

THE HIGH COURT

[2021] IEHC 635
[2020 No. 189 S]

BETWEEN

VECTOR WORKPLACE AND FACILITIES MANAGEMENT LIMITED.

PLAINTIFF

AND

FIRSTCARE IRELAND LIMITED.

DEFENDANT

JUDGMENT of Mr. Justice Quinn delivered on the 5th day of October, 2021.

1. This judgment relates to the plaintiff's application for summary judgment in the amount of €1,192,731.67, being the unpaid balance of invoices issued by it to the defendant between 20 January 2020 and 22 May 2020. I have concluded that the plaintiff is entitled to summary judgment in the amount claimed.

The Services Agreement

2. The defendant owns and operates a group of nursing home and long term care facilities. It appointed the plaintiff to provide non-clinical services to it at those facilities. The non-clinical services comprised catering, cleaning, laundry and facilities management, and the contract between the parties provided for variations to the scope of the services.
3. The plaintiff originally provided catering services to the defendant pursuant to a catering agreement dated 4 December 2008. A Services Agreement entered into on 10 Jan 2019 governed the wider range of services, and, subject to certain modifications, was in force until its termination on 30 April 2020.
4. The services to be performed were detailed in Appendix A to the Services Agreement. This detailed appendix stipulated such matters as hours of service, particular functions to be performed, parameters for agreement of quantities on produce and consumables and matters relating to personnel. Such detailed information was contained in the appendix in respect of each of the facilities respectively.
5. The Agreement permitted the plaintiff to subcontract certain services from time to time with the prior approval of the defendant. It expressly provided that the catering services could be subcontracted to Campbell Catering Limited., and the cleaning services could be contracted to Resource Group Limited, who were later replaced with Noonan Cleaning Services Limited.
6. The Agreement contained detailed provisions also relating to quality standards, certain indemnities as between the parties, operational matters, the provision of financial information, provisions governing the management of employees of the respective parties and provisions regarding insurance, limitation of liability and termination of the Agreement.
7. Clause 7 related to "Compensation". The level of fees was governed by an exhibit which contained comprehensive provisions governing the rates of charge for each of the categories of services provided. Clause 7(c) of the agreement covered payment terms and provided as follows: -

"All invoices submitted by Aramark (the trading name of the plaintiff) to clients (the defendant) shall be paid within 30 days of the invoice date. If a client disputes an invoice in good faith, it shall notify Aramark as soon as practicable and in any event within five working days of receipt, in which case the parties shall work together in good faith to resolve the dispute".

8. Clause 7(d) provided that a change in the nature or scope of the services would constitute a change in scope of the agreement and could result in a change in the fees.
9. During the years 2018 and 2019, certain changes were made to the scope of the services. In particular, in 2018 it was mutually agreed that cleaning services, which had been transferred to Noonan Cleaning Services Limited, would be taken "in house" by the defendant. It was also agreed that laundry services would be removed from the Agreement.
10. In 2019 the defendant took back from the plaintiff the payroll services element of the contract.
11. Clause 10 of the Agreement provided for termination. It provided that either party considering terminating the Agreement should give to the other party a notice containing its reasons for considering termination. During an initial period of 30 days following the receipt of such notice, the parties would discuss those reasons in an effort to avoid the need for termination. Following the expiry of that 30-day period, the notifying party, if not fully satisfied, could terminate the agreement on giving 60 days' written notice of its intent to terminate.
12. In effect this was a provision for a 90-day period of notice.

Termination of the Agreement

13. On 2 March 2020, the defendant gave the initial 30-day notice to the plaintiff, stating that it was giving this to allow for alternatives to termination to be sought, and prior to issuing a 60-day notice of termination at the end of the 30-day period.
14. The letter, written by the defendant's managing director, Mr. John O'Donnell, stated as follows: -

"Per the contract we are providing you with the initial 30-day notice for the discussion period, which again per the contract is intended to allow for alternatives to termination to be sought, and prior to issuing the 60 days' notice of termination at the end of this 30-day period

The reason 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. Due to the decision of the board of the company as outlined, we see that there is little likelihood of this decision being reversed.

. . . Both parties have always operated this contract on a very helpful and professional manner and I think it is very important that we now agree a co – ordinated and mutually acceptable communication and action strategy in relation to this matter”.

15. The letter concluded by inviting the plaintiff to waive the initial 30-day discussion period, and include those days as part of a 90-day termination notice, with the effect that the contract would run to 31 May 2020.
16. Two features of the letter are noteworthy in light of the issues which later emerged between the parties. Firstly, the defendant makes it clear that the decision to terminate is grounded on monetary considerations. The defendant is saying that it expects to achieve price savings of between €200,000 and €300,000 per annum with an alternative provider. It does not raise a question as to the validity of the plaintiff’s invoicing up to this point, but focuses on its expectation of achieving more competitive pricing elsewhere. Secondly, the defendant acknowledges that the contract had been operated professionally by both parties, contrary to assertions made in the replying affidavits.
17. Discussions took place between the parties and by mutual agreement the termination date was fixed for 30 April 2020.
18. Both parties refer extensively to an agreement having been made that the account between the parties would be brought up to date and that a sum of €2 million would be paid over four instalments to be paid on 31 March 2020, 30 April 2020, 31 May 2020 and 30 June 2020. The first two payments of €500,000 were made. There is disagreement between the parties as to the precise terms and meaning of this agreement. It was not documented but is referred to in a letter of 7 April 2020 from Mr. O’Donnell to Mr. Shane Flynn, managing director of the plaintiff in which he states as follows: -

"Dear Shane,

As discussed previously the payment plan to clear the Aramark Catering and FM account balances is €500,000 at the end of March, €500,000 on the 30 April, €500,000 on the 31 May, and the balance on the account estimated to be approximately €500,000 on the 30 June 2020, with the first €500,000 having been paid”.

