APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/298

Whelan J. **Neutral Citation Number [2022] IECA 281**
Collins J.
Allen J.

BETWEEN

GREENVILLE PRIMARY CARE LIMTED

PLAINTIFF/APPELLANT

AND

INFRASTRUCTURE INVESTMENT FUND ICAV

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 8th day of December, 2022

Introduction

1. This is an appeal by the plaintiff against the judgment and order of the High Court (O'Regan J.) made on 11th November, 2021, by which it was required to provide security for the defendant's costs of the action.

Background

2. By agreement for lease dated 11th October, 2011, made between John Whelan and Moss Kelly, as landlord, and Health Service Executive *("HSE")*, as tenant, Messrs. Whelan and Kelly agreed to grant and HSE to take a 25 year lease on a primary care centre to be built in the grounds of the abandoned convent at Convent Road, Listowel, County Kerry.

3. By two agreements dated 24th July, 2018, made between the plaintiff and the defendant, the defendant agreed to sell and the plaintiff to purchase the site on which the primary care centre was to be built, and it was agreed that the agreement for lease with the HSE would be transferred to the defendant.

4. One of the two agreements, called Agreement for Assignment of Agreement For Lease and Ancillary Matters, recited a contract for sale dated 28th February, 2012 between St. Brendan's Trust and the plaintiff and a confirmation that the plaintiff was then entitled to the benefit of the agreement for lease with the HSE. By then, planning permission had been obtained for the primary care centre but construction had not commenced.

5. In very broad terms, the agreement was that the defendant would have the site on which the health care centre was to be built – which was referred to in the agreements as *"the property"* – and the plaintiff was to retain the old convent with land to the rear – which was referred to as *"the retained property"*. In return, the plaintiff was to have a cash price of €650,000; various wayleaves over the property for the benefit of the retained property; *"a monitoring role"* in relation to the construction of the primary care centre with a view to advising on potential cost savings, which, if achieved, would be shared; the prospect of an additional payment in respect of *"Additional Space"* in the primary care centre, if planning permission could be obtained for an extension and the HSE would agree to take a lease of it; and the prospect of a lease of part of the building for which planning permission had been

obtained if permission could be obtained for a change of use from a dispensary serving the doctors in the primary care centre to a commercial pharmacy.

6. I want to keep out of the weeds as much as possible but among the myriad issues in the case is a dispute about the date of the agreements.

7. On the plaintiff's case the agreements were made on a date in May, 2018. On the defendant's case, they were made on 24th July, 2018. On the plaintiff's case the agreements were signed by both parties in May, 2018 and sent to the defendant's solicitors *"to be held on trust and to our order pending completion of the property acquisition"*. The date of the agreements is said by the plaintiff to be somehow relevant to the defendant's obligation to apply for planning permission for the extension but the obligation to apply for planning permission for the extension was an obligation *"within 6 months of the date of completion of the purchase of the property."*

8. It is common case that the purchase of the property was completed on 24th July, 2018. If, as is the plaintiff's case, the agreements were to have been held in trust until then, the effective date was 24th July, 2018 and it does not matter when they were signed. And in any event, the defendant's obligation to apply for planning permission for the extension ran from the date of completion of the sale. It seems to me that on any view the only relevant date is 24th July, 2018 but – like a lot of the detail that emerged in the course of a protracted exchange of affidavits on this motion – it is simply not relevant for present purposes.

The action

9. By plenary summons issued on 20th February, 2019 the plaintiff claimed an order for specific performance of the Agreement for Assignment of Agreement For Lease; an injunction requiring the defendant to permit access by the plaintiff to such information and

documentation in relation to the building works as the plaintiff might reasonably require; and damages €763,705. While the summons claimed an order for specific performance of the Agreement for Assignment of Agreement For Lease, generally, the focus of the statement of claim – which was delivered on 5th March, 2019 – was on the *"monitoring role"* in relation to the construction costs. The estimated construction cost for the primary care centre, it was said, was €3 million. This was in fact the *"Projected Cost"* provided for in the Agreement for Assignment of Agreement for Lease. The plaintiff, it was said, had identified cost savings of €1,241,797.40, exclusive of VAT, but the defendant had entered a fixed sum contract for the building works for a sum in excess of €3 million. The claim was that by reason of 33 alleged breaches of contract by the defendant in connection with the procurement of the building contract which it had entered for the construction of the primary care centre, the plaintiff had lost – or the defendant had thrown away – the opportunity of achieving cost savings of €1,241,979.40 plus VAT and the plaintiff had lost the opportunity to be paid half of that sum, which was said to be €763,705.40. On 19th June, 2019 a defence was delivered denying the claim on various grounds. Specifically, the defendant pleaded that it had entered a design and build contract on 1st March, 2019 for the construction of the primary care centre in accordance with the requirements of the HSE Agreement for Lease for €3.5 million, plus VAT.

10. At some stage in the summer of 2019 the building work commenced. Although the work was being carried out in accordance with the specifications in the HSE Agreement for Lease and in accordance with the plans for which planning permission had been obtained, the plaintiff objected that the services which were being built on the sold lands were not sufficient to serve the retained property, and in particular would not be sufficient to accommodate a nursing home which the plaintiff was contemplating building on the land to the rear of the convent.

11. On 24th June, 2019 the plaintiff applied for an interlocutory injunction restraining the continuation of the building work. The premise of the application, in very general terms, was that the laying of the services in the way in which there were being laid was a breach of the defendant's obligation to provide wayleaves for the benefit of the retained lands.

12. That plaintiff's motion was heard and refused by me in the High Court on 5th July, 2019 on a number of grounds, including that the claim in relation to easements was not part of the case which had pleaded. The plaintiff was then given liberty to amend its statement of claim within fourteen days to plead the case in relation to the easements which it wanted to make. The time allowed for the amendment of the statement of claim was the time which the plaintiff had asked for but, in the event – and without any further order or consent in the meantime – the amended statement of claim was not delivered until 20th February, 2020. I should add for completeness that the plaintiff appealed to the Court of Appeal against the refusal of the interlocutory injunction but later declared the substance of its appeal to have been largely overtaken by developments, to which I will come.

13. The amended statement of claim introduced two new claims: the first in relation to the extension and the second in relation to the grant of easements.

14. As to the extension, the plaintiff pleaded that the planning application submitted by the plaintiff had been rejected as incomplete and/or deemed invalid, by reason of which it claimed that it would sustain a loss of rent of approximately €50,000 per annum.

