



**THE COURT OF APPEAL  
CIVIL**

**High Court Record No. 2018/743 S  
Court of Appeal Record No. 2020/64  
Neutral Citation No. [2022] IECA 11**

**UNAPPROVED  
NO REDACTION NEEDED**

**Whelan J.  
Murray J.  
Pilkington J.**

**BETWEEN**

**CECILA ONYENMEZU t/a NORLIA RECRUITMENT SERVICE**

**PLAINTIFF/APPELLANT**

**- AND -**

**FIRSTCARE IRELAND LIMITED, FIRSTCARE IRELAND (BLAINROE)  
LIMITED, FIRSTCARE IRELAND (EARLSBROOK) LIMITED, FIRSTCARE  
IRELAND KILCOCK LIMITED, BENEAVIN HOUSE LIMITED, BENEAVIN  
LODGE LIMITED**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of Mr. Justice Murray delivered on the 25<sup>th</sup> day of January 2022**

1. The plaintiff operates a business recruiting and supplying temporary and relief staff to the health care sector. She trades under the name ‘*Norlia Recruitment Services*’ (‘*Norlia*’). The second to sixth defendants are companies that own or operate nursing homes, those homes being managed by the first defendant. Where not necessary to distinguish between them, I shall refer to the defendants throughout as ‘*First Care*’.
2. It is common case that between 23 May 2015 and 18 January 2018 the plaintiff provided services in the form of temporary and relief staff to the second to sixth defendants. Following some initial disagreement as to the precise sums due to her in respect of the services provided in 2015, the plaintiff has been paid for the services she rendered in that year. She says that she has been paid nothing in respect of the services she provided in 2016 and 2017. In these proceedings she seeks to recover the monies she says are due for those years in accordance with what she alleges was the agreement between the parties. This is said by her to amount to a total of €749,353.40.
3. This appeal is against the refusal of the High Court ([2020] IEHC 36) to grant the plaintiff summary judgment against the defendants in that sum. In the course of the affidavit evidence exchanged in connection with the application for that relief, the defendants at no point disputed that the plaintiff had provided the alleged services to the defendants, never identified any respect in which it was said that the plaintiff’s calculation of the value of those services was other than correctly reflected in her claim, never averred that the contractual documentation relied upon by the plaintiff did not reflect the agreement between the parties, did not dispute that the charges alleged by the plaintiff to have been agreed had been agreed, and did not contend that the plaintiff had in fact been paid for the services rendered during this period. However, the defendants’ counsel in the course of oral argument before the

High Court claimed that there was sufficient uncertainty around the contractual relationship between the parties to afford the defendants with an arguable defence to the claim. The High Court judge agreed, refusing the application for summary judgment on that basis. The plaintiff now contends that she erred in so doing.

4. There were four affidavits before the court sworn in connection with the application for summary judgment – two of these were sworn by the plaintiff (on the 28 September 2018 and the 18 December 2019) and two were sworn on behalf of the defendants by their Chief Executive Officer, Mervyn Smith (18 December 2018 and 17 December 2019). For ease of reference I will refer to these affidavits respectively as CO1 and CO2 and MS1 and MS2. The defendants required leave of the court to file the latter affidavit (the hearing took place on January 13 2020). Although thus delivered late, and very shortly before the hearing, that affidavit did not suggest any lack of certainty to the terms of the agreement between the parties – either generally or with regard to the amounts due under the relevant agreement.
5. As between her two affidavits, the plaintiff's evidence was that the services were initially provided pursuant to a written contract dated 23 May 2015, this being subsequently amended on 7 and 15 November 2016. This written agreement is referred to throughout as the '*Service Level Agreement*' ('*the SLA*'). It is the plaintiff's case that this contract was initially entered into with the fifth named defendant, having been signed by its financial director. Thereafter, she said, services were provided to the second, third, fourth and sixth named defendants on foot of various parol agreements the effect of which was that each of these defendants adopted the terms of the SLA. The plaintiff exhibited invoices (issued on 7 December 2016, 7 December 2017 and 11 January 2018) with details of the hours worked by the staff employed by the plaintiff including the time worked, whether the staff were nurses or health care assistants, the amount charged and the date on which the services were provided,

detailing from there the sums she said were due from each of the defendants. In respect of the second to sixth defendants these were said to be (respectively) €100,606.14, €168,716.99, €220,518.31, €200,326.04, and €59,185.92. The plaintiff contended that the first defendant was liable either jointly with the other defendants or severally for the entire amount.