19. By a reply of 8 April 2020 Mr. Flynn stated that the plaintiff would prefer if all overdue amounts were brought up to date immediately, but that “in the spirit of partnership I confirm Aramark’s agreement to your proposed payment plan on the following basis”.
20. He continued: -

"I acknowledge that your proposed numbers are estimated in terms of the final amount to be paid under our contract, but in principle, I agree to your proposed schedule of repayment dates and amounts and want to be clear that we, at Aramark can expect and require all outstanding monies to be paid in full no later

than the agreed dates, with the final balance to be paid in full on 30 June 2020. For clarity that means that we require a payment of €500,000 on 30 April 2020, €500,000 on 31 May 2020, and the balance to be paid in full on 30 June 2020".

21. Over the following weeks, exchanges took place between the parties in which the plaintiff delivered further invoices which had not been delivered at the time when the instalment agreement had been made, the last of them on 22 May 2020. In these exchanges the plaintiff was pursuing the defendant at least in relation to the May payment. Reliance is placed by the plaintiff on certain assurances that the matter was "in hand". For example, on 8 June 2020 Mr. O'Donnell indicated to the plaintiff that he was due to meet with the board the following Wednesday and *"one of the items on the agenda is payment to Aramark and I will give you a call on Thursday morning to update you"*.
22. The payments of €500,000 were made on 30 March 2020 and 30 April and no further payments were made.
23. On 12 June 2020, the plaintiff wrote to the defendant expressing its disappointment that the payment due on 31 May 2020 had not been made and demanding payment of all sums due within seven days of that letter, failing which proceedings would follow.
24. On 13 June 2020, the chairman of the defendant, Mr. Mervyn Smith, emailed Mr. Flynn stating: -

"As chairman, I have spoken to senior Firstcare management in relation to Aramark and recent communications and I am deeply unhappy with what I am hearing and I am deeply unhappy with the contents of this communication (being a reference to the demand for payment). I will be forwarding it on to our solicitors on Monday and we be arranging (sic) to meet them ASAP".

25. On 9 July 2020, the plaintiff's solicitors OSM Partners wrote to the defendant giving notice that they had instructions to commence proceedings for the payment of the sum of €1,192,731.67, unless that amount was paid within seven days.
26. By an undated letter, the defendant's solicitor Owen O'Sullivan replied stating that arising from recent communications between the CEO of the defendant and the chairman of the defendant an investigation had been initiated into all matters relating to the totality of the services provided by the plaintiff to the defendant *"and into all matters relating to the billing and invoicing to our client"*.
27. The letter continued: -

"The chairman of Firstcare received some initial feedback that is very concerning and a decision has been made to initiate a wider and more detailed investigation with the assistance of external specialist professionals. In addition, a very serious matter in relation to government Covid-19 support funding for catering employers and employees has been brought to the attention of our client and it has begun an investigation into that matter as well."

Our client believes that it is critical that a full and proper investigation is carried out into all of the aforementioned matters in order for it to ascertain what monies, if any, may be owed by it to your client, Vector, and what monies your client may in turn owe to Firstcare”.

28. On 7 August 2020, Messrs OSM replied. They stated that the plaintiff was a stranger to the issues referred to and that no such issues had ever been raised with the plaintiff.
29. OSM referred also to Clause 7 of the Services Agreement which contains the requirement that if any invoices were to be disputed notice to that effect must be given within five working days of receipt. They noted that this provision had never been invoked by the defendant.
30. They continued: -

“Respectfully, your letter, received after demand for payment has been made, is the first indication that your client had any issue with the full discharge of the monies owed to our client. The bald, vague and unsubstantiated claims in your letter, appear to our client to be more about an effort to delay and refuse payment on validly issued invoices than raising any genuine issue of concern or dispute.

Furthermore, the issue of any government Covid-19 payments are entirely extraneous to the performance of and payment under the Services Agreement ”.

These proceedings

31. The application for summary judgment is grounded on an affidavit sworn on 13 August 2020 by Mr. Thomas Neville, chief financial officer of the plaintiff. Mr. Neville refers to and exhibits the Services Agreement and the correspondence referred to above. He then recites and exhibits the 68 invoices issued between 22 January 2020 and 22 May 2020 which he says are for a total sum of €1,192,731.67. Mr. Neville swears that the amount due and owing has been calculated in accordance with the Services Agreement and he refers to the letter of 7 August 2020 rebutting the allegations made by the defendant.

Affidavit of John O’Donnell sworn on 25 August 2020

32. Mr. O’Donnell refers to the Services Agreement and he states that: -

“Subject to the plaintiffs executing all aspects of the Services Agreement to a high standard, the defendants agreed to pay for all agreed and approved invoices received from the plaintiffs”. (emphasis added)

33. Mr. O’Donnell does not refer to the provisions of Clause 7(c) or offer any explanation as to why a notice disputing any of the invoices as required by that clause was not delivered.
34. Mr. O’Donnell says that the defendants had cause to raise various service quality issues from time to time with the plaintiffs over the first few years of the agreement, but that for the most part the agreement worked satisfactorily.