15. As to easements, the case pleaded is that the defendant was obliged by the Agreement for Assignment of Agreement For Lease and Ancillary Matters – which although it is dated 24th July, 2018, the plaintiff maintains was made on an unspecified date in May, 2018 – to grant the plaintiff easements over the sold land for the benefit of the retained property, and that by deed dated 24th July, 2018 (which was the conveyance of the site) the defendant, in

compliance with its obligations under the contract, granted the plaintiff the easements required by the contract, specifically:-

> *"Full right and liberty for [the plaintiff] its successors and assigns the owners from time to time of the Retained Property … for the benefit of the Retained Property and each and every part thereof;*
>
> *2.1 to the free passage and running to and from the Retained Property and each and every part thereof of the Utilities through the Conduits now laid in under or over or at any time laid in under or over the [sold property] or parts thereof from time to time containing the Conduits.*
>
> *2.2 to enter onto the [sold property] (or appropriate or reasonable parts thereof) upon reasonable notice (except in the case of emergency) with workmen and others and all necessary equipment and remain there for such reasonable time as is necessary for the purpose of inspecting, cleansing, repairing, replacing …"* and so on and so forth,

16. Acknowledging that it is a statement of the obvious, the case pleaded is that the plaintiff has in fact been granted the easements which it is entitled to.

17. Having set out the agreement and the terms of the grant of easements, the amended statement of claim pleads that it was an express or an implied term that the defendant would accommodate the plaintiff's easements and/or permit the plaintiff to connect up with the conduits and/or that the defendant would construct the conduits in such a manner as would facilitate the plaintiff's exercise of the granted easements and would not construct the easements in such a manner as would prevent the plaintiff from exercising the easements. And then, at para. 28, it is pleaded that:-

> *"The following were further express and/or implied terms of the Contract and/or the Grant of Easements:*

(a) That the Granted Wayleave would benefit or accommodate the reasonable future development of the property retained by the plaintiff;

(b) That the Granted Wayleave would permit the plaintiff to connect into the Conduits and/or accommodate the future development as a 60 bed nursing home of the property retained by the plaintiff;

(c) That the defendant would construct the conduits including the drainage for storm water in such manner as would accommodate or be sufficient for the capacity required by the plaintiff for the Retained Property, including the reasonable future development of same;

(d) Further, or in the alternative, that the defendant would not construct the conduits in a manner which refused, prevented or obstructed the plaintiff exercising its right to connect into the conduits, or in a manner which diminished or restricted that easement and/or would likely lead to flooding on the plaintiff's Retained Property."

18. The plaintiff's case is that the defendant carried out the construction work otherwise than in accordance with what it claims were its obligations and that the plaintiff, having been refused permission to connect to the storm drain laid by the defendant, laid its own drain and watermain. Slightly peculiarly, while it is pleaded that the plaintiff's works were completed on 17th January, 2020, the cost particularised in the amended statement of claim is an estimated sum of €184,266.91 plus VAT. Perhaps it was that the precise connection fees for the new services were not then known.

19. While the amended statement of claim includes a claim for a declaration that the plaintiff is entitled to the free flow of water and sewage and other utilities as defined by the deed of grant of easements and that such conduits to be constructed to accommodate the plaintiff's reasonable or anticipates use of the granted easements, the substance of the claim

in respect of the alleged denial of easements appears to be a money claim for the cost to the plaintiff of laying alternative services.

20. The defendant delivered its amended defence on 28th May, 2020.

21. The defendant denies any breach of its obligations in relation to the application for planning permission for the extension to the primary care centre and pleads that an application made in April, 2019 for permission for an extension was rejected by Kerry County Council on the basis that it sought permission or an extension to a building which had not yet been built; and that the application was resubmitted on 11th November, 2019 when the building was substantially complete.

22. As to the plaintiff's claim in relation to easements, the defendant admits the contract and the grant of easements but pleads that it has no obligation beyond the express wording of the documents and that there is no warrant for the contention that the defendant was obliged to provide a wayleave which would benefit or accommodate the reasonable future development of the retained lands in general, or a 60 bed nursing home in particular. The amended defence goes on to address the plaintiff's pleas in some detail but for present purposes it is sufficient to say that the bones of the defence is that the plaintiff is not entitled to easements for its future planned development of the retained lands.

23. Following the delivery of the amended statement of claim there were three strands to the plaintiff's case, first the monitoring role; secondly, the extension; and thirdly, the easements. There was no complaint about the commercial pharmacy, or the hoped for commercial pharmacy.

The motion for security for costs

24. By notice of motion issued on 7th July, 2020 and originally returnable for 23rd November, 2020 the defendant applied for an order pursuant to s. 52 of the Companies Act, 2014 and/or O. 29 of the Rules of the Superior Courts requiring the plaintiff to provide security for its costs; and an order pursuant to O. 20, r. 6 fixing the amount and manner of the security.

25. The motion was grounded on a reasonably short affidavit of Mr. Brian Gilroy, who briefly summarised the background to the dispute, the claim originally made, the High Court application for an interlocutory injunction, the appeal to the Court of Appeal, and the delivery of the amended statement of claim and defence. Mr. Gilroy, on advice, identified two central claims: the *"cost savings"* and the refusal by the defendant to accommodate the future development of the plaintiff's retained lands. He deposed, on advice, that the defendant had a *prima facie* defence to both claims.

26. I pause here to note that for whatever reason, Mr. Gilroy did not deal with the alleged beach of contract in relation to the plaintiff's option for a lease extension to the care centre but neither, as I will come to, did that form any part of the plaintiff's answer to the application for security for costs.

27. As to the plaintiff's inability to pay the defendant's costs if the action were to fail, Mr. Gilroy pointed to the most recent filings with the Companies Registration Office which showed, as of 31st December, 2018, tangible fixed assets of €141,080; a sum for cash and cash equivalents of €26,693; creditors falling due within one year of €313,676; and a negative balance sheet of €30,548. There was, he suggested, clear reason to believe that the plaintiff would be unable to pay the costs if the defendant was successful in defending the action. At that stage, as Mr. Gilroy noted, the defendant had an order for the costs of the failed motion for an interlocutory injunction.

28. The defendant's costs of defending the action were estimated by a legal costs accountant at €285,666 and Mr. Gilroy exhibited the breakdown.

29. The plaintiff was first called upon to provide security for costs by letter dated 28th November, 2019. Its initial response by letter dated 3rd December, 2019 was that the plaintiff has assets worth well in excess of €1 million and would be more than able to pay the costs in what was said to be the unlikely event that the plaintiff would be unsuccessful. The plaintiff's solicitors' letter put a value of €800,000 on the retained lands, €700,000 on the *"pharmacy unit"*, €760,000 on the *"cost saving"* claim, and €35,000 per annum on the extension. After a brief exchange of correspondence in December, 2019 the defendant's solicitors indicated by letter dated 8th January, 2020 that the application would be made in early course but in the event, as I have said, the motion did not issue until 7th July, 2020.