6. It is of some importance that at paragraph 12 of CO1 the plaintiff identified the terms according to which she said she had agreed to provide temporary nursing staff to the second to sixth defendants, asserting that these had been agreed in writing. She alleged four terms:

(a) That the defendants agreed to pay for the plaintiff's services in accordance with the schedule of hourly rates agreed in the contract;

(b) That upon submitting a time sheet on the completion of services by temporary staff and upon verification thereof the defendants would pay the sums due on receipt of the corresponding invoice within fourteen days;

(c) That the defendants would pay the fees equal to the amount of hours detailed in the invoice, those fees being subject to change;

(d) That this agreement was varied by written agreement on or about the 7 and 15 November 2016.

7. At no point in either of his two replying affidavits did Mr. Smith raise any issue around the plaintiff's claim that the contract comprised the SLA as modified in the way contended by her. None of the terms alleged at paragraph 12 of CO1 were controverted. Nonetheless, Mr. Smith said that the amount claimed by the plaintiff was not due or owing by the defendants at all, and that the books and records of the defendants did not disclose any unpaid invoices

due and owing to the plaintiff by the defendants or any of them. The reason he said that no monies were due and owing was that (he contended) certain alleged contractual conditions had not been complied with by the plaintiff. He said that agreed protocols had not been observed, that there had been a breach of the SLA and that additional charges had been imposed above and beyond the terms agreed in the SLA.

8. In this regard, Mr. Smith said that there had been '*serious overcharging*' by the plaintiff of the defendants in an amount of €70,000. He said that this was drawn to the attention of the plaintiff and that the overcharging was admitted and a full refund made. He said that during September and November 2016 contact had been made by the defendants with the plaintiff to ensure (a) that there would be no reoccurrence of overcharging by the plaintiff, and (b) that the plaintiff and defendants were operating legally in the eyes of the Health Information and Quality Authority ('*HIQA*'), the National Employment Rights Authority, the Gardaí and the Revenue Commissioners. He said that as part of the SLA the plaintiff and defendants had agreed that in order for any of the invoices to be considered, accepted, approved and due for payment the plaintiff was required to provide to the defendants together with each invoice: (a) confirmation that the nurses provided for the defendants' nursing homes were qualified and registered with the nursing governing body, the Nursing and Midwifery Board of Ireland and (b) confirmation that all nurses provided to the defendants' nursing homes were Garda vetted. He said that compliance with each of those conditions was critical for the defendants' as otherwise they would be in breach of the requirements of HIQA. He asserted that if the defendants' nursing homes did not comply with HIQA registration criteria they could lose their licences. He said that the parties had agreed that the plaintiff would have in place a valid and current tax clearance at the time of seeking a proposed payment from the defendants and that the plaintiff agreed. He said that to comply with this protocol

the plaintiff agreed that she would supply to the respondents the access number for online verification of the tax clearance certificate.

9. The trial judge described this as the primary defence advanced by the defendants. She recorded them as asserting that due to alleged non-compliance with these conditions, they were not obliged to pay on foot of the invoices raised by the plaintiff. As she also noted, the case as so expressed was that it was the SLA that contained the protocols which, it was contended, had not been complied with. This was a case that assumed that the SLA was agreed and binding as between the parties.
10. Mr. Smith made four other points in his affidavits. He said that First Care had been contacted by the Revenue Commissioners in January 2018 which said that Norlia had been in default of payment of taxes to an amount of several hundred thousand euro, that First Care became very concerned by this and that it at that time confirmed to the Revenue Commissioners that no monies were due and owing by First Care to Norlia. He also said that there was no counterpart of the written agreement of 23 May 2015 signed by the plaintiff. As noted by the trial judge, Mr. Smith did not suggest any conclusions that ought to have been drawn from the absence of a counterpart signature. Third, he suggested that there was confusion on the part of the defendants as to the identity of the party represented by the plaintiff as there was a registered company with the name Norlia Ltd. Finally, he contended that the defendants were entitled to bring a counterclaim against the plaintiff for exemplary and/or aggravated damages for knowingly false allegations made concerning the defendants in respect of unpaid invoices and for abuse of the court process.
11. Each of the arguments presaged in Mr. Smith's affidavit was either not pursued before the High Court or rejected by the trial judge. She emphasised that no detail had been given of alleged agreements made subsequent to the SLA. She refused to accept that there had been

any confusion on the part of the defendants as between the plaintiff and any legal entity. She concluded that no basis was disclosed on the affidavit evidence to support the assertion that protocols in relation to registration, qualification, garda vetting or tax clearance were part of the contracts, whether the original SLA or a collateral contract or some amendment to the SLA, nor had it been established that the alleged breach of the protocols justified the non-payment of invoices.