35. He says that in 2017 he received certain complaints from management colleagues in relation to the services provided by the plaintiffs, and that these originated from residents, resident's families, staff and regulatory bodies. He says that these issues were raised in various meetings with Mr. Robert Doyle, general services manager for the plaintiff. He says that Mr. Doyle assured the defendant that he and his colleagues will work hard to improve the overall quality of services.
36. There is no suggestion that invoices relating to this earlier period remain unpaid.
37. Mr. O'Donnell then refers to having raised the quality of service issues with the chairman of the defendant Mr. Smith. He says that in 2018 the defendant engaged a consultant, Ms. Maureen Hennessy, to commence a department by department review inside each nursing home and to report back with her findings. Mr. O'Donnell says that the plaintiffs were not as cooperative and helpful with the work of Ms. Hennessy as he would have expected, notwithstanding, he says, that this was purely a fact finding exercise.
38. Mr. O'Donnell stated that one of the first issues Ms. Hennessy reported was her surprise that the plaintiffs had subcontracted out a significant part of the services. He says that this led to many further reviews and communications with the plaintiffs and in the end to mutual agreement that the cleaning and personal laundry service be removed from the Services Agreement.
39. Mr. O'Donnell says that Ms. Hennessy, following the occurrence of a vacancy, was later appointed group financial controller of the defendant, commencing in January 2019. At Ms. Hennessy's suggestion, two further consultants were then retained by the defendant. A Mr. Ian Jackson was retained as a catering consultant and Mr. Damien Traynor was retained as a facilities management consultant. These consultants were commissioned to visit the nursing homes and report back. Mr. O'Donnell states that Mr. Jackson identified improvements required in the catering area. He says also that Mr. Traynor recommended discontinuance of the facilities management and waste and energy management functions under the Services Agreement.
40. No reports or written communications of any of these contracts were exhibited. Nor was any affidavit sworn by Ms. Hennessy, Mr. Jackson or Mr. Traynor. Mr. O'Donnell simply states that they reported to him on unsatisfactory aspects of the performance of the plaintiffs.
41. Mr. O'Donnell then refers to the termination of the agreement and the discussions leading to the agreement for the payment for instalments. Importantly, Mr. O'Donnell states that he made the agreement as to the payment of four instalments: -

"In good faith I agreed to make four monthly payments, €500,000 each with the plaintiff, based on an implicit and logical understanding that everything was fully in order with all invoices already received and that all subsequent invoices received from (the plaintiff) would all be satisfactory and stand up to scrutiny".

42. Mr. O'Donnell says that the defendants paid the first two of the four instalments and that subsequent to the payment plan being agreed the defendants received invoices during April and May totalling €963,634.71. He states: -

". . . these proposed invoices are still on my desk and have not been approved and have not been signed off as agreed in due and owing to the plaintiff. The amount of these invoices is substantially in excess of the total estimated by the defendants and me".

43. Mr. O'Donnell states that many of the invoices relate to services provided during the Covid-19 crisis, and that *"under all headings my senior colleagues have queries and concerns. Until they are properly addressed, then I as a Managing Director am not in a position to sign off and approve these proposed invoices and therefore they are not deemed due and owing by the defendants"*.

Defendant's internal meeting 10 June 2020

44. Mr. O'Donnell referred to an internal meeting of the defendant held on 10 June 2020. Extensive reliance is placed by the defendant on discussions had at this meeting. Mr. O'Donnell states that at that meeting, he appraised the chairman of his dealings with the plaintiff and says that he *"Highlighted the inconsistencies between the amounts of the invoices received and the sums that were projected by the defendants and plaintiffs in relation to the months of March, April and May 2020, when agreeing to specific monthly payments of €500,000 each"*.
45. He says that he showed the chairman examples of the relevant invoices and explained that he was not in a position to approve the March, April and May proposed invoices.
46. Mr. O'Donnell says that the outcome of the meeting was that the chairman informed Mr. O'Donnell of his decision to launch an investigation, with external professional assistance into all service and financial matters pertaining to the Services Agreement with the plaintiff. He says that he was directed that until this was properly and fairly executed no further monies were to be paid to the plaintiffs.
47. Mr. O'Donnell states that the chairman indicated to him that *"if arising from the investigations, that a claim was warranted by the defendants against the plaintiffs then he would have no hesitation issuing legal proceedings against the plaintiffs in relation to such a claim"*.
48. Mr. O'Donnell referred also to two additional matters which arose in the discussions. These relate firstly to the operation of the government Covid-19 Temporary Wage Subsidy Scheme, (the "TWSS"), and secondly a certain allegation relating to pricing made by a subcontractor, Andrew Keating.

The TWSS

49. Mr. O'Donnell said that he had been informed by a new catering services provider, that they had recently been informed by a senior employee of the plaintiff, unnamed, that the plaintiff had processed a claim under the Government Covid-19 Temporary Wage Subsidy

Scheme for catering staff working in the defendant's catering department. Mr. O'Donnell said that it was his belief that the plaintiff ought to have informed the defendant in advance of such an action being taken and that the defendant ought to have been credited with the sums received.

50. In this affidavit Mr. O'Donnell states that he was informed of this matter by a new catering supplier, who he does not name. He contradicts that averment in his second affidavit (sworn on 20 September 2020) when he states that Ms. Hennessy had informed him of this matter, after she had been informed of it by the new catering provider who Ms. Hennessy names as Q Café.

