

Expert Determination – extent to which an expert can decide questions of law - scope of an expert’s mandate

The Supreme Court issued an important judgment in *Dunnes Stores v. McCann and Ors* (22 January 2020) in the context of ADR, that is, concerning the scope of authority of an independent expert appointed for the resolution of a dispute. It was the first time such a matter came before the Irish courts. The dispute essentially revolved around the validity of a certificate of completion in a construction contract. The judgement focuses on the extent to which an expert can decide questions of law or whether a court can be asked in advance to determine questions of law which may arise in the course of the resolution of the dispute.

Background

The parties had entered into a contract for the development of the ‘Point Village’ on North Wall Quay. The development of Point Village did not proceed as planned and as a result, a dispute arose between Dunnes and Point Village. That dispute resulted in a Settlement Agreement, which included a clause stating that ‘[t]he sum of €3,000,000.00 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes of a certificate by PVDL’s architect (or in the event of a dispute, the independent architect within the meaning of the Development Agreement) confirming that the Point Square has been completed in accordance with the Development Agreement’. A completion certificate was issued by the Point Village Architect, which was then sent by the Point Village solicitors to Dunnes Stores with a request for payment. Ultimately, Dunnes refused to release the sum of €3m on the basis that they did not accept the validity of the certificate (including a subsequent certificate) issued by the Architect for Point Village. An independent expert was appointed to resolve the dispute.

Central to the dispute was Clause 7.7.2 of the Development Agreement which provided that:

“The design and specification for Point Square shall be to a first class standard appropriate to a prestigious shopping centre commensurate with the newly redeveloped Eyre Square in Galway and Grand Canal Square Dublin and the Civic Plaza, Dundrum Town Centre.”

The dispute revolved around whether or not the completed Point Square met the requirement that its design and specification was ‘to a first class standard appropriate to a prestigious shopping centre’.

Dunnes issued a plenary summons in which it sought inter alia a court declaration that the area known as Point Square did not comply with the defendants’ obligations under Clause 7.7.2 of the Development Agreement and a declaration that Clause 7.7.2 of the Development Agreement and the design and specification and requirements therein were to be “interpreted, applied and implemented in accordance with the factual matrix as of the date of execution of the Development Agreement”. Dunnes maintained that that should include all representations made by action, by conduct and orally and by reference to various plans appended to the Development Agreement and terms, sections, elevational drawings, perspective images and marketing material together with comparators set out in Clause 7.7.2 that illustrated the overall design, specification, quality and completion of the Point Square and the manner in which it was to ultimately present. The defendant applied for a stay preventing Dunnes from taking any further step in the proceedings pending the determination by the independent architect of the dispute between the parties. The scope of authority of the independent expert was accordingly central to the dispute.

Substance

In essence the argument made by Dunnes was that while the U.K. authorities tended to be to the effect that courts should not intervene in relation to an issue of interpretation or construction of a clause to be considered or applied by an expert in advance of the expert commencing and completing his determination, it submitted that more recent authority from that jurisdiction is no longer so fixed in that view. Dunnes made the point that the dispute between the parties as to the interpretation and construction of Clause 7.7.2 of the Development Agreement needs to be resolved in the first instance before the independent architect can make his determination in accordance with the correct interpretation of that clause. Dunnes contended that the independent architect is not authorised under the agreement between the parties to carry out an interpretation of Clause 7.7.2.

The court observed that it was evident from the submissions made that Dunnes have a fear that the expert would not consider all of the material sought to be relied on by Dunnes in the course of the consideration of the dispute between the parties.

Relying on various UK authorities, counsel on behalf of Dunnes submitted that the following principles can be extracted from those authorities, namely:

- (1) Courts retain jurisdiction to review a decision of an expert as to his jurisdiction;
- (2) A question concerning the scope or remit of the jurisdiction/authority of an expert, including the principles as derived from the contract upon which that determination must be made, is a question of law;
- (3) The authority/jurisdiction of an expert to determine an issue is dependent upon the interpretation and construction of the contract/clause appointing him;
- (4) The determination as to the authority/jurisdiction of an expert is solely a question of construction on the terms of the contract/clause appointing him and having regard to the matrix thereto. The courts do not imply terms into such a contract/clause that might expand the remit of an expert's jurisdiction/authority beyond that expressly agreed between the parties. There are no applicable presumptions;
- (5) Expert determination clauses are not to be interpreted as broadly as arbitration clauses;
- (6) The courts are reluctant to accept that parties to a commercial contract intended to agree to appoint an expert to determine a dispute absent any qualification/experience in respect of the subject matter of the dispute. Such reluctance is heightened when it is contended that the parties did so while intending not to have any recourse to the courts;
- (7) A court will intervene in an expert determination process to decide a question concerning the authority/jurisdiction of the expert;
- (8) A court will intervene and determine a question concerning the authority/jurisdiction of the expert prior to affording the expert the opportunity to consider that question where it is just and convenient to do so. "Exceptional" circumstances do not need to be established to justify such intervention;
- (9) A court will only intervene prior to affording the expert the opportunity to consider the question provided there is a real, as opposed to hypothetical, dispute between the parties; and

(10) In considering whether it is just and convenient to intervene a court will have regard to the following:

(a) Any decision by an expert as to if his jurisdiction is not final. It is reviewable by a court. To avoid a possible waste of time and costs it is preferable for a court to determine the issue of an expert's jurisdiction upon the raising of the issue thereby enabling the expert process to continue thereafter on foot of a correct interpretation and construction of the applicable clause/contract appointing the expert;

(b) In circumstances where the jurisdiction of an expert, or the extent thereof, is dependent on the determination of a point of law, such as the interpretation and construction of a contract, then it is preferable that a court make such a determination prior to the expert engaging in the process before him any further.

By contrast, Point Village in its submissions, characterised the issues to be decided as follows:

(1) Where the parties to a contract have agreed to refer a dispute to an independent expert for a final and binding determination, does the expert have the authority to decide issues of law or contractual interpretation which are necessary for the resolution of the dispute?

(2) Is there, in this case, any dispute that can properly be characterised as an issue of law or contractual interpretation?

(3) If (1) there is a dispute of law or contractual interpretation and (2) that dispute falls outside the expert's authority, should the Court intervene to grant an advisory declaration about the meaning of a contractual clause before the expert has expressed any view on the issue?

(4) If the plaintiff is seeking to litigate in the courts an issue which is subject to an agreed dispute resolution mechanism, what relief should the Court grant? Should the Court stay, or alternatively strike out, the proceedings?

It was the view of Point Village that there is no dispute of law or contractual interpretation between the parties. Rather, there is an issue of professional judgment or fact about the weight that ought to be attached to certain factors and documents in determining the dispute between the parties as to whether or not Point Square has been completed to a "first class standard appropriate to a prestigious shopping centre commensurate with" the three named comparators.

Premature intervention

In any event Point Village contended that if there was an issue of contractual interpretation, the expert would have the authority to decide it: the proceedings are premature in circumstances where no decision has been reached or no view has been expressed on the matter by the expert. It submitted that, for the situation to be dealt with by the Court at this stage would involve the Court intervening in advance to give an advisory declaration on a hypothetical question on the basis that Dunnes fears that there may be a possibility that the expert could operate outside his mandate.

The court observed that there was nothing particularly controversial about the proposition contended for on behalf of Point Village: clearly, parties who enter into a contract providing for

resolution of disputes by expert determination intend that such determination should be binding. That, of course, does not mean that the courts cannot and will not intervene in an appropriate case. In any event, the court observed that whether or not a court would intervene in any expert determination given in the case under consideration simply does not fall to be considered at this point in time. Any such intervention would appear to be premature. It found that it was clear from the authorities that the courts will not intervene unless there is an appropriate basis for doing so. The court observed that, to a large extent, the Court in this case is being asked to deal with a hypothetical situation given that the independent architect has not given any indication of his approach and there is nothing to suggest that he will venture outside the terms of his mandate.

Expert's mandate

Point Village also maintained that where a dispute is referred to an expert, the expert is required to determine the meaning of any contractual term necessary for the determination of the dispute. The court approved of the following summary of the principles established by the English case law: -