12. The defendants do not seek to cross appeal against any of these findings and do not in their respondents' notice filed for this appeal contend that this court ought to affirm the decision of the High Court on any basis other than that relied upon by the trial judge.
13. The ground on which the trial judge held with the defendants arose as follows. In the course of argument before the High Court counsel for the defendants identified what the trial judge described as '*a subsidiary defence*'. As described by the trial judge this was to the effect that only one agreement had been exhibited, that that agreement was unexecuted, that five nursing homes were named as defendants and the SLA exhibited named only one of the nursing home defendants, and that it was for the plaintiffs to make out their case. He submitted the agreement between the parties was governed by an SLA and parol evidence as supported by the exhibits to the affidavits, and argued from there that a plenary hearing was necessary given the lack of an executed written agreement and the ambiguity between the parties regarding the terms of the agreement. The question of whether the protocols could form part of the contract was, he said, a matter for oral hearing.
14. While noting the inconsistency between this claim and the argument prefigured in the affidavit evidence (which assumed that the SLA was in fact binding), the trial judge nonetheless concluded that a plenary hearing was required to address what the judge described as the '*defence based on uncertainty*'. In this regard, the judge attached

considerable significance to correspondence exchanged between the parties in September and November 2016.

15. That correspondence is properly related to clause 2.2 of the SLA. It provided as follows:

*‘The Client agrees to pay for the services in accordance with schedules of Hourly rates to be agreed upon between the parties from time to time. These rates will be based on labour costs, employer pay related social charges, INO rates, holiday pay and all statutory employers costs, agency fees, VAT and PRSI.*

16. On September 7 2015 – and following the presentation of invoices for 2015 - Mr. Cliff Byrne (described in the defendants’ affidavit evidence as the ‘*Company Accountant*’) sent to the plaintiff an email in which he evaluated those invoices by reference to the hourly rates and administration fees specified in the SLA. He adopted the position that the invoices were not in compliance with the terms of the SLA, also querying orientation and travel expenses which he said were not provided for in the SLA. An email was sent by Mr. Byrne on 15 September 2016 in which he stated that the invoice had been recalculated and the rates/charges as per the SLA had been applied and the recalculation would be applied to all previously submitted invoices and future invoices would be calculated in the same manner.
17. The rates which Mr. Byrne thereupon stipulated were €11 per hour in respect of care assistants, and €22.50 per hour in respect of staff nurses. He also made it clear in that letter that travel fees and staff orientation fees would not be paid. He posited an administration fee of €50.00 per home. He agreed holiday and employer PRSI as invoiced, also referring to a health care assistant agency fee of €9.00 per hour and a nurse agency fee of €18.00 per hour.



18. The plaintiff replied by e-mail on 7 November 2016, accepting Mr. Byrne's proposals in relation to staff travel expenses and staff orientation fees. She said that an administration fee would be charged in the amount of €50.00 '*per house, per month*'. She agreed his hourly rate stipulations with one exception. That exception related to the requirement for double pay for Sundays and for public holidays. In this regard she said the following :

*'Overtime must be paid a rate of time and a half, and double time must be paid on Sundays and public holidays. The significance of this is that overtime relates to night duties on both weekdays and Saturdays. Nonetheless, as recognition of good clientele, we are forfeiting the charge of overtime, while retaining the double pay for Sundays and public holidays.'*

(Emphasis added)

19. On November 15 the plaintiff sent a further letter to Mr. Byrne. This referred to a telephone conversation they had had on November 10, describing this as a follow up call during which they discussed the e-mail of 7 November. She referred to their having made progress in resolving matters. She reiterated in that letter some of the proposals in her e-mail of November 7, and in particular that there would be no travel costs or orientation fees, and that the hourly rate for nurses and care assistants was, respectively, €22.50 and €11.00. She also said that a standard rate of €50.00 per house per month administration fee would be charged. However, her position in relation to overtime and Sunday work and work on public holidays was different from that expressed in her e-mail of November 7. She said :

*'Overtime is paid at the rate of time and a half for all overtime, Sunday work and public holiday work.'*

