[2019] IEHC 675

THE HIGH COURT

[2017 No. 4639 P.]

BETWEEN

3V BENELUX BV

PLAINTIFF

AND

SAFECHARGE CARD SERVICES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 16th day of October, 2019

Introduction

1. This is an application on behalf of the defendant for an order directing the plaintiff to provide security for the defendant's costs of an action for damages for breach of contract.

2. It is resisted on the grounds (1) that the defendant has no *prima facie* defence, (2) that the plaintiff will be able to pay the defendant's costs in what is said to be the highly unlikely event that the action should fail and, (3) that the cause of any risk, if any, that the plaintiff might not be able to pay the costs is attributable to the defendant's breach of contract.

3. The case is quite complicated.

Overview

4. The defendant is an Irish registered company which carries on the business of developing financial products that allow prepaid debit cards to be issued to customers. The plaintiff is a company registered in the Netherlands which distributes prepaid cards in the Benelux countries through its retail networks.

5. By a services agreement in writing dated 1st October, 2014, each of the plaintiff and the defendant agreed to provide to the other the services therein defined for the term of the agreement. In very broad terms, the defendant was to supply the cards and the plaintiff to distribute them. The revenue generated by the sale and use of the cards was to be shared as to 75% to the plaintiff and 25% to the defendant. The term of the services agreement was five years from 1st October, 2014.

6. The operation of the agreement between the parties depended on the involvement of a bank. The prepaid cards each had a credit card number, the first six digits of which identified the issuing bank. Those six digits are called a Bank Identification Number ("*BIN*"). The services to be provided by the issuing bank are referred to as BIN sponsoring services.

7. The plaintiff and the defendant had been doing business together since 2009. Before the agreement the subject of these proceedings, the relationship between the parties was governed by a tripartite services agreement dated 28th January, 2010, between the plaintiff and the defendant and ABN Amro Bank NV ("*ABN Amro*"), under which the BIN sponsoring services were provided by ABN Amro. That earlier agreement was for a term of three years and at the expiration of the term, ABN Amro gave notice of its intention to discontinue providing BIN sponsoring services. While ABN Amro declined to be party to

the 2014 agreement, it continued to provide BIN services while the plaintiff and the defendant tried to find an alternative supplier.

8. Like everything else in this case, there is an issue as to who was responsible for securing an alternative BIN service provider. Moreover, there is an issue as to whether an alternative BIN services provider was available.

9. The services agreement provided that it would apply to an Initial Product called a Virtual Visa Voucher, referred to in the agreement as Product A, and such additional products as might be set out from time to time in additional Product Schedules, which were in turn defined as schedules to be agreed and added describing a specific product and detailing the process and terms and conditions for sale to and use by customers, and the services to be provided by each of the plaintiff and the defendant in relation to the product, and the charges applicable to that particular product.

10. A second product, Product B, was agreed and implemented. The plaintiff's case is that a third product, Product C, to be called Pay.com, was agreed and was to have been launched in January, 2016 but never was. The plaintiff's case is that this product would not have required a BIN sponsor, but I understand it to be common case it would have required payment processing services from a third-party provider.

11. The two products which were launched could be purchased more or less anonymously and could be used to draw cash from ATMs, as well as to pay for goods and services. They were subject to a variety of limits as to the frequency and amount by which the cards could be topped up.

12. The evidence on this application does not disclose the reason, or the reason, if any, given, as to why ABN Amro decided to cease providing BIN services but on 5th February, 2013, the EU Commission had announced that it had adopted two proposals for reinforcing the EU's existing rules on anti-money laundering, specifically by lowering the threshold below which cards could be used anonymously and strengthening the rules on customer due diligence by requiring the collection and vouching of information.

13. On 20th May, 2015, the European Parliament and Council made Directive (EU) 2015/849, the Fourth Anti-Money Laundering Directive. Article 67 of the Directive required Member States to bring into force such laws, regulations and administrative provisions as were required to give effect to it in national law by 26th June, 2017.