- (1) Where the parties have chosen to resolve an issue by the determination of an expert rather than by litigation or arbitration, the expert's determination is final and binding unless it can be shown that he acted outside his remit.
- (2) A distinction must be drawn between the expert who has misunderstood or misapplied his mandate with the consequence that he has not embarked on the exercise which the parties agreed he should undertake, and the expert who has embarked on the right exercise but has made errors in concluding that exercise and has come up with what is arguably the wrong answer.
- (3) A failure of the first kind means that the determination is not binding because it is not a determination of the kind that the parties have contractually agreed should be binding.
- (4) A failure of the second kind does not invalidate the determination, but may leave the expert exposed to a claim in negligence.
- (5) In deciding whether an expert determination can be challenged, the first step is to construe his mandate. This is ultimately a matter for the court.
- (6) The second step is to ascertain whether the expert adhered to his mandate and embarked on the exercise he was engaged to conduct by asking himself the right question(s) and applying the correct principles.
- (7) Once it is shown that the expert departed from his instructions in a material respect, the court is not concerned with the effect of that departure on the result. The determination is not binding.
- (8) Where the expert has made an error on a point of law which is not delegated to him, the error means that the determination will be set aside. (It has yet to be decided whether an error by the expert on any point of law arising in the course of implementing his instructions will also justify setting aside the determination – the court referenced Lord Neuberger M.R. in *Barclays Bank v Nylon Capital*).

- (9) Where a procedure has been laid down (e.g. to produce a draft memorandum) the expert must follow it. However, what the procedure requires the expert to do is an aspect of the mandate, and ultimately a matter for the court.

The court however qualified its endorsement of the above principles by observing that they should not be elevated into a rigid set of principles to be slavishly applied in every case. It would be important to emphasise that in every case, it will be necessary to construe the precise terms of the contract to see what the parties actually agreed between them as to the role of the expert: one needs to consider precisely what disputes were intended to be referred to the expert, whether the dispute that has arisen is one that is intended to be resolved by expert determination and whether there is any other relevant term in the contract as to how the expert is to reach his determination. It is important to bear in mind that if the expert goes outside the terms of his mandate, his decision will be invalid.

Decision

The court noted inter alia the parties' terms of appointment of the independent expert as provided in the contract, which stated that the appointee (by the appropriate body, in due course) 'shall act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties hereto' (clause 15.1 of the relevant agreement). That agreement went on to state that:

'The expert shall allow both parties to make representations in writing and shall consider such but shall not be limited or fettered by them in any way and shall be entitled to rely on his own judgment and opinion. . . ." (at clause 15.2).

In light of those specific terms of appointment the court observed that:

'It would not have made sense for the agreement to provide that a dispute should be referred to an independent architect for resolution whilst, at the same time, leaving open the need to go court to interpret the terms under which he was to resolve the dispute.' (at para. 66)

The court noted that the parties agreed that this particular area of dispute should be referred to an independent architect. They agreed that whilst he could receive representations from the parties, he was not to be limited or fettered by them and that he was free to rely on his own judgment and opinion. Finally, it was agreed that his decision was to be final and binding on them. Therefore, the court found that there was no basis for interfering with the resolution of the dispute between the parties by the independent expert and that the proper course was to permit the independent expert to carry out the function which the parties had given him.

The court also endorsed a public policy consideration, namely that there is a public policy interest in encouraging the use of alternative dispute resolution to provide potential litigants with a means of resolving their dispute in a way which is cheaper and more efficient than litigation through the courts and that such policy considerations would be undermined if the process provided for by parties in an agreement could be halted by initiating court proceedings in order to seek a judicial determination of a legal dispute in the course of the expert determination process.

The court accordingly found that, in circumstances where the independent architect has been appointed, and in accordance with the terms of the agreement, submissions have been furnished to him, he should be allowed to proceed with his function. The fact that he may be obliged in the

course of carrying out his function to interpret the terms of Clause 7.7.2 does not preclude him from exercising his function. His function necessarily involves the resolution of mixed questions of law and facts. As a matter of practicality, it is difficult to see how he could actually decide whether or not the Point Village Square had been completed in an appropriate fashion without interpreting what was meant by Clause 7.7.2. The court found that that clearly had to have been within the contemplation of the parties when the agreement was entered into by them.

Comment

The combination of the precise terms of the appointment of the independent expert, namely (i) that his decision was to be final and binding on the parties and that; (ii) whilst the expert shall allow both parties to make representations in writing and shall consider such, that *he shall not be limited or fettered by them in any way and shall be entitled to rely on his own judgment and opinion*, appears to have been key to the court's finding in this case. That finding was supported also by the public interest objective of the promotion of ADR, where the parties have chosen to avail of it as the mechanism to resolve their disputes. The judgement is also authority that where an independent expert strays outside the terms of his / her mandate, his / her decision will be invalid.