20. The defendant never responded to that correspondence. The plaintiff has averred (at para. 18 of her second affidavit) – that the invoices for 2016 and 2017 ‘*were prepared on the basis required by the defendants and on the basis set out in our correspondence of the 7<sup>th</sup> November 2016*’. The plaintiff proceeded to aver that she provided nurses and nursing staff to the defendants on an ongoing daily basis all through 2016 and 2017 and received no further communication or contact of any kind from First Care regarding the plaintiff’s invoicing until she received an e-mail on 14 December 2017 following the delivery by her of invoices to the defendants on December 7. This was not disputed or queried by Mr. Smith in his second affidavit.
21. Considering this chain of correspondence and the SLA, the trial judge found that there was significant uncertainty between the parties as to the terms of the contract, and that this uncertainty meant that there was a real issue as to the applicable contractual terms. This meant that the court could not characterise the *prima facie* defence identified as simply a mere assertion unsupported by evidence or inconsistent with the uncontested documentation. The critical paragraph in her judgment (at para. 31) is as follows:

*‘Having regard to the above chain of correspondence and the terms of [exhibit] CO1, it appears to me that there is significant uncertainty as to the terms of the contract between the various parties. The invoices the subject of this claim cover the entirety of 2016/2017. The contractual arrangements applicable might be confined to those in the SLA, i.e. the document exhibited at CO1; or they might be those that appear to have been unilaterally applied by the Plaintiff set out in the 15 November letter (although the payment terms are not disclosed as the proposals in respect of the Schedule are not exhibited); or they might be those identified by the Defendants in the September 2016 emails; or they might be some other set of terms altogether. What*

*is clear is that there is a significant question as to the contractual terms that govern the relationship between the parties for the years 2016/2017 and that having regard to the material exhibited, it is not possible to state with certainty the contractual terms between the Plaintiff and each of the Defendants.'*

22. This resulted in the somewhat unusual situation in which all of the arguments advanced by the defendants on affidavit were either rejected or abandoned, while the point on which they succeeded in their defence of the action was made by them at no point prior to the commencement of the hearing of the matter and was never averred to by them.
23. 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

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.

24. 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.
25. This case, in one sense, presents the converse of this common situation described by Clarke J. Here, the trial judge found that it was arguable that the documentation exhibited disclosed uncertainty around the terms of the contract on foot of which the debt was alleged to have been incurred and was sought to be recovered, but the defendants themselves never asserted on oath any such uncertainty, nor did they question in their affidavits the rates charged by the plaintiff which, she contended, had been agreed. The absence of any averment asserting the uncertainty as found by the trial judge or denying the terms as alleged by the plaintiff forms the centrepiece of the plaintiff's appeal. She says that without affirmatively challenging on oath the certainty of the agreements with the defendants or the relevant terms

asserted and relied upon by the plaintiff, the defendants may not now mount the ‘*subsidiary defence*’ they presented, and the trial judge accordingly erred in refusing summary judgment on the basis of that defence.

26. 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).
27. 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

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.

- 28.** In practice, trial judges may be inclined to exercise their discretion flexibly so as to permit a defendant to advance arguments which are not identified in its replying affidavit if that case can be substantiated by reference to the evidence that is before the court (including the plaintiff's own evidence) and, in particular, if that ground of defence has been identified in correspondence or submissions exchanged in advance of the hearing. That said, this case demonstrates the difficulties that can arise when a defendant decides to depart from the usual procedure mapped out by the Rules that it should deliver an affidavit in order to resist an application for summary judgment, that that affidavit should identify (but not argue) each defence upon which the defendant proposes to rely, that it should specify the evidence that the defendant says will support that defence, and that insofar as the defendant proposes that its defence, or one of its defences, is to only part of the plaintiff's claim that the part of the plaintiff's claim to which it is a defence is identified.
- 29.** A defendant who seeks to deviate from that path adopts a perilous course. The court may refuse to allow the presentation of a case that has not been flagged in this way. Springing a new and previously unannounced defence on a plaintiff at the hearing of an application for summary judgment may result in proceedings being adjourned to allow the plaintiff to adduce further evidence to address it with consequent implications in costs. And most importantly and obviously, a defendant cannot - where summary judgment is sought against it - advance a legal argument that is dependent on facts that are not substantiated in some

way by the evidence before the court, and it may not agitate a case that is inconsistent with the facts to which it has itself averred.