The Andrew Keating allegation

51. Mr. O'Donnell stated that the chairman then informed him at the meeting that he had been presented with certain information from a Mr. Andrew Keating, of Gahan & Keating Builders, the main facilities management subcontractor retained by the plaintiff. Mr. Keating had informed the chairman that in February 2019 he had been invited to a meeting with the plaintiffs and asked to increase his prices by 10% *"as a kickback for the plaintiffs and to the obvious serious detriment of the defendants"*. Mr. Keating had informed the chairman that he had declined to be a party to such action. Mr. O'Donnell continued that he believed that in the light of this information: - *"the entire matter needed to be investigated on a range of fronts, including questions to be answered in regard to the relationship between the plaintiffs and all the other suppliers and contractors employed by the plaintiffs and invoiced to the defendants under the Services Agreement"*.
52. Mr. O'Donnell said that he said to the chairman that if the plaintiffs *"had the audacity to approach a longstanding service provider of the defendant, in such a manner, that an investigation be carried out to determine whether similar style detrimental arrangements had been made with any other subcontractor suppliers that were not known to the defendants"*.
53. Mr. O'Donnell does not say when this information was first brought to the attention of the chairman. Mr. Smith later says that this was on 4 June 2020.
54. Mr. O'Donnell concludes by stating his belief that the invoices submitted to the defendants subsequent to the notice of termination of the service agreement *"have at least in part not been fairly or properly prepared and have been prepared and submitted solely for the purpose of insuring that the total amount in dispute between the plaintiffs and the defendants exceeds the threshold for entry into the Commercial List"*.
55. He says therefore that he believes that the invoices were prepared in contravention of the agreement on a payment plan made in or about 08 April 2020.
56. Mr. O'Donnell concludes by stating that the total sum on invoices issued by the plaintiffs and approved for payment by him is approximately €200,000 and that this amount falls far short of the threshold of €1 million for entry to the Commercial List.

57. The matter of entry to the Commercial List was disposed of when the proceedings were entered by order of Barniville J.

Affidavit of Andrew Keating sworn on 25 August 2020

58. The defendants delivered an affidavit sworn by Mr. Andrew Keating on 25 August 2020. Mr. Keating says that he is a director of Gahan & Keating Builders, which was a subcontractor to the plaintiff. Mr. Keating refers to a meeting which he attended on 16 January 2019 in the offices of the plaintiff with Mr. James Kelly, the plaintiff's head of procurement and a number of his colleagues. Mr. Keating states that during the course of the meeting: -

"Mr. Kelly requested of me to agree to give Aramark (the plaintiff) a rebate totalling 10% of all invoice amounts from my company to Aramark in relation to work done for Firstcare. Mr. Kelly stated this 10% amount was for the sole benefit of Aramark and it was not a matter that Firstcare would be made aware about".

59. Mr. Keating said that Mr. Kelly said that there were: -

"Opportunities for my company to do work for other Aramark clients and that it would be in my interests to seriously consider this request. I was shocked at the rebate request and I became very uncomfortable in the meeting and I raised other business matters to deflect away from the matter that Mr. Kelly had raised. The meeting ended and it was my hope that the matter would never be raised again".

60. Mr. Keating says that Mr. Kelly followed up with him on a number of occasions thereafter but he declined to agree to the request. He exhibits certain emails between himself and Mr. Kelly. During the course of these exchanges, Mr. Kelly at one point invited Mr. Keating to agree to a 7% rebate on all business, instead of the originally requested 10% rebate. When asked why he was looking for the rebate, Mr. Kelly stated that it was *"In return we aim to open your business up to wider Aramark opportunities"*.

61. A remarkable feature of this affidavit is that Mr. Keating states that he was being asked to give the plaintiff rebates totalling 10% or potentially only 7%. The allegation made by Mr. O'Donnell is that Mr. Keating was asked to increase his prices by 10%. It may be that more transpired between Mr. Keating and the plaintiffs which would link rebates to a price increase. However, the existence of such a link is not even asserted by the defendant or Mr. Keating. The affidavit sworn by Mr. Keating and delivered on behalf of the defendants is wholly inconsistent with the allegation by Mr. O'Donnell, based on hearsay, that Mr. Keating was asked to increase his prices.

Affidavit of Ray Taylor sworn on 4 September 2020

62. Mr. Taylor is the operations director of the plaintiff. He says that the quality service issues and other matters referred to in the affidavit of Mr. O'Donnell were all matters which appear to have been discussed internally within the defendant over a period of time, going back as far as 2017. However, he says that they do not relate to the invoices the subject matter of the proceedings which relate exclusively to work done and service provided during the course of 2020. He also says that the plaintiff has no record of

serious complaints by the defendant with respect to the quality of work done and goods and services provided. He says that the first time these matters were raised was in the defendant's solicitor's undated response to the letter of demand for payment.

63. Mr. Taylor asserts that the defendant has not queried the validity or accuracy of any single referenced invoice, and states that Mr. O'Donnell has said only that he has yet to formally consider them and sign them off.
64. Mr. Taylor states that the arrangement between the plaintiff and its staff and the government in relation to the operation of the TWSS scheme is not of concern to the defendant. He says that the Services Agreement itself provides that the plaintiff will be responsible for all payroll related matters attributable to its own employees.
65. Mr. Taylor asserts that the invoices are consistent with all of its prior dealings with the defendant throughout the duration of the Services Agreement.
66. Mr. Taylor denies that the plaintiff ever asked Mr. Keating to increase its prices on the Firstcare contract in the manner suggested. He describes this therefore as "*A needlessly scandalous averment*".

Affidavit of John O'Donnell sworn on 29 September 2020

67. Mr. O'Donnell says that in late May 2020 the defendant's group financial controller Maureen Hennessy presented him with a summary of the invoices for March and April 2020, totalling €963,000. He says that this was a significant increase of approximately €193,000 or 25% on what had been expected by the plaintiff and the defendant to be invoiced. He says that he was "*shocked at the increase*" which clearly required an analysis and explanation.
68. Mr. O'Donnell says that in the course of his discussions with Ms. Hennessy she informed him that the plaintiff had ordered three times a typical weekly order for goods in the last week of April 2020 from one of the contracted suppliers, Bunzl, for cloths, toilet paper, chemicals, gloves, paper hand towels, bin bags, handwash, mop holders and catering disposal items. He says that the plaintiff had not sought the approval of the defendant in placing this order. He also says that an unusual feature of this order was that the plaintiff had typically never ordered these items on behalf of the defendant before. He also said that the order made no logical sense considering that the relationship was approaching its termination, and therefore it was surprising as he would have expected that the plaintiff would be looking to minimise amounts owing from the defendant and not increase the order levels.
69. In a second affidavit Mr. Taylor exhibits email exchanges approving these orders.
70. Mr. O'Donnell referred also to the claims made under the TWSS scheme and complains that the plaintiff did not credit the amount of those subsidies in any of its invoices, which he says the plaintiff should have done, and this amounted to an overstatement of invoices by approximately €50,000.