14. The Directive did what the Commission had two years previously said that it intended to do, namely, lowered the threshold below which more or less anonymous cards could be provided and increased the requirements of customer due diligence, specifically, the verification of information provided to financial services providers.

15. It is common case (without necessarily being agreed) that the products as they stood at the time of the services agreement were perfectly legal but that they would not meet the requirements of the national legislation required to transpose the Directive.

16. Similarly, it is common case that some modification of the products would be necessary in advance of the implementation of the Directive in the law of the Netherlands, although there is the difference of opinion between the parties' experts as to when that would need to be done: whether, as contended for by the defendant's expert, well in advance of the prescribed date for implementation of the Directive, or, as contended for by the plaintiff's expert, in advance of the date - which might be and in the event was, long after the date prescribed by the Directive - on which it was actually transposed.

17. There is a dispute between the parties as to whether the services agreement required them, more particularly the defendant, to modify the products to make or keep them compliant with the new requirements. That, counsel are agreed, will be a matter for the trial judge.

18. There is a dispute, also, as to whether such modification as was required would have meant that the product would have changed. It is said on behalf of the plaintiff that such modifications as were required were simple and straightforward, but what is not accepted is that the work and expense of complying with the new requirements would have to be done and met by the plaintiff. Before the implementation of the Fourth Anti-Money Laundering Directive the maximum limit for the use of a card without customer verification was €2,500 per annum. After implementation that limit was reduced to €250 per annum. If the limit of €2,500 per annum was to be continued, someone would have to carry out customer due diligence on such of the cardholders or applicants as would be willing to provide and vouch the required information.

19. Counsel are agreed that the issue as to whether the products after the necessary changes had been made would nevertheless be precisely the same as it had been before the changes were made is a matter for the trial judge. If it is, I am satisfied that the defendant has advanced a credible argument based on sufficient facts that they would not be.

20. It is common case that on 29th January, 2013, ABN Amro informed the parties of its "*intention to discontinue*" providing services and that on 2nd July, 2013, ABN Amro informed the parties of its "*actual decision*" to discontinue providing services. As of the date of the services agreement on 1st October, 2014, the parties well knew that the viability of the agreement depended on one or other or both of them identifying and securing a new BIN sponsor beyond the time at which ABN Amro would withdraw its services. What was not known was precisely when that would happen.

21. There is a dispute as to whether there was an alternative BIN sponsor available. The plaintiff's case is that long before the events complained of, the parties had secured an alternative BIN sponsor, in the person of Raphaels Bank, and that soon after the events complained of, the plaintiff secured the BIN sponsorship services of another alternative sponsor in the person of Wirecard. The defendant accepts that Raphaels Bank was for a time willing to provide BIN sponsorship services and that Wirecard later did provide such services but argues that the products for which Raphaels Bank was willing to provide

services and the products for which Wirecard is providing services are different to the products the subject of the services agreement.

22. The evidence is that the parties signed a BIN transfer agreement with Raphaels Bank in January, 2015 which expired at the end of June, 2015 but it seems to me that it is perfectly clear that Raphael's Bank was not prepared to provide services for the products as they then stood. All the appearances are that Raphael's Bank was prepared to provide services if, but only if, the product was changed so that it could no longer be anonymous.

23. The plaintiff's case is that on 18th January, 2016, it signed a letter of intent with Wirecard for the provision of BIN services, and that on 4th August, 2016 it signed a co-branding agreement pursuant to which a number of prepaid debit cards were issued from October 2016 onwards under the brand pay2d. It is clear from the plaintiff's evidence that that was a product which anticipated the implementation of the Fourth Anti-Money Laundering Directive and would be compliant with the requirements of the implementing domestic legislation when it came into force.

24. While ABN Amro had in January 2013 given notice of intention to discontinue services and in July 2013 of its "*actual decision*" to do so, in fact it continued to provide services while the plaintiff and the defendant sought to secure an alternative supplier, to whom the card customers could be migrated.

25. On 20th October, 2015, a television programme was broadcast on Dutch national television called *Opgelicht* (which in English means scammed). This programme is said to have suggested that the 3V cards were routinely being used fraudulently and to have associated their use with terrorism.

