



**THE COURT OF APPEAL
CIVIL**

Record No.: 2021/283

**Donnelly J.
Faherty J.
Barniville J.**

Neutral Citation No: [2022] IECA 146

VECTOR WORKPLACE AND FACILITY MANAGEMENT LIMITED

PLAINTIFF/RESPONDENT

-AND-

FIRSTCARE IRELAND LIMITED

DEFENDANT/APPELLANT

**JUDGMENT of Ms. Justice Donnelly delivered (*ex tempore*) on the 28th day of June
2022**

1. This is an appeal from a judgment and order of the High Court (Quinn J.) for the plaintiff (hereinafter the respondent) in the sum of €1,192,089.05 together with costs. The defendant (hereinafter the appellant) has appealed on the primary ground that the High Court erred in failing to grant leave to serve a defence and counterclaim, in circumstances where the appellant submits it had established an arguable defence.

2. The respondent's claim before the High Court was that the debt represented the sum due to it by the appellant for work done and goods and services provided under the terms of a written services agreement entered into by the parties on the 10th June, 2014. The appellant is the operator of a number of nursing homes and long term care facilities and the respondent

provided, under the services agreement, various services such as catering, cleaning, laundry and facilities management services.

3. There is no dispute that the services agreement was lawfully terminated by the appellant. In a written notification as required by the agreement, Mr. John O'Donnell of the appellant sent a letter to Mr. Ray Taylor, the operations director of the respondent, stating that the reasons "*for terminating the contract are monetary, with a minimum saving of €200,000 per annum and up to €300,000 per annum achievable with an alternative provider.*"

4. Agreement between the parties was reached as to early termination and there is no issue on this. Payment was overdue on some matters and another agreement was reached as to a payment plan. A letter was sent on the 7th April, 2020 from Mr. O'Donnell saying the plan was to pay €500,000 at the end of March (already paid), €500,000 on the 30th April, €500,000 on the 31st May and the "*balance on the account estimated to be approximately €500,000 on the 30th June 2020*". The respondent wrote back saying they would prefer if all overdue amounts were paid but said it agreed with the plan. It said that this was however an estimate of the final amount.

5. The first two payments of €500,000 were made. Over the weeks following that payment plan, further invoices were delivered. On the 9th July, 2020 the respondent's solicitors wrote a letter saying they had instructions to commence proceedings for the payment of the sum of €1,192,731.67 unless the amount was paid within seven days. The reply from the appellant's solicitor said that an investigation had been initiated into all matters concerning the totality of the services provided by the plaintiff and into the billing and invoicing of the client.

6. The summary summons issued on the 22nd July, 2020. The matter was entered into the commercial list. The respondent sought summary judgment and a date for hearing was set.

7. Each party swore a number of affidavits. Mr. Thomas Neville, the chief financial officer of the respondent, referred to the services agreement and swore that the amount due and

owing had been calculated in accordance with that agreement. The other deponent on behalf of the respondent was Mr. Taylor. Mr. O'Donnell, as well as Mr. Mervyn Smith, who is described as the chairman of the appellant, swore affidavits on behalf of the appellant. A further affidavit of a Mr. Keating was placed before the Court by the appellant and I will refer to that further below.

8. Quinn J. delivered judgment on the 5th October, 2021 and it is against that judgment that this appeal lies. His judgment is detailed. It is not suggested that he erred in identifying the correct principles applicable to summary judgments but that he misapplied them.

9. The appellant's position was that he had established an arguable defence. In particular the appellant submitted that his affidavit evidence disclosed that: (a) the final amount claimed by the respondent in the invoices was higher than expected; (b) there were issues with complaints about the services that had been revealed; (c) there had not been enough time to deal with the individual invoices which were "*still on [Mr. O'Donnell's] desk*"; (d) the amount of cleaning supplies had been tripled during the last months; (e) they had been told that the respondent had availed of a government employee Covid scheme but did not credit this to the appellant; and (f) another catering provider had told the appellant that he had been asked to overcharge the appellant by 10%. An affidavit from Mr. Keating, the sub-contractor, was exhibited in the second affidavit of Mr. O'Donnell.