30. On 20th November, 2020 a replying affidavit of Mr. John Whelan was filed on behalf of the plaintiff. By then the High Court order for costs against the Plaintiff had been set aside by the Court of Appeal and an order made instead reserving the costs on the injunction application to the hearing of the action.

31. Mr. Whelan, at some length, contested the proposition that the defendant had established a *prima facie* defence to the *"cost saving"* claim. This time I will stay out of the weeds and say only that it was accepted on the hearing of the appeal that the defendant had a *prima facie* to that part of the claim.

32. Mr. Whelan also contested that the defendant had established a *prima facie* defence to the easement claim, focussing on a conversation said to have taken place on 11th July, 2019 at which the defendant's engineer is said to have said that the plaintiff would not be provided with any storm water or water supply connection, at all. As to the merits of the plaintiff's claim, or the merits of what the defendant suggested was a *prima facie* defence, Mr. Whelan did not say that what he said was based on legal advice. But what he did say was that the

only defence advanced to the plaintiff's claim that it was entitled to an easement for the benefit of the future development of the retained lands was the contention, in para. 24(c) of Mr. Gilroy's affidavit, that the contract was not intended to, and did not on its terms, grant the plaintiff an unfettered right to connect up with any conduits that might be laid on the defendant's land. In fact, Mr. Gilroy, at para. 24(a) of his affidavit had identified the issue pleaded in the amended defence, which was whether the easements admittedly granted extended to the accommodation of the reasonable future development of the plaintiff's lands, in general, or the development of a 60 bed nursing home, in particular.

33. As to the plaintiff's ability to meet an order for the defendant's costs, Mr. Whelan exhibited the plaintiff's unaudited abridged financial statements for the year ended 31st December, 2019. The balance sheet for 2019 showed – as Mr. Whelan said it showed – a revaluation of the plaintiff's fixed tangible assets from €141,080 to €856,367 and net assets of €371,520. Mr. Whelan explained that on 7th November, 2019 Mr. Brian O'Leary, auctioneer, had valued the plaintiff's property at €850,000 having regard to the then proposed rezoning of the lands to mixed use in the draft Listowel Municipal Area Development Plan, and that on 15th October, 2020, following the adoption of the Development Plan on 21st September, 2020, Mr. O'Leary had revalued the property at €900,000.

34. It will be recalled that part of the bargain was that the plaintiff was to have the option for a 25 year lease over that part of the primary care centre designated for the time being as a dispensary if planning permission could be obtained for a commercial pharmacy. Mr. Whelan deposed that the plaintiff's planning expert, Mr. Jan Oosterhof, had advised that a planning application for a pharmacy would have a very strong chance of success and that Mr. O'Leary had valued the plaintiff's option to acquire a pharmacy lease at €750,000. The combined value of the pharmacy lease and the net equity on the balance sheet was said to be €1,606,367. Mr. Whelan exhibited a copy letter of 8th October, 2020 from Mr. Oosterhof

which said what Mr. Whelan said it said, and a copy letter of 15th October, 2020 from Mr. O'Leary which described the *"Pharmacy portion"* of the primary care facility as extending to some 1,350 – 1,400 sq. ft. and expressing the *"opinion that the value of the pharmacy portion of this property [is] in the region of €750,000."*

35. Finally, under the heading *"Special Circumstances"*, Mr. Whelan pointed out that the application for security for costs had been made one year and five months after the delivery of the statement of claim and one year after the plaintiff's application for interlocutory relief had been heard by the High Court. Mr. Whelan suggested that there had been considerable delay on the part of the defendant and made much of the fact that the Court of Appeal had allowed the plaintiff's appeal against the costs order made by the High Court. He also suggested that the plaintiff's alleged inability to ascertain the defendant's financial standing was a matter to which regard should be had in determining the merits of the application.

36. There was also filed on behalf of the plaintiff an affidavit of Mr. Brian Lonergan, the plaintiff's accountant, exhibiting the plaintiff's abridged financial statements for 2019. Mr. Lonergan explained the accounting rules which, he said, dictate how the 25 year lease on the pharmacy is accounted for in the financial statements but there was no 25 year lease on the pharmacy, whether in the financial statements or anywhere else.

37. On 18th January, 2021 an affidavit of Mr. Myles Kirby was filed on behalf of the defendant, which exhibited a report which he had prepared in order to assess the ability of the plaintiff to meet an order for costs. Mr. Kirby deposed that the opinions and conclusions in the report were his own and that he did not believe that the plaintiff was in a financial position or had sufficient assets to discharge an adverse costs order. He also deposed to a belief that the underlying issues in the proceedings had not given rise to the plaintiff's inability to meet an adverse costs order.

38. Mr. Kirby recorded his instruction to express his professional opinion as to whether the plaintiff would be in a position to pay the defendant's costs if the action should fail and he did that.

39. Mr. Kirby noted that the defendant's costs were estimated at €285,666. He noted that the plaintiff would also incur costs in the prosecution of the action which, absent any information as to the plaintiff's costs to date or estimated future costs, he took at the same figure.

40. Mr. Kirby had been provided with the plaintiff's publicly available filings in the Companies Registration Office, the plaintiff's then recent revaluation of the retained property, and a valuation prepared on behalf of the defendant by a Mr. Ger Carmody. Mr. Kirby noted that a request by the defendant's solicitors for a copy of the plaintiff's full unabridged financial statements – said to have been necessary to allow a proper response to the plaintiff's affidavits – had been refused on the basis that it was a *"'fishing expedition' with respect to historical accounts."* While Mr. Kirby would have preferred to have had the unabridged financial statements, he said that he had sufficient information to form and give his opinion.

41. Mr. Kirby set out the financial background of the plaintiff and went through the abridged financial statements and the revaluation of the retained property. He noted that although the change in zoning had occurred in 2020 the gain – or the great bulk of the gain – had been recognised in 2019, when the financial statements showed, besides the gain, a contingent liability of €202,560 for the related tax charge on the gain. Mr. Kirby had some observations on the accounting treatment of the revaluation but focussed on the fact that the property was an asset of the plaintiff. He noted the significant discrepancy between the form of the valuers' reports and between the figure of €900,000 which Mr. O'Leary put on the property and Mr. Carmody's figure of €265,000; but disclaimed any experience in land

valuations. Mr. Kirby observed – wryly? – that in his experience as a receiver and liquidator on hundreds of property sales, valuations by their very nature are inherently subjective.

42. Cutting to the chase, Mr. Kirby observed that the plaintiff plainly did not have the liquidity to meet an adverse costs order for €285,000 so that its ability to do so would be entirely dependant on how much value it could realise from the retained property, and how any realisation would be applied to competing creditors. He set out in a table an Estimated Outcome Statement showing two alternative scenarios, one in which Mr. Carmody's valuation would be realised and the other in which Mr. O'Leary's valuation would be achieved.