26. On 23rd October, 2015, an e-mail from the plaintiff to the defendant reported that ABN Amro was threatening to take immediate unilateral action to terminate the services if no migration date was set.

27. On 30th November, 2015, Raphaels Bank pulled out. In an e-mail to the defendant, it referenced the expiry at the end of June of the BIN transfer agreement that had been made in January, 2013. The e-mail recalled that Raphaels Bank has initially declined to become involved but had been persuaded to reconsider on the basis that the product construct would be changed. According to Raphaels Bank, it was by then clear that the product would not be changed, and Raphaels Bank would not support it.

28. In a letter dated 4th December, 2015, the defendant rehearsed the events of October 2015; asserted that several unsuccessful attempts had been made by the plaintiff to find an alternative sponsor; suggested that the *Opgelicht* programme had "*scuppered any prospect of an appropriate financial institution providing BIN services*"; and declared the services agreement "*frustrated and terminated with immediate effect*".

The pleadings

29. A little unusually, this application for security for costs was issued after the pleadings had closed. The defence was delivered on the basis that no point would be taken about alleged delay.

30. The substance of the plaintiff's claim is for damages for breach of contract. The focus of the statement of claim is very much on the events leading up to the defendant's letter of 4th December, 2015, and the effect of that letter, rather than what happened thereafter, but it is pleaded that the plaintiff's business was badly damaged by the refusal of the defendant to perform the agreement and was interrupted for a significant period while the plaintiff secured an alternative BIN services provider and an alternative supplier of cards. A number of heads of special damage are set out in the statement of claim but there are no figures or dates.

31. The statement of claim does not unambiguously make the case that the defendant was obliged to secure a BIN sponsor, or an alternative BIN sponsor, or to modify the products to whatever extent might be required to ensure that BIN sponsorship services could be secured: but that appears to be a large part of the plaintiff's case.

32. In replies to particulars dated 16th January, 2018 it was said that the plaintiff estimated its special damages at in excess of €7 million. That loss was said to be "broken down" under the headings in the statement of claim but whatever the breakdown may have been, it was not set out. The plaintiff's reply to a request for further and better particulars of the alleged losses was (as had previously been stated) that the plaintiff had engaged Grant Thornton to prepare a detailed financial analysis and to calculate the losses. The answer to a request for particulars of precisely how the plaintiff's business had been badly damaged and of the precise reputational damage allegedly suffered was that these were matters of evidence.

33. It is clear, then, on the pleadings and particulars, that the plaintiff claims that its business was badly damaged by, and following, the letter of 4th December, 2015: but not how.

34. The defence, if I will be forgiven for saying so, is rather peculiar. By way of preliminary objection, it is pleaded that the services agreement was frustrated prior to 4th December, 2015, alternatively on 31st January, 2017, alternatively on 26th June, 2017 (the date for implementation of the Fourth Anti-Money Laundering Directive); alternatively, on some other (unspecified) date.

35. The most interesting of the several alternative dates is 31st January, 2017. It will be recalled that the basis of the defendant's assertion in its letter of 4th December, 2015, that the contract had been frustrated was that ABN Amro had threatened to withdraw its services and that there was no alternative supplier. The defence, however, pleads - and it does appear to be the case - that ABN Amro continued to provide BIN services for a further fourteen months.

36. In the alternative to the plea that the contract was frustrated, the defence pleads that it was discharged by the plaintiff's participation in the *Opgelicht* programme, which is said

to have been a breach of contract; and/or by the plaintiff's inability to secure a replacement BIN provider; and/or by the migration of the plaintiff's customers to the new product in September, 2016.

37. In the further alternative, the defence denies that the defendant was guilty of the alleged or any breach of contract; or that the plaintiff suffered the alleged or any loss; or that any loss (if any) was caused or contributed to by the defendant.