10. The High Court judge addressed all matters in holding that despite the extensive reference to findings and reports by various people including the group financial controller, none had sworn an affidavit. This, he said, was a classic case of hearsay which reduced the appellant's objections to the invoices to the level of bare assertions. He also said that while the affidavits were replete with references to an investigation, it was nowhere said how long or what form it was to take, or when it would be completed.

11. The judge held that the allegation as regards Mr. Keating was not corroborated in the affidavit of Mr. Keating himself.

12. The allegation regarding the government Covid scheme was wholly speculative and was made by reference to self-contradictory descriptions by Mr. O'Donnell. There was no denial by the respondent that they had availed of the scheme but it was noted that it related wholly to their own sphere of operations. In relation to the issues about the services, he said that termination was the contractual remedy for the appellant's general dissatisfaction or "*sense*" of being overcharged. The judge held that while the replying affidavits had at one level the appearance of containing detail, the reliance on general complaints, not substantiated by reference to invoices, was such as to amount to a series of bald assertions which do not go to the validity of the claim in respect of goods and services delivered by the plaintiff.

The appeal

13. In urging on the Court that the appellant had established an arguable defence, counsel made submissions, that can, I believe, be grouped into five main headings:

- a) a general point about the danger of granting summary judgment;
- b) a claim that the invoices could not be treated as proving the debt;
- c) that the appellant's affidavits were perused more critically than the respondents;
- d) that even if some of the appellant's evidence was hearsay, it was sufficient to establish the necessity for plenary hearing;
- e) that there was a valid counterclaim in existence.

The law

14. As stated above there was no disagreement between the parties on the law nor was there any submission that the trial judge had failed to identify any relevant principle. If there was a

difference in the parties' submissions on the seminal case of *Harrisrange Limited v. Duncan* [2002] IEHC 14, it was that the appellant stressed point (ix) of McKechnie J.'s formulation of the test which states "*leave to defend should be granted unless it is very clear that there is no defence*", while the respondent stressed point (xi), that "*leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence*".

15. At the oral hearing, counsel for the respondent relied upon the judgment of Murray J. (Whelan and Pilkington JJ. concurring) in the case of *Onyenmezu v. Firstcare Ireland Limited* [2022] IECA 11. He did so primarily to bring to the Court's attention the manner in which Murray J. synthesised the legal principles, but also to suggest that what the defence had done in that case, which of course differed on the facts, was to approach its defence in a similar manner by making generalised and unsubstantiated averments.

16. The most relevant parts of that judgment to the present appeal are as follows (paras. 23-24 and 26-27):

"The legal framework within which this issue as it thus evolved falls to be addressed is settled and familiar. A court in exercising the jurisdiction to grant an application for summary judgment must proceed with care and caution. The fundamental question it must address on such an application is whether there is a fair and reasonable probability of the defendant having a real or bona fide defence, in law, on the facts or both. This is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. If the court concludes that there is a fair and reasonable probability of the defendant having a defence thus understood, the court must refuse to enter judgment. In interrogating that issue, the court must satisfy itself before entering judgment that it is 'very clear' that the defendant has no defence. Necessarily, the court must assess the credibility of the defence presented, but

in doing so does not engage in any qualitative assessment of the cogency of whatever evidence may be advanced by the defendant by way of asserting a defence. Indeed it must be remembered that in determining whether the defendant has established such a defence for the purposes of an application for summary judgment the court is concerned to assess not merely whether the defendant has established a fair and reasonable probability of a defence on the basis of facts known at the time of the application, but also whether there - 12 - is a real prospect that some material support for that party's case would emerge if case proceeded to plenary hearing with discovery, interrogatories and oral evidence.