- 30.** These considerations presented the defendant here with a significant challenge in seeking to advance the case it sought belatedly to present before the trial judge. The issue of whether a contract is sufficiently certain to be enforced at law may be an objective one, but that question and the issue of whether the parties have between themselves reached a consensus upon all material terms of an agreement are closely related. In truth, while the defendants characterised the issue as one of ‘*uncertainty*’ this case was in fact about what the parties had agreed, the alleged ‘*uncertainty*’ deriving from the defendant’s claim that the plaintiff had not with sufficient clarity established that what she said had been agreed had in fact been agreed. Where a plaintiff puts up in evidence what it says has been agreed, it is very difficult for a defendant to contend in an application of this kind that there has been no agreement to that effect at all without adducing a witness who can and does say that.
- 31.** Bearing all of this in mind, the trial judge’s description of the defence advanced by counsel is telling: counsel had argued (she said at para. 20 of her judgment) that ‘*there is uncertainty in respect of contractual conditions between the Plaintiff and the Defendants*’. Yet so stated, the alleged uncertainty led nowhere. Absent a plea that the entire agreement was so uncertain that it could not be enforced at all (and this was *never* said in evidence by the defendants – although as I explain later it was belatedly suggested under questioning by this court) this only affords the defendants a defence if that ‘*uncertainty*’ affects the ‘*contractual conditions*’ relevant to (a) recovery of the monies said to be due and/or (b) the quantum of the plaintiff’s claim. In theory it might have been that an uncertainty as to certain terms of the agreement could be relevant to a defence based upon the failure to comply with conditions precedent to the contract, or indeed to possible defences by way of counterclaim

or set off. However, by the time this case came to this court the only relevant questions insofar as the terms of the contract were concerned were whether the defendants were obliged to pay the plaintiff for the services she had provided to them, and if so in what amount.

32. In resolving whether the defendants had established a fair and reasonable probability of their having a real or bona fide defence based upon uncertainty in respect of these matters, it appears to me critical that the following four facts were either undisputed on the evidence, or indisputable having regard to the documents exhibited in the affidavits.
  
33. First, the plaintiff and each of the defendants contracted for the provision of services by the former to the latter on the basis of the SLA. While the defendants have in their submissions disputed whether this agreement was adopted by the defendants other than the fifth named defendant I do not believe this to be tenable. The plaintiff averred that these terms had been applied to and adopted by each of the defendants (CO1 at para. 12; CO2 at para. 4). This averment was never disputed. She said that the payment of invoices by the defendants clearly demonstrated acceptance of all of the terms and conditions of the contract (CO2 at para. 5). While complaint was (quite reasonably) made by counsel on behalf the defendants at the hearing of this matter that the documents exhibited as purporting to evidence the agreement of some of the defendants to contracting with the plaintiff did not do so, Mr. Smith in his second affidavit positively relied upon the SLA in respect of each defendant, alleging that the plaintiff had breached the SLA, and referring to '*the agreed SLA terms*' (MS2 at para. 6). He *never* denied the averment of the plaintiff that he had confirmed on behalf of all defendants their intention to be bound by the executed agreement (CO2 at para. 6). He exhibited correspondence from Mr. Byrne which purported to set out the '*rates/charges*' as applied '*per the SLA*' (MS2 at para. 8). He referred to '*the very important*



*pricing related terms and conditions in the SLA*' (MS2 at para. 11) and to matters that had been agreed '*[a]s part of the SLA*' (MS2 at para. 12). The defendants cannot credibly assert by way of submission that, in fact, there is some uncertainty as to whether that agreement applied at all.

34. Second, the relevant provision of the SLA made it clear that the charges to be imposed were to be agreed upon between the parties from time to time (clause 2.2). While counsel for the defendants sought to attach significance to this – at one point describing the SLA as an agreement to agree - in a contract of this kind potentially operating over an extended period of time, there is nothing surprising or wrong about terms as to pricing being treated in this way. The fact that the rates were to be agreed only presents an impediment to enforcement of the contract if the plaintiff is unable to establish that they were in fact so agreed.
35. Third, it was the plaintiff's evidence that the SLA was varied by agreement on the 7 and 15 November (CO1 at para. 12(d)). The correspondence exhibited as evidencing that agreement shows specific rates for health care assistants, nurses, and administration fees, being proposed *by the defendants* by letter dated September 15 2016 and – with one exception – being accepted by the plaintiff on November 7 and November 15. The exception – rates for overtime, Sunday work and public holiday work – was proposed in the letter of November 15 at time and a half. At no point did Mr. Smith aver that these were not in fact the agreed rates. Given that they were – save in respect of overtime, Sunday work and public holiday work – the rates proposed *by the defendants* themselves, it is impossible to see how he could have done so.
36. Fourth, the plaintiff avers generally that the invoices were '*per the terms of the contract*' (CO1 at para. 13; CO2 at para. 5). It is clear that '*the contract*' is the SLA as modified by the November 2016 correspondence and that it was in accordance with those agreed terms

and conditions that the plaintiff alleged the invoices had been raised (CO2 at para. 5). The invoices are exhibited in the proceedings. They are detailed, identifying the first name of the nurse or healthcare assistant whose services were being billed, the date, time and hours worked by them. At no point did the defendants aver either (a) that the invoices thus delivered did not in fact correspond with the agreed terms or (b) that the services as recorded on those invoices had not, in fact, been provided as asserted therein.