71. Mr. O'Donnell said that Ms. Hennessy advised him that multiple verbal requests for a detailed breakdown of the relevant charges had been made and that the relevant information was never provided. He continues: -

"There was a view building with Maureen Hennessy at the time that because of the reluctance of Robert Doyle, general services manager of the plaintiff, to provide the defendant, was being charged a (sic) 'monthly budgeted' labour charge, which could be in excess of the actual catering labour charge, which would not have been correct under the contract, after the initial fixed catering labouring charge for the first three years for the Services Agreement, as detailed in Clause 1.4(a)(i) on p. 46 of the Services Agreement and possibly why the requests for this information were ignored. This view had gained further traction and is supported by the fact that the new catering provider is charging a lower average labour charge than the plaintiff was charging. This all requires time to complete an in-depth analysis as our catering labour charges would currently be running at a higher level over the last number of months due to infection control procedures within the homes requiring additional catering hours". (emphasis added)

72. No explanation is proffered as to the significance of the statement that all of the above was based " . . . on a view building with Maureen Hennessy . . .".
73. Mr. O'Donnell continues by referring to estimates of a catering labour overcharge in respect of the first three years of the contract. He states that that overcharge *"Alone by the plaintiff for the three years is likely to be of the order of €450,000"*.
74. Mr. O'Donnell then refers to regular communications between the defendant and Mr. Ian Jackson, the catering consultant retained by the defendant, none of which are exhibited. He summarises the views given by Mr. Jackson on a number of issues including such matters as control of food waste, food waste disposal and visibility on the breakdown of costs.
75. Based on the input of Mr. Jackson, Mr. O'Donnell extrapolates that for the last twelve months of the contract *"There is an overcharge of approximately €91,700 based on the €917,600 charge by Aramark for food and food related costs in 2019"*.
76. Mr. O'Donnell continues with further references to numerous internal discussions within the defendant during which the defendants formed a view that the plaintiff was seeking to *"ramp up"* orders prior to the end of the contract at the end of April and the view of Ms. Hennessy that *"there needs to be a downward adjustment in a significant number of their invoices"*.
77. Mr. O'Donnell says that it is not reasonable that the defendant should have been paying management fees for the duration of the contract from 10 June 2014 *"considering the service level being provided to the defendant and the plaintiff not acting in the best interests of the defendant"*. He states that those fees totalled €160,250 per annum and

extrapolates this to a total sum of €944,000.11 over the entire period of the contract. In relation to the intended investigation, Mr. O'Donnell states as follows: -

"The review to date is very much of a preliminary nature, and the totality of the issues raised need time and a provision of backup information from the plaintiff to be fully investigated".

78. He continues: -

"I believe the defendant needs to be given the appropriate time to properly investigate all previous invoices provided by the plaintiff, and that the defendant is given the required time and cooperation from the plaintiff to investigate the very serious issues raised by external third parties in relation to alleged actions by the plaintiff in relation to the Services Agreement with the defendant". (Emphasis added)

79. With reference to the allegation of the approach to Mr. Andrew Keating of Gahan & Keating, Mr. O'Donnell says as follows: -

"The defendant was led to the inevitable conclusion that the plaintiff had approached other subcontractors and suppliers requesting them to increase their prices and/or to build in additional mark-ups for the plaintiff's benefit and was not acting in the defendant's best interests".

80. No evidence is proffered to support this "inevitable conclusion". Mr. O'Donnell refers to the affidavit sworn by Mr. Keating, which as I have described earlier does not corroborate the allegation.

81. Mr. O'Donnell then summarises the deductions which he believes should be made from the claim of the plaintiff, totalling €1,671,065.

82. He provides a breakdown of these under the different headings of Catering Services, Facility Management Services, Management Fees and "Capped Costs".

83. He also states that these deductions relate only to the invoices the subject of the current claim and do not cover amounts that should be deducted for services billed to the defendant in 2020 and prior periods and which have been paid by the defendant.

84. At first view, these proposed deductions appear to be very specific in that detailed numbers are provided. However, the figures under each of the headings amount to no more than a calculation on the part of the defendant of amounts which it claims are due to it. They are only calculations and are not supported by evidence. In many cases they are only estimates.

85. Mr. O'Donnell exhibits the draft of a proposed Defence and Counterclaim which the defendants seek leave to deliver.

86. The draft Defence and Counterclaim contains a general denial that work was done or services provided by the plaintiff up to and including the date of termination of the Services Agreement that "*justified the sums invoiced by the plaintiff to the defendant as set out in the special indorsement of claim*". It says that sums invoiced by the plaintiff for March and April 2020 were a significant increase of approximately 25% "*on what had been expected by the plaintiff and the defendant to be invoiced*". Whatever about the defendant's "expectations" no basis is stated for the assertion that the invoiced amount exceeded what had been expected by the plaintiff to be invoiced, or as to the relevance of such expectations.
87. Reference is then made to refunds alleged to be due in respect of the TWSS scheme, an excess for the monthly budgeted labour charge over the actual catering labour charge, overcharges for food, estimates in respect of additional waste charges, deductions in respect of goods which the defendant says were not requested – but does not deny were received and used – alleged overcharges and the claimed amounts of €1,671,065 referred to earlier.
88. Under the heading "*Counterclaim*" it is alleged that of the €35 million paid by the defendant to the plaintiff over the life of the contract it has been overcharged by approximately €3.5 million. It claims also that it has incurred costs for the preparation of reports by experts on facilities management and catering costs, none of which are exhibited.