*At the same time, while the court must be cautious in granting summary judgment, and while the requirement that a defendant establish a fair and reasonable probability of the defendant having a defence is a relatively low threshold, it is a threshold: it is neither in the public interest nor in the interests of the parties that straightforward claims for a debt or liquidated demands should require to be determined by plenary hearing, with the additional delay and cost that such a hearing involves and the additional burden thereby placed on the resources of the courts (see *Promontoria (Aran) Ltd. v. Burns* [2020] IECA 87 at para. 4). The defendant must, accordingly, go further than merely assert a defence. Thus, in *IBRC Ltd. v. McCaughey* [2014] 1 IR 749, Clarke J. (as he then was) stated that the type of factual assertions which may not provide an arguable defence are those that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence may be available, or which comprise facts which are in and of themselves inconsistent or contradictory.*

...

*Order 37 Rule 3 of the Rules of the Superior Courts provides that a defendant upon whom a motion for summary judgment has been served 'may show cause against such motion by affidavit ... or by offering to bring into Court the sum indorsed on the summons.' The Rule makes it clear that the affidavit must specify whether the defence alleged goes to the whole or to part only and (if so) what part, of the plaintiff's claim. In the absence of a delivery of pleadings properly so called, it is evident that the Rules operate on the basis that it is via this affidavit that the defendant identifies all grounds of defence upon which it relies in seeking to resist summary judgment, and the affidavit must thus state clearly and concisely what the defence is, what facts are relied upon to support it and – if a legal objection is raised – it must record the relevant facts and the point of law arising thereon (Supreme Court Practice, 1997 Vol. 1 at para. 14/3 to 14/4) : 'In proceedings seeking liquidated sums, a defendant has to put his defence on affidavit' (Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd. and anor. [2012] IEHC 374 at para. 18 per Kelly J.). Indeed, the older authorities operate on the basis that it is only technical legal defences that can be presented without the delivery of such an affidavit, and that an affidavit is required for any defence on the merits (see *Bradley v. Chamberlain* [1893] 1 QB 439).*

*This remains the approach generally adopted by the courts today : Clarke J. in *GE Capital Woodchester Ltd. and anor. v. Aktiv Kapital Asset Investment Ltd. and anor.* [2009] IEHC 512 at para 6.5 explained that insofar as factual issues arise in an application for summary judgment 'it is ordinarily necessary for a defendant to place affidavit evidence before the court setting out the facts which, if true, would arguably give rise to a defence'. He - 14 - proceeded to explain that the defendant must establish either facts which give rise to an arguable defence or that there is a credible basis for*

believing that facts to ground the defence put forward exist. The defendant's affidavit should set out 'in a clear way why the sum claimed is said not to be due and owing to the Plaintiff' (Ulster Bank v. O'Brien [2015] IESC 96, [2015] 2 IR 656 at para. 3 per MacMenamin J.)"

17. It is against that legal background that the appeal must be decided.

Analysis and decision

18. The threshold to resist summary judgment is low but there is nonetheless a threshold. Did the trial judge err in holding that the threshold had not been reached?

Danger of granting summary judgment

19. Counsel for the appellant submitted that the trial judge erred in failing to have regard to the fact that the amount claimed in the summary summons was actually amended by the respondents because there was an administrative error in charging an amount of €642.62. This error had been identified by Mr. Taylor in his affidavit.

20. It is regrettable that any error occurs in originating court documentation and in particular in an affidavit which seeks to provide proof for the assertion made in that document. It is not the case however that every error must automatically lead to a rejection of a right to summary judgment. Each case must be decided on its own facts. If the error appears to support the defence contention that other errors may have been made to the extent that an arguable defence has been made out, that is something to which the Court must have regard. In the present case, the error of itself does not have that result and it is necessary to consider the more substantive points made.