**37.** Counsel for the plaintiff was not contradicted when, in the course of his oral submissions to this court, he said that the first occasion on which the defendants actually identified any uncertainty in the charges applied in the invoices was in the course of their written legal submissions on the appeal. There, the defendants purported to identify a number of terms that were uncertain in respect of the invoices for 2016 and 2017:

- (a) Staff travel costs;
- (b) Nurse hourly rates;
- (c) Administration fees;
- (d) Staff orientation fees;
- (e) Payment terms – payment plan, payment deadline, and the provision of replacement invoices.

**38.** The instances given, if anything, prove the point. Each of these was addressed in one way or another in the November 2016 correspondence. There were to be no staff travel costs or staff orientation fees (items **(a)** and **(d)**). The hourly rates (item **(b)**) were proposed *by the defendants* at €11.00 per hour for healthcare assistants and €22.50 for staff nurses and this was accepted by the plaintiff. The administration fees (item **(c)**) were similarly agreed at €50.00. Whether or not there was a dispute around payment terms (**(e)**) nothing has been said by the defendants to indicate that these affect the recoverability at this point in time of

the sums claimed. And, to repeat, the undisputed evidence was that it was these terms that were reflected in the invoices.

- 39.** The arguments around uncertainty were further elaborated upon by counsel for the defendants in the course of his oral submissions to this court. He identified various features of the documentation underlying the plaintiff's application which, he said, evidenced a '*lack of care*' on her behalf. These included the fact that parts of the SLA referred to the plaintiff as '*a company*', that the SLA (at para. 1.7) provided that the defendants would be responsible for the holiday pay of staff provided by the plaintiff while at the same time referring to the hourly rates to be paid in respect of staff as *including* holiday pay (clause 2.2), that while the SLA (clause 2.3) referred to a minimum charge of four hours this appeared in no other document (the point being, as I understood it, that this had not been applied by the parties), and that as well as referring to rates to be agreed the SLA referred to hourly rates for nurses as being '*approx. €22 and €23*' (this being indicative of a lack of certainty as to the rates to be applied). He was critical of the fact that the plaintiff had averred in her affidavit that what were in fact time sheets were notes of conversations with various defendants whereby they agreed to be bound by the SLA and relied in her affidavit upon time sheets as evidence of distinct contracts. He referred to a level of mistrust on the part of his client, pointing to what he said was a contradiction as to overtime and rates for Sundays and Bank holidays between the plaintiff's letter of November 7 2016, and that sent a week later on November 15.
- 40.** Counsel also noted that while the letter of November 15 stated that there would be an administration charge of €50 '*per house, per month*' in fact, he contended, an administration charge appeared on each and every invoice. Counsel further stressed that the fact that the defence based upon the protocols (which was not being pursued before this court as part of the defence to the application for summary judgment) would be the subject of discovery

requests were the matter remitted to plenary hearing. He expressed concern that on the invoices the relevant staff had been identified by their first name, and said that in advance of a plenary hearing his clients would conduct an analysis of whether the persons so named had in fact worked on the dates in question. He noted that the invoices contained a box recording '*Holiday Pay Entitlement: Employer PRSI @ Monthly Basis*' at '8%'. He said that this seemed to have been added to the total. He stressed statements on the invoices to the effect that payment was required within ten days (in respect of invoices raised some two years after the services were provided) and that a company number was contained on the invoices. He identified one invoice on which an additional rate was *not* charged for Sundays. Complaint was also made of the fact that a schedule of rates produced by the plaintiff contained a variety of rates which did not correspond to those now charged. He complained of the fact that this document referred to rates for '*long distance*' and '*very long distance*', observing that these could not possibly present contractually enforceable rates. Finally, in the course of his submissions, counsel for the defendants was asked if his client was denying that there was any contract with the plaintiff. His response was that when the matter was looked at in its entirety and '*on reflection*' the terms were not sufficiently certain to give rise to a contract at all.

