Store*", as illustrated by the interchangeable references to 'anchor store', 'anchor unit' and 'store' in the judgment for specific performance, Barniville J. was not required to make a formal determination on that issue, as para. 117 of the first judgment correctly observes. He was nonetheless entitled to acknowledge the parties' use of those terms and to apply that understanding in construing the Development Agreement. In those circumstances the conclusion in the first judgment that there was no "*admitted understanding*" between the parties as to what they understood by 'anchor unit' is incorrect.

42. In consequence of the foregoing, the statement at paras. 107, 117 and 124 of the first judgment under appeal, repeated at para. 33 of the second judgment under appeal, that the judgment for specific

performance did not in fact decide that references to ‘the Store’ and to ‘the anchor unit’ were to one and the same thing under the Development Agreement is erroneous in law.

e) Definition of Fit Out Works

43. The first judgment records that the appellant relied upon the requirements of para. 1(a) of the Orders that the Fit Out Plans be in all material respects in accordance with the Fit Out Guide and in para. 1(c) of the Orders that the Fit Out Works be designed, carried out and completed in accordance with Clause 11.4, which requires that the work be designed, carried out and completed in accordance with the Fit Out Guide. The appellant also submitted that it was clear from Clauses 4.1 and 4.3.1 of the Development Agreement that the Fit Out Plans cover the entire anchor unit. Since the Fit Out Plans the respondent had submitted did not do so, the respondent had not complied with Clause 4.3.1.

44. Paragraph 43 of the first judgment summarised the respondent’s position as that “*there is no clear express term in the Development Agreement which requires Dunnes Stores to fit out the entire Store at any point in time*”. Whilst it accepted that it was the ‘anchor’ tenant, it did not follow that it was obliged to fit out and trade from the entirety of the Store immediately. The respondent relied on the absence of a definition of ‘anchor unit’ in the Development Agreement. It submitted that in the present context what constituted an anchor store was not commensurate with the extent or quantum of trade capable of being carried out from the Store, nor was it required to trade from every part of it.

45. As for the requirement in the Development Agreement that the respondent fit out the entire floor area of the Store, paras. 104 and 105 of the first judgment noted that the judgment for specific performance held that the reference in the definition of Fit Out Works to “*may require*” included the precise detail of those works and not, as the respondent had unsuccessfully contended, whether those works were to be carried out at all. Having made that finding, the judgment for specific performance ordered the respondent to specifically perform its obligations under Clause 11 by way of orders that imposed mandatory, pro-active obligations on it to draw up Fit Out Plans in accordance with the Fit Out Guide with a view to carrying out Fit Out Works “*to a standard of quality equivalent to the fit out of Dunnes Stores at Henry Street*”. Paragraph 105 of the first judgment reflects that interpretation where it concludes that “*..., Order 1(d) required the defendant to “procure the execution and completion of the Fit Out Works of the Anchor Unit (as defined in the Development Agreement) ...within 26 weeks of the date of this Order...*”.

46. The argument that the respondent has a discretion to determine the area in which the Fit Out Works are to be carried out, as distinct from the discretion it unsuccessfully asserted in the proceedings that led to the making of the Orders to select the Fit Out Works that it would carry out, is a variation on the theme that the definition of Fit Out Works confers a species of unfettered discretion on the respondent as to the nature, extent and content of the Fit Out Works to be carried out. That argument is rejected for the same reasons as those in paras. 137 to 155 of the judgment for specific performance which dismissed the respondent’s

representations as to the meaning and effect of the Development Agreement and the clauses identified therein, which representations are in substance repeated in the respondent's solicitors' letter of 28 April 2022 in support of the latter's interpretation of the Orders.

IV. Conclusions and Proposed Orders

47. In answer to the two questions that I posited at the end of Part I of the judgment, for the reasons given at Part II, I find that the High Court adopted an incorrect approach to the interpretation of the Orders. For the reasons given at Part III, I hold that the appellant is entitled to the relief it seeks in this appeal. I would therefore allow the appeal, set aside the High Court Order of 19 November 2025 and grant a declaration that the respondent was in contempt of court by reason of its failure to comply with the Orders in the manner described in the Schedule to the appellant's motion of 17 May 2022.

48. In the light of these conclusions, I am of the view that the Court is not required to address the appellant's submission to the effect that the first judgment erred by permitting the respondent to assert a new interpretation of the Development Agreement and Orders that had not been raised earlier in the proceedings. It is also unnecessary for the Court to rule upon the appellant's submission that the second judgment erred in finding that its alternative application, to clarify the meaning of the Orders, advanced issues that it had not raised earlier in the proceedings.

49. The default position under s. 169(1) of the Legal Services Regulation Act 2015 is that a party that has been entirely successful in proceedings is entitled to an award of costs against the

unsuccessful party unless the court hearing the matter orders otherwise. I am of the provisional view that, having been entirely successful in these proceedings, the appellant is entitled to the order it asks the Court to make: that the respondent pay the appellant the costs it incurred in these proceedings before the High Court and this Court, to include all reserved costs.

50. Should the parties wish to make any submissions as to the content or form of these proposed orders they should contact the Office no later than seven days from the date of the delivery of this judgment. Should it be necessary, the Court will convene a short hearing to hear those submissions and thereafter make such determinations as it deems fit.

51. Since this judgment is delivered electronically, I am authorised by Whelan and Butler JJ. to state that they agree with it and with the orders it proposes be made.

Appearances:

For the Appellant: Michael M. Collins SC, James Doherty SC and John Lavelle, instructed by McCann Fitzgerald LLP.

For the Respondent: Mark Lynam SC, Martin Hayden SC, Shane Murphy SC and Ross Aylward, instructed by Arthur Cox LLP.