Estimated Outcome Statement

Fixed and Current Assets	***Scenario 1***	***Alternative scenario***
	Euro	***Euro***
Tangible Fixed Assets	*265,000*	*900,000*
Current Assets	*118,700*	*118,700*
Total Assets	***383,700***	***1,018,700***
Costs Associated with Realising Assets		
Capital Gains Tax on Retained Property		*(202,500)*
Estimated Marketing/Advertising/		
Agents Fees	*(7,950)*	*(27,000)*
Total Available Funds to Company		
Creditors	***375,750***	***789,140***
Balance owed to Debenture Holders		
At 31st December 2019	*(320,000)*	*(320,000)*
Funds Available for Unsecured Creditors	***55,570***	***469,140***
Unsecured Creditors		
IIF's Legal Costs	*(285,666)*	*(285,666)*
Greenville's Legal Costs	*(285,666)*	*(285,666)*
Directors' Loan Accounts	*(71,102)*	*(71,102)*
Trade Creditors and Accruals	*(9,885)*	*(9,885)*
Unsecured Creditors Balance	***(652,319)***	***(652,319)***

Surplus/(Shortfall) to Unsecured Creditors (596,569) (183,179)

43. The table shows, as Mr. Kirby said, that even on the basis of the more optimistic figure for the value of the retained property, the plaintiff would be unable to discharge an adverse costs order in full. Mr. Kirby calculated that in order to discharge all creditor claims in full, the retained property would have to be sold for a figure of at least €1.075 million.

44. On 12th February, 2021 Mr. Gilroy swore a second affidavit in which he commenced by saying that he had not responded to each and every averment made by Messrs. Whelan and Lonergan; but in which, as far as I can see, he did. Mr. Gilroy fought his way through the thicket of detail and argument as to what was said to have been said as to the connection to the services on the sold land, the capacity of pipes, and the merits of the cost saving claim, upon which it is not necessary to dwell. As to the alleged delay in applying for the order for security for costs, Mr. Gilroy pointed to the shift in focus of the claim soon after the delivery of the original statement of claim and the delay on the part of the plaintiff in delivering its amended statement of claim, which then had to be sent to the legal costs accountant for an estimate of the costs.

45. On 27th April, 2021 a second affidavit of Mr. Whelan was filed. Mr. Whelan exhibited what he described as a *"more comprehensive valuation of the plaintiff's retained lands/convent site dated the 3rd March, 2021"* and *"a more comprehensive valuation dated 10th March, 2021 of the benefit to the plaintiff of the exclusive option in respect of the pharmacy lease."* The more *"comprehensive valuation"* of the retained lands had some photographs and boilerplate and some comparators but the valuation was the same €900,000 previously given. Interestingly, the more comprehensive valuation noted that the convent is a protected structure without saying what affect that had on the value of the property. What was said to be the more comprehensive valuation of the pharmacy lease described the property as a commercial/retail unit on the ground flor of the primary care centre which,

"when complete will contain a pharmacy complementing the GP based Primary Care Centre. There is off street parking on site." It suggested that projected rental income over 25 years and heads of agreement with a current pharmacy operator suggested a probable income of €1.75 million over that period. The report repeated the valuation previously given for *"the pharmacy portion"* of €750,000 but now characterised that figure as the net value to the plaintiff after deduction of all future leasehold payments to the defendant. There was no breakdown of the projected income or outgoings.

46. Mr. Whelan rejected Mr. Carmody's figure of €265,000 for the retained lands by reference to the enormous demand for nursing home beds in Listowel and the price of €650,000 paid by the defendant for the site next door. He referred to a notification dated 8th April, 2021 by Kerry County Council of a decision to grant permission for the pharmacy and suggested that the rental stream from the pharmacy would commence immediately. And then, at great length, Mr. Whelan repeated what he had previously said about the delay in the bringing of the application for security for costs, revisited the detail of what had been said on the hearing on the interlocutory injunction application, and went into the engineering detail of the drainage of the retained lands.

47. A second affidavit of Mr. Lonergan, filed on 27th April, 2021, addressed Mr. Kirby's report. Mr. Lonergan stood over the directors' entitlement to have accepted Mr. O'Leary's valuation – which Mr. Kirby had not questioned – and while disclaiming the expertise to express a view on whether it was optimistic or not, pointed to the fact that the €850,000 in 2019 was not materially different to the €900,000 in 2020. Mr. Lonergan took issue with what Mr. Kirby had said as to the accounting treatment of the revaluation. As to Mr. Kirby's Estimated Outcome Statement, Mr. Lonergan queried the comparison between the value of the plaintiff's assets and liabilities as of 31st December, 2019 against a figure for estimated future legal costs which, he had been instructed, might not materialise for two years. Mr.

Lonergan referred to what he called the notification of the grant of planning permission for change of use to a pharmacy and recorded his instruction that the plaintiff had a pharmacist ready and willing to enter a contract to lease the pharmacy for *"approximately"* €70,000 per annum, which, he said, would be included in the plaintiff's 2020 accounts as a post balance sheet event: but which, by the way, as I will come to, it was not. Nor was it included in the draft 2021 financial statements.

48. In June and July, 2021 there was a further round of affidavits: a second from Mr. Kirby and a third by each of Messrs. Gilroy, Whelan and Lonergan.

49. Mr. Gilroy, by reference to a valuation from Mr. Carmody, contested the rental value put by the plaintiff on the pharmacy, which Mr. Carmody put at €40,000. He also pointed out that the decision to grant planning permission for the pharmacy had been appealed by the Listowel Pharmacists' Group. He had more to say about pipes, flows, connections, attenuation tanks and so on.

50. Mr. Whelan challenged Mr. Carmody's valuation of the retained lands, pointing, again, to the €650,000 paid by the defendant for the health care centre site. By reference to a letter from Mr. Oosterhof, he expressed confidence that the decision of Kerry County Council to grant planning permission for the pharmacy would be upheld on appeal. There was more about pipes, conduits, ducts, attenuation tanks, infiltration tanks and the rest of it.

51. Messrs. Kirby and Lonergan did not really add anything to what they had previously said.

The High Court judgment

52. The action being a Munster case, the motion was sent to the Cork non-jury and chancery list where it was heard by O'Regan J. on 10th November, 2021.

53. In her *ex tempore* judgment on the following day, O'Regan J. considered first whether the defendant had shown that it had a *bona fide* defence. By reference to the pleadings, the judge noted that there was no dispute as to the plaintiff's entitlement to a monitoring role in relation to the building costs, nor was there a dispute as to the plaintiff's entitlement to the grant of a wayleave. The judge identified the whole argument of both parties as being based on the interpretation of the agreement of 14th July, 2018, which, she noted, included, in clause 14, an entire agreement clause. Pithily, the judge found that there was a *bona fide* argument to be made to the effect that the rights and privileges which the plaintiff claimed were express or implied, were not implied.