- 41.** One issue related to some of these submissions merits closer analysis. As I have noted, the plaintiff in her first affidavit referred to the SLA being amended by correspondence dated November 7 and November 15 2016 and that affidavit proceeds on the basis that it was in accordance with these terms and conditions that the invoices were issued. In her *second* affidavit, however, the plaintiff avers twice that the invoices were sent only in accordance with the correspondence of 7<sup>th</sup> November (CO2 at paras. 18 and 19). To a large extent there is no difference between the terms in these letters. Both state that there will be no travel costs (and none appear on the invoices). Both state the same hourly rates (€22.50 for staff

nurses and €11.00 for care assistants). The administration fee specified in each is the same (€50.00 per house per month). Neither provided for staff orientation costs. To that extent the question of which of the two letters applied is not relevant.

**42.** Overtime and pay on Sundays and public holidays are addressed differently in the two letters.

The November 7 correspondence said that there would be no overtime but double pay on Sundays and public holidays. The November 15 correspondence said that there would be payment at the rate of time and a half for all overtime, Sunday work and public holiday work. However, the invoices themselves do not charge overtime save for Sundays, and in respect of Sundays do so at the lower of the two rates – that provided for in the letter of November 15 (being in respect of a 12 hour shift on the basis of the hourly rates suggested by the defendants, €198.00 for a care assistant, and €405.00 for a staff nurse). Had the rates been reversed – that is had the November 15 letter provided for a *higher* rate and had that rate been charged - there would certainly have been an issue around the recoverability of those rates because on the basis of the plaintiff's own evidence there would have been a material contradiction as to the alleged rates. That, however, does not arise.

**43.** As to the other objections, many of these do not touch the core issue between the parties, which is whether the plaintiff had discharged the burden of showing that there was an agreement between the plaintiff and the defendants that the rates as specified in the correspondence of November had been agreed. In the absence of any averment from the defendants to the contrary, and in circumstances where the undisputed evidence to the court was that the defendant continued to retain the services of the plaintiff and indeed to make payments to her in December 2016 on this basis, I do not believe the defendants have raised any proper basis on which this court could conclude that the defendants enjoyed an arguable defence on that, the critical point in the case.

- 44.** The defendants themselves proposed terms, all but those in relation to overtime and pay for Sundays and public holidays were accepted by the plaintiff, a proposal was made in respect of the latter and the defendants continued to avail of the plaintiff's services on that basis. That being so, the claim based upon the entire contract being vitiated by uncertainty must fail. The critical terms were agreed and were quite clear.
- 45.** It is clear from my summary of the oral submissions made to the court that counsel for the defendants sought to contend on his feet that the invoices did not in fact reflect the terms contained in the November 2016 correspondence. Although the points made in this regard were presented to the court as demonstrating uncertainty, they appear to me to really go to the issue of quantum. Apart from the fact that this was a new case (in contradiction to the position adopted in the respondents' notice) if the defendants wished to contend that the invoices did not properly implement the proposed administration fee, or the arrangements as to holiday pay or PRSI it was for the defendants to aver to that effect, or at the very least to flag this for the plaintiff and the court in advance of the hearing. Far from this occurring, counsel for the plaintiff said in the course of his reply that the first time he heard the specific objections thus articulated in respect of the invoices was in the course of submissions on this appeal. That statement was not contradicted.
- 46.** Obviously, this constrained counsel's ability to respond to those objections. But most importantly the plaintiff had said on oath that the invoices reflected the terms thus agreed and for all this court knows they did - the fact that the administration fee appeared on every invoice is not inconsistent with its being imposed in the manner detailed in the correspondence and it is not evident to me from the invoices on what basis it can be said that there was any deviation from the correspondence in respect of holiday pay. It must be repeated that not only did the defendants not aver to the fact that the invoices did not reflect

the terms thus said by the plaintiff to have been agreed, they never even recorded that position in correspondence when the invoices were sent to them. It is not sufficient for them to now say that at some future point and following discovery they will conduct an analysis to determine whether the persons who are stated on the invoices as having worked the hours recorded there actually did so. They must provide some basis on which this court can now conclude that there is a prospect that such evidence will in fact emerge, and they have not done this. Accordingly, I adopt the view that those objections were not properly before the court and – even if the manner in which they were raised is to be overlooked - were not duly substantiated.