Invoices

21. The appellant submits that the invoices did not speak for themselves. The trial judge agreed with the appellant's submission in that regard and said that the mere presentation of an

invoice cannot of itself constitute evidence of a debt such as would justify the grant of summary judgment in circumstances where the defendant questioned the validity of that invoice. The trial judge referred to the terms of the services agreement which provided that if an invoice is to be disputed in good faith, it must notify the other party as soon as practicable and in any event within five working days of receipt. That, he said, was never invoked by the defendant and there was no explanation for that omission. The trial judge did not make his ruling solely on the basis of the clause but instead said that the appellant never entered into correspondence following the initial invoice and demands for payment, nor in its replying affidavits did it identify any particular invoice which it disputed. In those circumstances the trial judge said that the respondent could validly invoke the clause in the services agreement.

22. The trial judge did not err in that regard. The appellant had only made general complaints about the invoices and never addressed them in any detail. It can also be said that the course of dealing between the parties supported the conclusion of the trial judge. The amount claimed was close to the type of figure that had been agreed between the parties in the payment plan. Moreover, Mr. O'Donnell swore on oath that the invoices were still on his desk despite the time that had passed. Indeed, in his second affidavit he said that €200,000 worth of invoices had been cleared but he never identified to which of the invoices this referred. I note that despite agreeing that this sum was owed, the sum was never paid over.

23. It must also be said that the respondent had in fact provided uncontroverted evidence that the majority of the items billed for were agreed in advance with the appellant in accordance with the terms of the services agreement. Furthermore, as will be discussed further below, where there was any particular dispute raised, the respondent was able to counter that by specific reference to requests or agreements by agents of the appellant.

24. For all these reasons I reject this submission.

Unequal critiquing of the affidavits

25. The submission that the trial judge did not subject the affidavits of the respondent to the same level of critique as he gave to those of the appellant does not withstand scrutiny. The trial judge was presented with what appeared to be a straightforward claim for money due and owing under the services agreement on foot of invoices which had been particularised and where the course of dealing including the payment plan which supported the view that something in the region of €1,000,000 was agreed to be owing.

26. The appellant put forward a number of affidavits and replying affidavits to support its contention that there was an arguable defence. There was a duty on the trial judge to examine those affidavits to see if they established such an arguable defence. If they did, he was required to permit the appellant to defend the action. If, however, he was to give judgment for the sum due, he was required to give substantive reasons as to why, despite the assertion of an arguable defence(s), he was not granting leave to defend. I do not wish to be taken as being critical of the submission when I say that it is in some ways akin to criticising a judge for giving too many reasons. He did explain, following detailed reference to the affidavits filed on behalf of the appellant and where appropriate to the affidavits on behalf of the respondent, why he was refusing leave.

27. I reject this submission.

Hearsay

28. In many ways this is the heart of the appellant's submission. While accepting that some of his evidence may be described as hearsay, counsel submitted he had put forward sufficient evidence to demonstrate that a plenary hearing was required before the contested matters could be properly adjudicated upon. To borrow the words of Murray J., he was submitting that there *"is a real prospect that some material support for [his] case would emerge if [the] case proceeded to plenary hearing with discovery, interrogatories and oral evidence."*

29. In answer to that, counsel for the respondent relied upon the judgment of the High Court which demonstrated, using the words of Clarke J. in *IBRC Limited v. McCaughey* [2014] IESC 44, that the factual arguments did not provide an arguable defence as they amounted to “*mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent*”.

30. I agree with the trial judge that the assertions of the appellant were general and unsubstantiated. They were also contradictory and inconsistent. The trial judge was also quite correct in saying that where serious allegations are made, including those tantamount to allegations of fraud, as in this case, it was not open to a party to rely upon hearsay.

31. In the present case two allegations in particular which were tantamount to fraud (or some type of corruption) were made. The first was the allegation that Mr. Keating had been asked by the respondent to increase his prices by 10% “*as a kickback*” for the respondent. Mr. O’Donnell and Mr. Smith maintained this on affidavit. However, an affidavit of Mr. Keating was exhibited, a strange procedural move in itself, which was nonetheless allowed by the trial judge. In considering that that affidavit did not corroborate Mr O’Donnell’s or Mr. Smyth’s assertions at all, but concerned a different issue, namely a rebate apparently in the context of a national volume discount, the trial judge correctly said that this was wholly inconsistent with what was being alleged. The trial judge was quite correct to reject that as a possible arguable defence.