Affidavit of Mervyn Smith sworn on 29 September 2020

89. Mr. Smith is the chairman of the defendant. His affidavit contains a repetition of the matters referred to by Mr. O'Donnell and his summary of matters which he says have been brought to his attention by Mr. O'Donnell, principally in the course of the defendant's internal meeting on 10 June 2020.
90. Mr. Smith refers to a telephone call he received on 4 June 2020 from Mr. Andrew Keating, director of Gahan & Keating Builders. He says that during the telephone call Mr. Keating informed him that in early 2019 he had been requested by the plaintiff to increase his prices by 10% on all of the plaintiff's related invoices, without the knowledge of the defendant. He says that Mr. Keating informed him that "*in return for this monetary kickback, Vector were promising access to their large client base to carry out other maintenance and small works*". Mr. Keating had informed Mr. Smith that he declined to participate in such an arrangement.
91. A remarkable feature of Mr. Smith's affidavit on this subject is that it is not corroborated by the affidavit of Mr. Keating delivered on behalf of the defendants, in which he refers to a proposal to provide rebates to the plaintiff, and not a proposal for an increase in the charges.
92. Mr. Smith said that he showed to Mr. Keating the affidavit of Mr. Taylor in which Mr. Taylor had on behalf of the plaintiff rebutted the allegation regarding the claim concerning an increase in the charges from Mr. Keating. He continues: -

"I then showed Mr. Keating the relevant section in Mr. Ray Taylor's affidavit and Mr. Keating informed me that Mr. Taylor's words are inaccurate".

93. He continues by saying that Mr. Keating stated that he was explicitly requested by Mr. Kelly of the plaintiff to increase his prices for the sole benefit of the plaintiff. Mr. Keating's only affidavit does not state this, and no further affidavit was sworn by Mr. Keating to address this contradiction, leaving only Mr. Smith's account of what Mr. Keating said to him.

94. Mr. Smith then states his belief that if the plaintiff: -

"would brazenly seek out price increase and kickback for the sole benefit of Vector, expressly based on Firstcare not being told, from a subcontractor like Gahan & Keating, then one can only conclude that Vector have successfully executed the same strategy with other subcontractors and product suppliers linked to the Firstcare contract".

95. This statement is made without regard to the fact that Mr. Keating had made it clear that he did not agree to or execute the alleged strategy.

96. Mr. Smith continues by saying that such conduct would represent a clear breach of the terms of the contractual relationship. He says that he has concluded that because of a likely reluctance of third party subcontractors and suppliers to cooperate with a Firstcare led investigation into matters pertaining to the relationship with "the dominant out contracting company in Ireland, an appropriate party/body should be carrying out the full investigation". He says that he will be: -

"executing a Voluntary Disclosure Document based on all the facts and evidence to hand and lodging it with the relevant State Agencies. I will be requesting that they carry out an immediate transparent full investigation into Mr. Keating's affidavit and other relevant information and to find out if any other subcontractors or suppliers were ever approached by Vector seeking them to increase their prices on invoices related to the Firstcare account and to pass those prices on to Vector, for the sole benefit of Vector and without the knowledge of Firstcare".

97. Finally, Mr. Smith says that such conduct on the part of the plaintiff "could be in breach of other business and legal codes but I will leave that for others to investigate".

98. Mr. Smith says that arising from all of these matters he had no alternative but to direct that no further payments be made to the plaintiff "until all these matters were thoroughly investigated". He says that he informed Mr. O'Donnell that he should "consider" seeking appropriate external professional assistance with the investigations.

Affidavit of Ray Taylor sworn on 16 October 2020

99. Mr. Taylor replies to the affidavits of Mr. O'Donnell, Mr. Smith and Mr. Keating. He addresses in detail the allegations made by the defendants, which he says are vague and unsubstantiated, and he claims that they are largely based on hearsay. In particular, he

notes the fact that although Mr. O'Donnell and Mr. Smith had sworn affidavits, no affidavits have been sworn by Ms. Hennessy, Mr. Doyle, Mr. Jackson, or Mr. Traynor.

100. In relation to the calculation of the amount due when the instalment arrangement was made in April 2020, Mr. Taylor says that he does not know how the defendant has arrived at an expectation that only a further €700,000 would be billed at that time. He points out that despite the general submissions relating to overcharging and non-delivery of services, there is in the defendant's affidavits no denial that relevant products were delivered and used in the nursing homes and care facilities.
101. In relation to materials ordered and utilised in the latter months of the contract, he refers to a book of exhibits which includes specific approvals for the items ordered and delivered.
102. In relation to the matter of the TWSS, Mr. Taylor refers to Clause 6 of the Services Agreement which provides that the plaintiff would retain responsibility for salaries, payroll and other taxes "*benefits, fees and other charges, including but not limited to unemployment taxes, social security contributions, worker's compensation premiums and all similar taxes and payments attributable to the plaintiff's employees*".
103. Mr. Taylor says that there has not been cited in any of the replying affidavits a single incident in which a request for further information or transparency relating to the costs of the services was ignored.
104. Mr. Taylor explains the manner in which annual labour budgets were set and submitted to the defendant and he says that the labour cost was "*by agreement a fixed cost based on the annual budget agreed with the management of the defendant*".
105. Mr. Taylor says the plaintiff did not charge the defendant for food waste. He says that the kitchen production waste at the defendant's facilities, which was one of the items referred to as having been identified by Mr. Jackson as an issue, was running at 4 to 5% which he states is at or below industry average.
106. In relation to the Andrew Keating allegation, Mr. Taylor refers to Clause 5(e) which expressly provides that the plaintiff will: -