47. The defendants make four additional points in their written legal submissions in defence of the trial judge's decision.
48. First, they say that the defendants did dispute that the outstanding sum for services rendered remains unpaid, noting that they denied that the monies sought by the plaintiff in respect of the 2016 and 2017 invoices were due and owing. This is certainly true: the defendants did, as I have explained earlier deny that the monies were due. However this was precisely the '*bare assertion*' which, the cases make clear, are not sufficient in themselves to present an arguable defence. The assertion must be justified on some basis. The basis the defendants chose to advance in support of the claim that the monies were not due was that there had not been compliance with agreed protocols. The court found that there were no such agreed protocols, and the defendants have not now contended otherwise: indeed they say in their written legal submissions that they '*stand over the judgment of Hyland J. in full*' and that they are '*opposing this appeal on the basis that the uncertainty of the contractual terms gives rise to a bona fide defence*'. Therefore, on the evidence the only case made was a bare assertion, and the law is clear that this does not give them a basis for defending the action.

The basis that they now assert is not attested to. Therefore, the fact that the defendants have denied that monies are due does not, in itself, advance their position at all.

- 49.** Second, they say that their counsel's contention that the uncertainty of the terms gave rise to a *bona fide* defence was grounded upon the averments of both the plaintiff and of Mr. Smith. Here reference is made to that evidence insofar as it established (a) that the contract was '*oral in nature*', (b) that the SLA as exhibited in the plaintiff's first affidavit was unexecuted and referred to only one of the parties and (c) that the plaintiff's case depended upon parol agreements in respect of the 2016/2017 invoices. These facts certainly created the opportunity for uncertainty as to some terms of the contract to arise, but as explained above this was not the point the defendants needed to establish. They had to lay some foundation for the claim that the terms were uncertain as to the amounts owing. In making that point they face the critical difficulty that the only evidence before the court was that the amounts said to be due and owing were calculated in accordance with the rates suggested by the defendants themselves with the additional matters included in the November 7 and November 15 letters.
- 50.** Third, in their submissions the defendants seek now to invoke and rely upon the provisions of s.2 of the Statute of Frauds (Ireland) 1695, saying that the absence of an executed copy of this agreement (being an agreement in respect of services provided to the defendants within the space of more than one year) is a bar to summary judgment. The questions of whether the agreement comes within the Statute of Frauds and its enforceability are (it is said) matters that require to be determined at plenary hearing.
- 51.** This argument was not identified in the respondents' notice which, as I have earlier said, stated that no additional grounds were being relied upon in support of the trial judge's judgment. The issue was not canvassed in the course of the hearing before the High Court.



In those circumstances it is not appropriate for this court to embark upon a consideration of the question now, not least of all having regard to the fact that the plaintiff may have wished (had the issue been earlier raised) to adduce evidence to address questions such as part performance, as well as to address the legal issue of whether the doctrine applies to contracts of this kind (see McDermott *Contract Law* 2<sup>nd</sup> Ed. 2017 at para. 5.121). The SLA, I would note in passing, was in fact signed on behalf of at least one of the defendants (these being the persons to be charged with the agreement for the purposes of this action).

**52.** Fourth, the defendants also refer to the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, saying that this decision is authority for the proposition that the court should not grant summary judgment where there is insufficient particularisation of a debt and the court must be certain as to how that sum was calculated. They say that the uncertainty as to staff travel costs, nurse hourly rates, administration fees, staff orientation fees and payment terms mean that it is impossible to determine on a summary basis what sum, if any, the plaintiff is entitled to pursuant to the contract. However, what the decision in *Bank of Ireland v. O'Malley* requires is that the court have '*at least some straightforward account of how the amount said to be due is calculated...*' (at para. 6.7). This requirement was satisfied here in the form of the detailed invoices that were specifically referenced in the Summary Summons.

**53.** In conclusion, it is my view that the learned trial judge erred in finding that this case necessitated a plenary hearing, and specifically in finding that the agreement was affected by an uncertainty that justified the refusal of summary judgment. The plaintiff in her evidence had established clear and definite terms governing the payment for the services rendered by her, and in the absence of credible evidence from the defendants that these terms had not been agreed (and there was no such evidence) there was no basis for the conclusion

that there was any uncertainty affecting the entitlement of the plaintiff to recover the amounts she said were due to her.

- 54.** The parties are invited to make a short additional submission (of no more than 1,000 words) as to the amounts in which judgment should be entered against the various defendants.
- 55.** As the plaintiff has been entirely successful in her appeal, it is my provisional view that she is entitled to her costs of the hearing in both this and the High Court. Should the defendants dispute this view, they should advise the Court of Appeal office within seven days of the date of this judgement whereupon a hearing will be convened to address the issue of costs.
- 56.** Whelan J. and Pilkington J. agree with this judgment and the order I propose.