54. As to whether there was credible testimony that the plaintiff would be unable to pay the costs, the judge looked first at the evidence as to the value of the pharmacy lease. She characterised the suggestion that the plaintiff had already found an entity who was willing to pay €70,000 per annum as being in the realm of mere assertion and thought that Mr. Carmody's figure of €40,000 per annum was more credible. Taking account of the defendant's tax liability in respect of any rental income and noting that the rent was contingent on planning permission and the identification of a tenant, the judge was prepared to attribute to the plaintiff's entitlement to a pharmacy lease a value of €10,000 per annum for the first five years. As to the value of the retained lands, the judge noted that Mr. O'Leary's valuation of €900,000 was based on the premise that the best comparator was the €650,000 paid by the defendant for the site. That, she said, failed to take into account the fact that the care centre site had the benefit of planning permission and the HSE agreement for lease.

55. The judge then turned to Mr. Kirby's Estimated Outcome Statement. On the best-case scenario there would be a shortfall of €183,000. Having looked at the valuers' comparators, the judge expressed the view that both were guesstimates and that the true value was likely to be somewhere in between. Even if one were to factor in a figure of €100,000

for the income from the pharmacy, there would be a substantial shortfall. O'Regan J. noted Mr. Kirby's conclusion that the plaintiff would be unable to pay the costs. That, she said, was not the test. Rather the issue was whether there was credible evidence; which, the judge found, there was.

56. Having looked at the chronology and evolution of the litigation, in particular the necessity and the time taken for the delivery of the amended statement of claim, the judge found that there had been no delay in the bringing of the motion such as would amount to special circumstances which would justify refusing to make the order sought. O'Regan J. fixed the amount of the security at €285,666 and made an order for the defendant's costs of the motion.

The appeal

57. By notice of appeal dated 1st December, 2021 the plaintiff appealed to this court against the judgment and order of the High Court. There were fifteen grounds of appeal but broadly speaking, the plaintiff's case was that:-

1. The judge had erred in the application to the facts of the legal principles appropriate to an application for security for costs.
2. The judge erred in her finding that the defendant had a *prima facie* defence to the plaintiff's claim for breach of its right to connect to the storm drain.
3. The judge erred in finding that the defendant had not contested its entitlement to connect to the conduits.
4. The judge erred in her assessment of the value of the pharmacy lease.
5. The judge erred in her assessment of the value of the retained lands.

6. The judge erred *"in her determination that there would be a shortfall available to the plaintiff on a sale of its property, having regard to its valuation of the retained property in its financial statements for the year ending 31 December 2019 and the valuation put forward for the pharmacy lease interest."*
7. The judge erred *"in her determination that the defendant had put forward sufficient credible evidence that the plaintiff would be unable to pay the costs, without any or any sufficient regard to the credible evidence to the contrary effect put forward on behalf of the plaintiff."*

58. Strikingly absent from the notice of appeal is any suggestion that the evidence adduced on behalf of the defendant as to the ability of the plaintiff to meet an adverse costs order was not credible.

59. On the appeal, there were three further rounds of affidavits.

60. In an affidavit filed on 8th February, 2022, Mr. Whelan deposed that a market offer had recently been received for the retained lands in the sum of €850,000. He exhibited a letter from Mr. O'Leary which recorded an instruction to seek market interest and an offer of €850,000 but not the identity of the would-be buyer or the circumstances in which the offer was made. Mr. Whelan deposed that the plaintiff's solicitors had issued draft terms for the pharmacy head lease and expressed confidence in an early favourable decision from An Bord Pleanála. And he complained about the design of the extension for which the defendant had obtained planning permission on 24th November, 2020 and the effect that that would have over the plaintiff's right of way. In ease of the court, he said, he exhibited again a bundle of correspondence which had already been exhibited.

61. On 7th March, 2022 a further affidavit of Mr. Whelan was filed. Mr. Whelan exhibited a grant of planning permission for the pharmacy by An Bord Pleanála dated 11th February, 2022. He referred to and exhibited an exchange of correspondence between the

defendant's solicitors and the plaintiff's solicitors in which the plaintiff protested that the planning application had held the plaintiff out as the owner of the primary care centre – which, obviously, it was not – and had indicated that there were five car parking spaces associated with the pharmacy unit – which there were not – and that the grant of planning permission was subject to a condition – with which, it was said, the plaintiff could not comply – that the total number of car parking spaces serving the primary care unit should be reduced from 68 to 60, five of which would be reserved for the use of the pharmacy. Mr. Whelan characterised the defendant's refusal to grant the plaintiff a lease of the pharmacy until these issues had been addressed as a further anticipated breach of contract.

62. In the same affidavit, which was his fifth affidavit on the motion for security for costs, Mr. Whelan attempted to bolster the evidence available to the High Court as to the value of the pharmacy lease and the rental value of that unit. He exhibited a spreadsheet, which he had prepared, dated 28th February, 2022, projecting a rental income over 25 years starting at €50,000 in 2023 and rising to €139,921 in 2047, and amounting in total to €1,758,942, after corporation tax at 25%. The figures were said to be based on three GPs initially, rising to 6/7 GPs and one extra for SouthDoc. Mr. Whelan also exhibited a report dated 28th February, 2022 signed by Mr. O'Leary in which Mr. O'Leary recalled that he had provided a market valuation of the pharmacy leasehold on 10th March, 2021 of €750,000. According to Mr. O'Leary's latest report, the rental income receivable for the property was based on a sub-lease agreement said to have been made with an unidentified pharmacy operator. The basis for the rental income receivable was said to be linked to the number of GPs operating from the primary care centre – currently three – and an observation in the report of the An Bord Pleanála inspector on the planning appeal that the remaining space on the ground floor of the medical centre could accommodate a maximum of 6 or 7 GPs. Mr. O'Leary calculated that

on the basis of a 6.5% yield, the net present value of €1,758,942 was €774,067, which went to show, he said, that his valuation of €750,000 was fair and reasonable.