32. In the course of oral submissions, counsel for the appellant suggested that a further affidavit of Mr. Keating had been obtained. That is not something that this Court can consider as it is not before us. Indeed, it is worth remarking that despite the time that has elapsed since the judgment of the High Court, no application to admit further evidence has been made by the appellant. Therefore, despite the obvious inadequacies of the appellant’s evidence having been identified by the trial judge, no evidence as to the further perusal of the invoices has been put

before the Court nor has any evidence of the investigations that were proposed to be carried out.

33. In relation to the issue of some kind of impropriety in the use of the government Covid scheme by the respondent, this is also wholly speculative. In the first place, this was a claim that was presented in a classic case of hearsay upon hearsay. Mr. O'Donnell said that he had been "*presented with information from the new Catering Services Provider, that they had been recently informed by a senior employee of the Plaintiffs that the Plaintiffs had processed a claim under a Government Covid-19 Crisis Funding Scheme for catering staff working in the Defendants' catering department.*" He then stated in his second affidavit that he had been informed of this by Ms. Maureen Hennessy, the chief financial officer of the appellant, after she had been informed of it by the new catering provider. The claim was therefore made, as the trial judge said, by self-contradictory descriptions given by Mr. O'Donnell. The judge also said that the plaintiff does not deny it availed of the scheme but asserts, consistent with a clause in the services agreement, that the manner in which payroll-related matters were done, including taxes, rebates and the like, is entirely within its own sphere of operation as far as it concerns its own employees. That was not in turn contested by the appellant. Such a serious claim ought not to have been made by way of hearsay, but particularly not by way of affidavit. It amounts to a bald assertion of a defence which does not meet the low threshold.

34. It is also striking that Ms. Hennessy did not swear an affidavit even though the appellant's affidavits referred to her input to substantiate the claim of an arguable defence on a number of occasions. References to investigations by her and others were never substantiated and were again in the realm of speculation. No reason has been put forward as to why this was not done and no evidence as to results of any continuing investigations have been placed before the Court.

35. In relation to claims about increased supplies during the beginning of the Covid-19 pandemic, the respondent had adduced evidence that these sums were ordered either directly by the appellant's staff or were sanctioned or agreed by them. This accords with common sense as this was the beginning of the Covid-19 pandemic. In any event, the trial judge correctly assessed the appellant's grounds overall as being mere assertions and that they had not identified any particular invoice with which there was a problem.

36. I am satisfied that the trial judge correctly dealt with the asserted defences on behalf of the appellant. These were bald assertions unsupported by evidence or by any realistic suggestion that evidence may be available, or indeed they comprised alleged defences where were in and of themselves inconsistent or contradictory.

Counterclaim

37. The appellant raised the issue that it had a valid counterclaim amounting to approximately €3.5 million of overpayment during the life of the contract. During the course of the appeal, the Court was told that since the judgment of the High Court the appellant had issued a plenary summons which mirrors the draft counterclaim exhibited to the affidavit of Mr. O'Donnell. In those circumstances, it is not necessary to enter into any further consideration of that issue.

Conclusion

38. The High Court gave a detailed judgment in which the legal principles were correctly identified. This appeal was based upon a contention that the High Court had simply gotten the matter wrong. I am satisfied that the trial judge did not err in the application of those principles. I have also considered the final factor identified by McKechnie J. in *Harrisrange Limited* which is to be determinative bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, which is the achievement of a just result whether

that be liberty to enter judgment or leave to defend as the case may be. I am satisfied that the just result in this case was that which the High Court judge found, that is that judgment in the amended sum claimed be granted to the respondent.

39. For the reasons set out I dismiss this appeal.