" . . . manage all purchases of goods, supplies, equipment and services referred to in the agreement, will pay for such goods and products and will be entitled to receive and retain all cash discounts and all other discounts, rebates and allowances otherwise available to [the plaintiff] under its arrangements with distributors or suppliers".
107. Mr. Taylor then explains the manner in which the plaintiff conducts its negotiations with suppliers on a national basis. He confirms that the plaintiff entered into certain discussions with Mr. Keating with regard to the supply of services to the plaintiff's units outside of the defendant's facilities. He says that it was intended that a national volume discount if negotiated with Mr. Keating would be an investment by Mr. Keating into

improved net pricing going forward would not to be funded by increasing prices to the plaintiff's clients. He states that at no point did the plaintiff request Mr. Keating or any other supplier or contractor to increase prices for the defendant or any other client to fund such a discount.

On this allegation there is a difference of evidence which at first pass would appear to be a matter not capable of being resolved on a summary application. However, it is very clear firstly that the contract expressly permits the plaintiff to negotiate discounts. Secondly, the affidavit of Mr. Keating, proffered by and relied on the defendants for this allegation, contradicts the allegation. Therefore, whilst there is a difference in the arguments proffered, there is no conflict in the direct sworn evidence of fact, having regard to the content of Mr. Keating's affidavit.

The instalment agreement

108. Each of the parties gives a different account of the circumstances in which it is said that the defendant agreed to make the four instalment payments.

109. The defendant states that this agreement was based on an "understanding" that there was nothing irregular in relation to the invoicing to date and that none of the issues subsequently identified had arisen. The plaintiff on the other hand relies on that agreement to suggest that there was no basis for the expectation on the part of the defendant that the invoicing would be at a lower amount.

110. On any view of the instalment agreement, the precise amount of the final balance formed no part of it. But the plaintiff's claim in truth does not rely that agreement. Whilst the existence of the agreement is informative, I do not consider it necessary to make any finding as to the connection between the instalment agreement, and the definitive final amount claimed by the plaintiffs.

Test for summary judgment

111. The parties are in agreement as to the test to be applied on an application for summary judgment, as identified by the Supreme Court in *Aer Rianta cpt v Ryanair Limited (No 1)* [2001] 4 IR 607 and *Harrisrange Limited v Duncan* [2002] IEHC 14, [2003] 4 IR 1.

112. In *Aer Rianta*, Hardiman J. stated: -

"In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

113. In *Harrisrange Limited v Duncan*, McKechnie J. referring to a series of principles and questions which should be asked, including such matters as "an assessment of the cogency of the evidence adduced by the Plaintiff" but observing caution having regard to the limitations inherent in attempting to resolve conflicting affidavit evidence.

114. He concluded by stating: -

"The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be".

Hearsay evidence rule

115. In *Promontoria (Aran) Limited v Burns* [2020] IECA 87, Baker J. made it clear that the rule against the admission of hearsay evidence applies as much to evidence tendered on affidavit as to evidence tendered orally.
116. There are exceptional cases particularly in the context of interlocutory proceedings, where there may be a justification for giving and accepting hearsay evidence. Nonetheless, it is very clear from *Promontoria (Aran) Limited v Burns* that as a general rule hearsay evidence will not be admissible.
117. The plaintiffs submit that extensive parts of the affidavits presented by the defendants constitute hearsay evidence. In particular, they say that Mr. O'Donnell and Mr. Smith rely on information imparted to them by Maureen Hennessy, Ian Jackson, Damien Traynor and others, none of whom have sworn affidavits.
118. In the context of exchanges of affidavits on an application for summary judgment, it will not always be required that a party adduce direct evidence by each and every member of its staff or consultant who may ultimately adduce evidence were the matter to proceed to a plenary hearing. Nonetheless, the defendants make very serious allegations against the plaintiff in this case, including allegations which are tantamount to allegations of fraud. Where such serious allegations are made, it is not open to the party making those allegations to rely on hearsay such as it has done in this case.

Clause 7(c) of the Service Agreement

119. The defendants submit and I agree that it can never be the case that the mere presentation of an invoice constitutes of itself evidence of a debt such as would justify the grant of summary judgment in circumstances where the defendant questions the validity of that invoice. A separate question is whether such a proposition is altered by the contract between the parties which at Clause 7(c) provides that if the defendant were to dispute an invoice in good faith, it must notify the plaintiff *"as soon as practicable and in any event within five working days of receipt"*.
120. It is not in dispute that clause 7(c) has never been invoked by the defendants. Nor has any explanation been offered for the omission to invoke this clause. I have some doubt as to whether it can be said that a clause allowing only a period of five days from delivery of an invoice, failing which the addressee of the invoice will be precluded from any challenge to it, is in itself enforceable. However, in this case, not only was no such "five day" notice given but the defendant did not either in its correspondence following the initial invoicing and demands for payment, or in its replying affidavits identify any particular invoice which it asserts is disputed. All of its assertions are made in the most general of terms regarding the delivery of services, "ramping up of orders", failure to account for food waste and the general assertion as to the defendant's expectations as to the amounts

which would be invoiced to completion of the contract. The generality and unsatisfactory nature of these assertions is most vividly illustrated by the statement of Mr. O'Donnell that the invoices in respect of April and May 2020 "*are still on my desk and have not been approved and have not been signed off as agreed and due and owing to the plaintiff*".