63. I have allowed myself to be lured into the weeds but will try to extract myself as quickly as I can. If the €774,067 in the report of 28th February, 2022 is close to the €750,000 in the report of 10th March, 2021, there is still no indication as to where the €750,000 came from in the first place. The rent projected for 2023 of €50,000 is much nearer Mr. Carmody's €40,000 than the €70,000 which someone had told Mr. Lonergan was available and which the High Court judge had characterised as mere assertion. The premise of the projected increase in the rent is an increase in the number of doctors practising from the health care centre – which makes sense – but while there may be space in the primary care centre for more doctors, there is no evidence that there are more doctors for the space. And, not to lose sight of the wood for the trees, there is no pharmacy lease and there is a dispute as to the defendant's obligation to adjust the car parking arrangements to as to allow compliance with the planning condition. Without expressing any opinion on the rights and wrongs of the issue, I do not accept that the position taken by the defendant in relation to the reduction and allocation of car parking spaces can properly be characterised – as Mr. Whelan would have it – as an attempt to wrest from the plaintiff a substantial asset. If, as appears to be the substance of the plaintiff's position, there are plenty of car parking spaces available to the defendant to allow the planning condition to be met, the plaintiff has not convincingly engaged with the defendant's argument that the plaintiff has no entitlement to them. Mr. Whelan's proposition in a later affidavit that the defendant is bound by the determination by An Bord Pleanála to do whatever is required to meet the planning condition appears to me to be novel. So too is the proposition that a right to car parking spaces may be found in one of the precedent forms in *Irish Conveyancing Precedents* which contemplates an agreement

might be made between the landlord and the tenant for the use of an unspecified number of car parking spaces.

64. Mr. Gilroy, in what was his fourth affidavit filed on 4th April, 2022 dealt at some length with the condition attached to the planning permission, emphasising that the option for the pharmacy lease was an option for a lease of the unit and not car parking spaces. He also raised the issue of a debenture issued by the plaintiff on 3rd December, 2021 and referred to a plenary summons issued against the plaintiff and Mr. Whelan on 7th January, 2022 by Mr. Moss Kelly – who appears to have been involved with Mr. Whelan in the negotiation of the HSE agreement for lease. Mr. Gilroy offered the view that the increasing costs of the proceedings added to his apprehension that the plaintiff would be unable to pay them.

65. By order of the Court of Appeal made on 1st July, 2022 permission was granted for the filing of one more affidavit from Mr. Whelan – which had already been sworn – and a short response.

66. In his affidavit filed on 5th July, 2022 Mr. Whelan exhibited what he said were the financial statements for the plaintiff for 2020 but which were the abridged financial statements which had been filed in the Companies Registration Office. These, he said, showed no material change from 2019. The financial statements for 2021 had not yet been prepared but would, he said, be furnished to the defendant as soon as they were available. The information in relation to the debenture to which Mr. Gilroy had referred, he said, was readily and publicly available.

67. As is evident from the plenary summons, a copy of which Mr. Whelan exhibited, the action by Mr. Kelly is a claim for €96,000 alleged to be payable by the plaintiff and Mr. Whelan on foot of a written agreement of 27th November, 2013. Mr. Whelan, by his solicitors, has been pressing for delivery of a statement of claim. The correspondence which was exhibited shows that Mr. Whelan contests that he has any personal liability to Mr. Kelly

and that the action against the company is to be robustly defended. While much has been made of the fact that Mr. Kelly has not delivered his statement of claim, it is clear from the summons that the primary claim is for a liquidated sum said to be payable on foot of an alleged written agreement. If Mr. Whelan does not know, broadly, what Mr. Kelly's claim is, he has not said so. If he has been advised or believes that the plaintiff has a good defence to Mr. Kelly's claim, he has not said so.

68. On 2nd August, 2022, by leave of this court by order of 29th July, 2022, a sixth affidavit of Mr. Whelan was filed exhibiting draft abridged financial statements for 2021. The accounts were said to be draft because they were not due until October, 2022 but I do not see this as a reason why they were not signed. Mr. Whelan exhibited updated valuations from Mr. O'Leary, each dated 19th July, 2022 and each – in common with most of Mr. O'Leary's valuations – running to one paragraph. A figure of €1.035 million was put on the retained lands and a figure of €864,000 on the *"pharmacy portion"* of the primary care centre. There was no justification offered for either figure.

69. The plaintiff's appeal was listed for hearing on 14th October, 2022. On the day before a form of notice of motion was stamped and sent to the defendant's solicitors by which the plaintiff sought leave to file a further affidavit sworn on 13th October, 2022 and *"if necessary"* short service. The additional evidence was said to be central to the appeal and with the acquiescence of the defendant, the court allowed the affidavit to be filed in court.

70. In his seventh affidavit Mr. Whelan deposed that he had instructed Mr. O'Leary on 28th September, 2022 to prepare an updated valuation of the retained property in circumstances in which he had *"earlier this month"* negotiated an agreement in principle to sell part of the property to a purchaser who intended to develop it. If Mr. O'Leary was instructed on 28th September the reference to *"earlier this month"* must have been to some date in September. The property was described as two acres with the old convent and school

buildings, a portion of which was said to be a fully serviced one acre site with independent access to the rear of the convent building. Mr. Whelan said that it was proposed to develop the convent building into a mixed-use development and to build a new building on the site behind; but it was entirely unclear whether it was the convent or the site which was to be sold or who was to develop the convent. Mr. Whelan contemplated that a planning application might be prepared within about four months. The proposed development works were so commercially sensitive that he could say no more to the court but he had discussed the matter with Mr. O'Leary who had reviewed the mixed-use development of the convent property and taking all matters into consideration had formed the view that this enhanced the value of the retained property to the region of €2 million.

71. Mr. O'Leary's report of 11th October, 2022 did not advance matters. Mr. O'Leary wrote that since his previous valuation in July, 2022 *"considerable development/planning works have taken place indicating a higher valuation for both the convent building and the adjacent one acre site."* He wrote that he had been advised that agreement had been reached *"earlier this month"* – which suggests that he was told that it was in October – with the purchaser: but he did not say the purchaser of what. Mr. O'Leary expressed the opinion that *"taking all matters into consideration",* the value of the property was in the region of €2 million.

72. When moving for leave to file the additional affidavit, counsel for the plaintiff also moved for an adjournment of the appeal in the expectation or at least the hope that more could be said about the agreement in principle in about four months. However, it was clear that whatever happened, the plaintiff was maintaining its position that on the evidence already before the court the appeal should be allowed. While recognising that the court was unlikely to be disposed to adjourn the appeal unless on terms that the defendant's costs thrown away were paid, counsel did not have instructions to undertake that they would be

paid or to move the application on the basis that they would be paid. Counsel for the defendant opposed the adjournment application. While he could not point to any prejudice that would arise from an adjournment other than costs, he pointed to the ever shifting value which the plaintiff would attribute to retained property and argued that enough was enough. In circumstances in which the appeal was ready for hearing and that, whatever might or might not happen in the meantime, there was every prospect that if it was adjourned it would have to be made ready for hearing again on substantially the same basis, the adjournment application was refused and the court proceeded to hear the appeal.