38. The defendant has counterclaimed for €104,489.84 for "*services provided pursuant to the terms of the services agreement*" for which the plaintiff was invoiced between April, 2016 and October, 2016; for damages for breach of contract, specifically by reference to the plaintiff's participation in the *Opgelicht* programme; and for "*certain funds and/or income that may arise from … unused funds*".

39. The counterclaim in respect of "*unused funds*" requires some explanation. The terms and conditions attached to the cards distributed by the plaintiff apparently allow a charge to be applied in the event that the cards are inactive for a period of time. These charges have been referred to as "*inactivity charges*". After the elapse of the specified period of time, the cards are debited with a charge of €1.50 per month until December, 2021 when the plaintiff will become entitled to the entire remaining balance. The evidence does not disclose the precise details as to how these charges are applied – not least the significance of December, 2021 which by all accounts is a date which applies to all of the cards, irrespective of when they were issued - but they are clearly a significant part of the plaintiff's revenue. As of the end of August, 2018 there was a "*Maximum Inactivity Balance*" – which I understand to mean the total credit balances on all of the outstanding cards – of €1,096,097. The plaintiff's expectation is that in the years from 2018 to 2021 it will become entitled to nearly half of this money, and on 31st December, 2021 to the entire balance which will then remain on the cards, of €556,856. The premise of the counterclaim is that the defendant is entitled to 25% of this money.

40. These inactivity charges were also the subject of much exchange in the affidavits and debate in the course of the hearing in relation to the plaintiff's ability to meet an order for costs: to which I shall come.

Legal principles applicable to an application for security for costs

41. Because the plaintiff is incorporated in the Netherlands, the defendant moves under O. 29 of the Rules of the Superior Courts, rather than s. 52 of the Companies Act, 2014. On the authority of *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2014] IEHC 18 and *Interfund Global Services Ltd. v. Pascarn* [2014] IEHC 164, the court is invited to take the same approach on this application as is taken to corporate plaintiffs under the Companies Act. There is no issue as to the jurisdiction invoked.

42. It is accepted by Mr. Howard that the onus is on the defendant to show that it has a *prima facie* defence and that there is reason to believe that the plaintiff will be unable to pay the defendant's costs if the action is unsuccessful. If those facts can be established, then the court ought to order security for costs unless there are specific reasons to cause

the court to exercise its discretion not to. Mr. McGrath accepts that the onus is on the respondent to the motion to make out any such specific reasons. Both sides rely on the restatement of the threefold test in *Usk and District Residents Association v. Greenstar Recycling Holdings Ltd.* [2006] IESC 1.

43. One of the special circumstances that will justify the court in refusing to order security for costs is where the plaintiff's likely inability to pay the costs flows from the wrong allegedly committed by the defendant.

44. In a comprehensive judgment in *Quinn Insurance (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2018] IEHC 16, Haughton J. drew together the legal principles applicable to an application for security for costs, specifically, on the application of the threefold test.

45. The first element of the test is whether the defendant has established a *prima facie* defence. The *prima facie* defence relied on may be a defence on the facts or in law. It is insufficient that the defendant should assert that he has a defence. A defendant relying on a defence of fact must set out sufficient facts and must demonstrate the existence of evidence on which he will rely to establish those facts, and a defendant relying on a defence in law must articulate such defence by reference to the facts as asserted by the plaintiff or which have been *prima facie* established by reference to the materials before the court. At para 12 Haughton J. said:-

> *"If a* prima facie *defence is established, it is no function of the court to 'forecast the outcome of the litigation or to pre-judge the facts or express an interim view on the questions of law involved … or .. to evaluate the prospects of success' (Murphy J. in Bula v. Tara Mines [1987] I.R. 494 at p. 501, approved by McCarthy J. in Comhlucht Paipéar Ríomhaireachta Teo. V. Úadarás na Gaeltachta [1990] 1 I.R. 320, at 331 and 332, and by Clarke J. in Usk at paragraph 8.7).*

46. The second element of the test is whether the defendant has adduced "*credible evidence*" that the plaintiff would be unable to pay the costs. Again, the test is emphatically not a matter of probability. As Clarke J. explained in *IBB Internet Services Ltd. v. Motorola Ltd.* [2013] IESC 53, at para. 5.16:

> *"The phrase 'reason to believe' should not be further defined., again for the reasons set out in [Jirehouse Capital v. Beller [2009] 1 W.L.R. 751] to avoid the risk of changing the test. While it does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all the 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 the 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."*

47. Mr. McGrath emphasised, quite rightly, that a mere risk of inability to pay is not enough. There must be reason to believe, based on credible testimony. Mr. McGrath referred to *Coolbrook Developments v, Lington* [2018] IEHC 634 in which Barniville J. applied the test formulated by Clarke J. in *IBB Internet Services Ltd. v. Motorola Ltd.* [2013] IESC 53.

48. There is one issue between counsel as to the correct legal test. Mr. Howard, while accepting that the court is not to address the merits of the case or who is likely to succeed, nevertheless argues that the court is entitled to put into the balance a high probability of success. He refers to the judgment of Barrington J. in *Lismore Homes v. Bank of Ireland Finance* [1999] 1 I.R. 510 which, at page 506, set out a long passage from the judgment of Sir Nicholas Browne-Wilkinson V.C. in *Porzelack K.G. v.Porzelack (U.K.) Ltd.* [1987] 1 W.L.R. 423, part of which was that:-

> *"Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter which can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed that is a matter which can be weighed.".*

49. Mr. McGrath submits that the defendant's reliance on this passage is misplaced. He points out that the passage relied on is not a quotation from Barrington J. but from the English case, and he argues that the proposition that account can be taken of the prospects of success has been repeatedly rejected in this jurisdiction.

50. I am satisfied that Mr. McGrath is correct. In *Bula v. Tara Mines* [1987] I.R. 494, Murphy J. was quite clear that it is no part of the function of the court on an application for security for costs to evaluate the prospects of success, and this has repeatedly been endorsed as the correct test. It is sufficient to refer to *Usk*.

51. What Barrington J. said in Lismore Homes was that:-

> *"It is dangerous to attempt to resolve [disputed questions of fact] on affidavit unless there is objective evidence which points conclusively in one direction or the other." [Emphasis added.]*

52. This statement, it seems to me, is perfectly consistent with the established principles that the court must ask whether a *prima facie* defence has been made out but must not go beyond that.

The alternative defences relied on

53. On this application, as in the pleadings, the defendant's position on the one hand is that the contract was frustrated in December 2015, and on the other, that it continued to provide the services it was required to provide until 31st January, 2017, when ABN Amro ceased providing BIN services. The defendant's position is that while the contract was discharged by frustration in December 2015, nevertheless it thereafter provided on an *ad hoc* basis the services it otherwise would have provided pursuant to the contract.

54. The proposition that the defendant provided services which were impossible to provide is at first blush a bit surprising, but it is based on sound principle.

55. As was explained by Lord Roskill in *Pioneer Shipping v. B.T.P Tioxide* [1982] A.C. 724 at 752, while in the ultimate analysis whether a contract was frustrated is a question of law *"that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men."* The decision as to whether a contract was frustrated will be a matter for the court and will necessarily be made long after the event. However, the date by reference to which the judgment must be made is the date at which the contract is alleged to have been frustrated, and the court must make an assessment of the reasonable commercial probabilities as they would have been apparent at that time, and not by reference to how things may ultimately have turned out. So, for example, in a case in which the issue is whether a contract was frustrated by an outbreak of war, the exclusive focus will be on the probable duration of the war at the date of alleged frustration and not, with the benefit of hindsight, on how long it might in fact have lasted.

56. The first issue, then, is whether the defendant had established a *prima facie* defence on the basis that the contract was frustrated on any of the dates relied on.