121. While a provision such as that contained in Clause 7(c) would not in every case render binding the amount presented on each invoice, in circumstances where the defendants have still not identified those invoices which they contest, even at the time of the hearing or in any of their affidavits, the plaintiffs can validly invoke Clause 7(c).

Conclusions

122. The defendants in all their affidavits refer extensively to findings and reports by their group financial controller, Maureen Hennessy, the external catering consultant Mr. Ian Jackson and an external facilities management consultant, Mr. Damien Traynor. Mr. O'Donnell, and to a lesser extent Mr. Smith, rely on statements apparently made to them by Ms. Hennessy, Mr. Jackson and Mr. Traynor. These references are relied on to support allegations of overcharging, waste, ramping up of invoices and non-delivery of services over an extensive period of time.
123. A remarkable feature of the case is that no affidavit has been sworn by any of those persons and none of the reports of those consultants or others are exhibited. This is a classic case of hearsay and reduces the defendant's objections to the invoices to the level of bare assertions.
124. The defendant's affidavits are replete with references to discussions in their own internal meetings and conclusions made between the chairman Mr. Smith and the managing director, Mr. O'Donnell to the effect that there should be undertaken an investigation. Nowhere it is said whether such an investigation has commenced.
125. It is said that the investigation should be an external investigation not conducted by the defendant itself, and that it will entail disclosures to State bodies. Nowhere is it said what the form of such an investigation would be, how long it would take, when it would commence, or what would be the status of any result of that investigation.
126. The allegation that Mr. Keating was encouraged by the plaintiff to increase prices is not corroborated by the affidavit of Mr. Keating himself.
127. The allegation regarding the plaintiff availing of the TWSS scheme, failing to give due credit to the defendant for such payments is wholly speculative and is made by reference to self-contradictory descriptions given by Mr. O'Donnell. The plaintiff does not deny that it availed of the scheme but asserts, consistently with Clause 6 of the contract, that the manner in which payroll related matters including taxes, rebates and the like, is entirely within its own sphere of operation as far as concerns its own employees.
128. The notice of termination issued on 2 March 2020 confirms as required by Clause 10 (a) of the contract, the reason for terminating the contract. The defendant states as follows: -

"The reason for terminating the contract are monetary, with a minimum saving of €200,000 per annum and up to €300,000 per annum, available with an alternative provider".

129. That letter goes on to discuss practical matters concerning the implementation of the termination with a view to agreeing a mutually acceptable communication and action strategy.
130. Insofar as the defendant expresses itself through the affidavits delivered in these proceedings to have been dissatisfied with the performance of the plaintiff, and in particular with pricing, in respect of which it now makes serious allegations of overcharging, the remedy which was available to it under the contract and which it invoked, was the right of termination. This was duly invoked and the plaintiff did not dispute the entitlement of the defendant to terminate. This measure was the contractual remedy for the defendant's general dissatisfaction or "sense" of being overcharged. This is confirmed by the letter of termination.
131. Mr. O'Donnell states: -
- (a) The amount of the invoices is substantially in excess of the total estimated.
 - (b) That the chairman stated to him in the internal meeting of 10 June 2020 that *"if arising from the investigations that a claim was warranted by the defendants against the plaintiffs, then he would have no hesitation issuing legal proceedings against the plaintiffs in relation to such claim"*.
 - (c) That *"there was a view building with Maureen Hennessy that because of the reluctance of Robert Doyle to provide information concerning monthly budgeted labour charges that those charges would be in excess of the catering labour charge"*.
 - (d) It is said that that view *"has gained further traction and is supported by the fact that the new catering provider is charging a lower average labour charge than the plaintiff was charging. Mr. O'Donnell says that this all requires time to complete an in-depth analysis"*.
 - (e) Mr. O'Donnell refers to Mr. Jackson's *"detailed file on the catering services provided"*. No such material is exhibited.
 - (f) Mr. O'Donnell says that Ms. Hennessy expressed the view that there *"needs to be a downward adjustment in a significant number of the invoices (if not all of them)"*.
132. In relation to the Keating allegation Mr. O'Donnell states that the defendant *"was led to the inevitable conclusion that the plaintiff had approached other subcontractors and suppliers requesting them to increase their prices"*. This amounts to no more than surmise on the part of the plaintiff, and no documentation, including the exhibits to Mr. Keating's affidavits support this.

133. Although a perusal of the defendant's replying affidavits has at one level the appearance of containing detail, the reliance on general complaints, not substantiated by reference to invoices, is 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.
134. It is clear from the judgments which I have quoted earlier that the court must exercise caution and guard against resolving contentious matters of evidence based only on a reading of the affidavits on an application for summary judgment and the test for granting leave to defend is set at a low bar. Nonetheless, the defendant relies on its own internal communications and has resorted to its own conclusions as to how the plaintiff has acted in the performance of its functions under the Agreement, stating that an investigation, the status, form and duration of which is not described, must be commenced before any of the claimed invoices are paid. It proffers no evidence to support the assertions that the plaintiff has acted in breach of contract or that the invoices have not been presented in accordance with the provisions of the Agreement itself.
135. This reliance on such general and unsubstantiated allegations leads to the conclusion that the defendant had not disclosed an arguable defence and it would be unjust to grant leave to defend.
136. In his affidavit sworn 16 October 2020, Mr. Taylor on behalf of the plaintiff identifies an amount of €642.62 being an amount charged by reason of an administrative error. The plaintiff therefore gives credit for that amount against its original claim and for the reasons identified above judgment will be entered in the revised sum of €1,192,089.05.