The arguments

73. The first issue on the appeal was whether the High Court judge had erred in funding that the respondent had shown that it had a *bona fide* defence to the easement element of the claim. The parties were agreed that the test was that propounded by Finlay-Geoghegan J. in *Tribune Newspapers (In receivership) v. Associated Newspapers Ireland* (Unreported, High Court, 25th March, 2011) which was adopted by Charleton J. in *Oltech (Systems) Ltd. v. Olivetti Ltd.* [2012] IEHC 512, [2012] 3 I.R. 396, namely that:-

> *"... what is required for a defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim."*

74. The appellant challenges the judge's finding that the existence of the wayleave was not denied on the ground that she failed to have regard to the respondent's denial of the appellant's entitlement to connect as set out in its solicitors' letter of 1st August, 2019 and the pleas at paras. 30, 41 and 43 of the amended defence.

75. It seems to me that the appellant has misunderstood the respondent's position in relation to the wayleaves. On the pleadings, as the judge observed, it is common case that the appellant has been granted the easements it was entitled to. The substance of the appellant's claim is that it is entitled to the wayleaves not for the benefit of the convent and garden behind as they stand, and as they stood at the date of the grant, but that it is entitled to wayleaves for the benefit of any reasonable future development, in particular, for the benefit of a 60 bed nursing home. There is clearly a legal issue as to whether the grant of easements was limited to the retained land as it stood or extended to future development. Moreover, as the judge said, the appellant's claim to be entitled to services for the benefit of a 60 bed nursing home is not based solely on the express terms of the grant but on an implied term in the grant and the contract which preceded it – which included an entire agreement clause. It can hardly be contested that the respondent has an argument to make that there are no terms to be implied into a deed of grant of easements or an agreement which contains an entire agreement clause.

76. As to the capacity issue, the core bargain was for the sale and purchase of the site with the benefit of the planning permission for the construction of the primary care centre and the HSE agreement for lease which required the construction of the building in accordance with the plans and particulars. As I understand the case, the appellant never sought a connection for the benefit of the retained property as it stood but even if I am wrong about that I am satisfied that the respondent has an argument to make that the appellant's entitlement to connect to the storm drain was limited by the capacity of the drain shown on the drawings.

77. The focus of the appeal was on the ability of the appellant to meet an adverse costs order. There was no disagreement as to the applicable legal principles but the suggestion was that the High Court judge had failed to correctly apply them.

78. To my mind, it is the appellant who has consistently failed to understand that what the respondent is required to prove – and all that the respondent is required to prove – is that there is reason to believe, based on credible testimony – that is to say, a significant possibility – that the appellant will be unable to pay the costs. The reason to believe must be founded on credible evidence but credible evidence adduced by a defendant is not made incredible by the plaintiff adducing contrary evidence. Nor, as was suggested in argument, can reason to believe that a plaintiff will be unable to pay the costs be displaced by showing that there is reason to believe that it will be.

79. Section 52 of the Companies Act, 2014 empowers the court to require security for costs *"if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant, if successful in his or her defence".* Section 390 of the Companies Act, 1963 contained identical language and what that threshold involves has been considered by the superior courts on a number of occasions.

80. Section 52 of the Act of 2014 does not require the inability to pay to be established as a matter of probability. What the court is required to do is *"to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is 'reason to believe' that the company 'will' be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring"*: *IBB Internet Services Ltd v Motorola Limited* [2013] IESC 53, per Clarke J. (McKechnie and MacMenamin JJ. agreeing) at para. 5.16.

81. In making that assessment, the court is not strictly concerned with issues of solvency: *Quinn Insurance Ltd (under administration) v PricewaterhouseCoopers (a firm)* [2021] IESC 15, [2021] 2 I.R. 70, per Clarke C.J. (O' Donnell, MacMenamin, Dunne and O' Malley JJ. agreeing) at paras. 7.11 – 7.12. The fact that a company's financial statements may disclose a

positive net asset position does not preclude the making of an order for security for costs. The issue in every case is whether, on all the evidence before the court, there is "*reason to believe*" that the company will be unable to pay the costs: *Flannery v Walters* [2015] IECA 147, per Finlay-Geoghegan J. (Peart and Mahon JJ. agreeing) at para. 23 and following. The assessment required by s. 52 *"involves not only a consideration of the relevant plaintiff's current ability to meet an order for costs but also any likely change in that ability brought about by the passage of time and, of course, predicated on the failure of the proceedings": IBB Internet Services Ltd v Motorola Limited* at paragraph 5.8.

82. On the defendant's case, there is an abundance of evidence that "*there is reason to believe that the [plaintiff] will be unable to pay the costs of the defendant if successful in [its] defence"*.

83. Behan & Associates have estimated the respondent's costs of defending the action at €285,666. That estimate makes little, if any, allowance for the costs of the application for security for costs, and none for the costs of this appeal. It makes no allowance, either, for the contingent liability for the costs of the application for the interlocutory injunction in the High Court, or the appeal against the refusal of that application. The estimate has not been challenged by the appellant. Indeed, it was effectively accepted at the hearing of this appeal that the estimate is if anything an underestimate.

84. On the respondent's analysis – which is supported by the valuation reports prepared by Mr. Carmody, as well as the evidence and reports of Mr. Kirby –there is no prospect of the appellant being in a position to pay any part of the respondent's costs if the proceedings fail. I have referred to Mr. Kirby's Estimated Outcome Statement, in which he hypothesises two scenarios. In the first scenario – based on Mr. Carmody's valuation of the retained property of €265,000 – when current assets are added and the estimated costs of realisation are deducted, the total funds available to creditors is €375,750. When allowance is made for the balance due

to debenture holders as of 31st December, 2019 (€320,000) there would be a total of €55,750 available to meet unsecured liabilities of €596,569. In that scenario, the appellant would clearly not have the funds to discharge the respondent's costs. In the other scenario considered by Mr. Kirby – based on Mr. O' Leary's then current valuation of the retained property of €900,000 – there would still be a significant shortfall to unsecured creditors of approximately €183,000.

85. The analysis in Mr. Kirby's table is not challenged by the appellant. Neither does the appellant dispute that developments since January, 2021 have a significant adverse effect on the position disclosed by that table. According to the appellant's draft abridged unaudited financial statements for the year ended 31st December, 2021 (which, for reasons which are unexplained, have not yet been finalised) the balance due to debenture holders is now €582,333 rather than €320,00; an increase of €362,333. The directors' loans balance has also increased significantly (from €71,102 in 2019 to €154,851 in the draft 2021 financial statements, an increase of €83,749). In addition, it is agreed that the costs estimate used by Mr. Kirby is now something of an under-estimate, given that it does not account for the costs of this appeal.

86. All of this demonstrates clearly that, even if Mr. O' Leary's valuation of €900,000 were to be accepted for the purpose of analysis, only very limited funds would be available for unsecured creditors and those funds would not be sufficient to discharge the estimated costs of the respondent, even if one were to disregard the other unsecured liabilities of the appellant and also disregard the fact that the appellant will, presumably, have to make payments in respect of its ongoing legal costs from time to time. Even if Mr. O'Leary's subsequent valuation of €1,035,000 (dating from 19th July, 2022 i.e. subsequent to the hearing in the High Court) were to be used, there would be a very significant shortfall in the funds available to unsecured creditors and the appellant would not be able to meet an order for the respondent's costs.

87. Mr. O' Leary has since produced an even higher valuation of the retained property, namely a valuation of "*in the region of €2,000,000*" dated 11th October, 2022 but in my view no credence can be given to that valuation, premised as it is on information regarding the future potential development of the lands that has not been disclosed to the court or to the respondent and which, consequently, has not been, and could not be, subjected to any scrutiny.

88. But the problem for the appellant is not simply that the financial numbers do not work for it even when its valuation(s) of the retained property is applied. A further, and perhaps more fundamental, problem is that there is no basis on which the court can simply disregard the evidence of valuation that is before it from the respondent. Mr. Donnelly S.C., for the appellant, invited the court to prefer Mr. O' Leary's opinion to that expressed by Mr. Carmody but, in the absence of cross-examination, that is not a course open to the court: *RAS Medical Limited v Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 IR 63.

89. In any event, the court is not concerned with determining what the value of the retained lands is or may be in the future. The court is concerned with a different, and perhaps easier, question, namely whether there is *"reason to believe"* that the appellant will be unable to pay the respondent's costs if the respondent is successful in defending the proceedings. As is clear from *IBB Internet Services Ltd. v Motorola Ltd.*, that does not involve any assessment of probability. Rather what is required to be established is that *"there is something significantly greater than a mere risk of such an eventuality occurring*": The respondent's evidence, including its evidence of valuation of the retained property, is "*credible evidence"* that provides "*reason to believe"* that the appellant will not be able to pay the respondent's costs. The fact that the respondent's evidence is disputed does not mean that it is not credible or that it does not provide a reason for believing that such is the case. Having regard to that evidence, there is clearly is *"something significantly greater than a mere risk of such an eventuality occurring"*.

90. As the arguments developed before this court, it became clear that the appellant could not succeed in its appeal unless it managed to persuade the court that its rights under clause 7 of the agreement of 24th July, 2018 – its option for a lease on what might become the commercial pharmacy – should be valued at, or at least very close to, the value ascribed to them by the appellant. It will be recalled that in October, 2020 Mr. O' Leary purported to value the "*pharmacy portion*" of the primary care centre at "*in the region of €750,000*". That valuation appeared to be based on a misunderstanding on the part of Mr. O' Leary that the appellant was the owner of the "*pharmacy portion*" of the premises which of course it was not. Clause 7 (which was not referred to by Mr. O' Leary) simply gave the appellant the right in certain circumstances to call for a lease of that part of the premises. As of October, 2020, the appellant had not exercised any rights under clause 7. In March, 2021, Mr. O' Leary provided a valuation of the *"leasehold interest*" in the pharmacy premises. He valued it at €750,000, that figure being said to represent the net value to the appellant of the projected rent over the term of the lease, after deduction of the rent payable to the respondent. The March, 2021 valuation report did not in fact provide any calculations or identify what assumptions have been made as to the level of rent that would be payable to the appellant. That issue was later addressed in some detail by Mr. Whelan but not until about a year later. In July, 2022, eight months or so after the High Court hearing, Mr. O' Leary provided a further valuation of *"in the region of €864,000"*, without any explanation of the basis on which the valuation had increased.

91. The appellant's financial statements do not ascribe any value to the appellant's rights under clause 7. In his affidavit of 27th April, 2021 Mr. Lonergan presaged the inclusion of the value of the pharmacy lease in the plaintiff's 2020 financial statements as a post balance sheet event: but that did not happen. In his first affidavit sworn on 19th November, 2020 Mr.

Lonergan had explained that such rights are characterised as Right-of-Use *("ROU")* assets and can only be recognised when an actual lease is in place. No lease is in fact in place here.

92. The High Court judge ascribed a value of €100,000 to the prospective lease, for the reasons given by her in her judgment.

93. The essential question that presents itself here is whether, in light of what the appellant says as to the value of the prospective lease of the pharmacy premises (including but not limited to Mr. O'Leary's valuation reports) the position disclosed above is materially altered. Put another way, the question is whether, having regard to what the appellant says as to the value of the prospective lease of the pharmacy premises, it can no longer be said that there is "*reason to believe*" that the Appellant will be unable to pay the respondent's costs and no significant risk of that such an eventuality.

94. There is no lease in place. The appellant says that the respondent has wrongly refused to grant a lease. Whether that is so is not something that the court can form a view on in this appeal. It is not an issue in the proceedings, as currently constituted. But even if a lease were granted, there are significant question marks over the value of any such lease. While the appellant has now obtained planning permission for the use of part of the primary care centre as a retail pharmacy, there is a real issue about its capacity to implement that permission, even assuming that a lease was granted to it. The permission granted by An Bord Pleanála is subject to conditions regarding car-parking that the appellant (and/or any pharmacy operator to whom the appellant might let the premises) may not be in a position to comply with. There are arguments either way and Mr. Donnelly has articulated those arguments from the appellant's perspective. There is the possibility of a further planning permission application. However, the fact is that, as Mr. Donnelly expressly accepted in argument, there is a plausible scenario in which any lease that the appellant might get in respect of the pharmacy premises would effectively have no commercial value at all.

95. Moreover, as I have said, much of the value which the plaintiff would ascribe to the pharmacy lease depends on an increase in the number of doctors practising from the primary care centre from the current three to six or seven, or possibly eight. Whether or not that may happen is, obviously, uncertain.

96. In these circumstances, there is no basis on which the court could properly conclude that the picture disclosed by Mr. Kirby's Estimated Outcome Statement (updated in the manner explained above) is altered to such an extent that there is no reason to believe that the appellant will not be able to pay the respondent's costs. To arrive at that conclusion, the court would have to be satisfied it was clear that the proposed leasehold interest had a significant value, sufficient to transform the picture disclosed by Mr. Kirby's table. In light of the fundamental uncertainty as to the value (if any) of the proposed leasehold interest, the court cannot be so satisfied.

Conclusion

97. It follows, in my firm view, that the appeal must be dismissed and the order of the High Court – including as to the costs of the motion to the High Court – affirmed.

98. Provisionally, it seems to me that the respondent having been entirely successful on the appeal, is entitled to an order for its costs of the appeal. However, I propose to allow the appellant ten days from the date of electronic delivery of this judgment within which to give notice in writing to the respondent's solicitors and the Court of Appeal office of any wish to contend for any other order, in which case the panel will reconvene to deal with the question of costs. Obviously, the costs of any such hearing will likely follow the event.

99. Whelan and Collins JJ. have read this judgment in draft and have authorised me to say that they agree with it, and with the orders I have proposed.