The alleged frustration

57. There is some difference between the parties as to the circumstances in which a contract will be frustrated.

58. Both sides rely on the judgment of McWilliam J. in *McGuill v. Aer Lingus Teo.* (Unreported, High Court, McWilliam J., 3rd October, 1983) in which the court distilled from the authorities to which it had been referred seven principles:-

> *"1. A party may bind himself by an absolute contract to perform something which subsequently becomes impossible.*
>
> *2. Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed,*
>
> *3. The circumstances alleged to occasion frustration should be strictly scrutinised and the doctrine is not to be lightly applied.*
>
> *4. Where the circumstances alleged to cause the frustration have arisen from the act or default of one of the parties, that party cannot rely on the doctrine.*
>
> *5. All the circumstances of the contract should also be strictly scrutinised.*
>
> *6. The event must be an unexpected event.*
>
> *7. If one party anticipated or should have anticipated the possibility of the event which is alleged to cause the frustration and did not incorporate a clause in the contract to deal with it, he should not be permitted to rely on the happening of the event as causing frustration."*

59. Reference was also made to *Ringsend Property Ltd. v. Donatax Ltd.* [2009] IEHC 568, *Zuphen v. Kelly Technical Services (Ireland) Ltd.* (Unreported, High Court, Murphy J., 25th May, 2000), *William Neville and Sons Ltd. v. Guardian Builders Ltd.* [1995] 1 I.L.R.M. 1, and *Collins v. Gleeson* [2011] IEHC 200.

60. The point of difference between the parties is whether it is necessary that the event should be unforeseen or unexpected. Mr. Howard argues that it is not, and he points to a decision of the Court of Appeal in England in *Ocean Tramp Tankers Corporation v. V/O Sovracht, The Eugenia* [1964] 2 Q.B. 226.

61. *The Eugenia* was one of very many cases that arose out of the closure of the Suez Canal. The canal had been nationalised by the Government of Egypt on 26th July, 1956 and there was an immediate build-up of English and French military forces in Cyprus. In late August and early September, the parties negotiated, and on 9th September, 1956 signed, a time charterparty for a "*trip out to India via Black sea*." At the time the contract was concluded, both parties recognised that there was a risk that the canal might be closed but failed to agree on what was to happen in such event, deciding instead to "*leave it to the lawyers to sort out.*" The ship was brought into Suez on 31st October, 1956 and the canal was blocked later that day.

62. Lord Denning contemplated the jurisprudential basis of the doctrine. It was not, he said, as had once been thought, based on an implied term. Rather it was based on the injustice of the parties being bound to perform something radically different to that which was undertaken by the contract. He said:-

> *"We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract' see Davis Contractors v. Farham U.D.C. [1956] A.C. 729 by Lord Radcliffe. "*

63. In *The Eugenia* the charters argued that the contract had been frustrated by the fact that the canal had been blocked. If the ship had never entered the canal – so the argument went – the fact that she would have had to go around the Cape would have made the venture fundamentally different. Lord Denning, by looking at the "*venture*" as the whole trip from delivery to re-delivery of the ship rather than the voyage to carry iron and steel from Odessa to Vizagapatam (which was the purpose for which the charterers required the ship) concluded that it was not. But the premise of the examination of whether the contract had been frustrated by the closure of the canal – a risk that was obvious to all mercantile men - was that it might have been.

64. Mr. McGrath submits that the defendant's reliance on *The Eugenia* is misplaced. In the first place, he says, it is just not Irish law. In any event, he says, the case must be seen to have been decided on its own facts.

65. I am mindful that I ought not, on an application such as this, to be tempted to weigh, still less decide, disputed issues of law but it seems to me that the weight and consistency of

the Irish authorities is such that the proposition that frustration can arise by reference to an event which the parties have contemplated but against which they have made no provision is not even arguable.

66. Incidentally, although the premise of *The Eugenia* was that the parties had failed to make provision against the eventuality of the closure of the canal, I am unconvinced that this was the case. The decision was that the contract was a time charter, and the that the charterers had to pay the hire for the ship for so long as they had her.

67. The first argument advanced on behalf of the defendant is that it has a *prima facie* defence that the contract was frustrated on 4th December, 2015. The supervening event is said to have been the unavailability of an alternative BIN sponsor. The plaintiff counters that there was or would have been no insuperable difficulty in obtaining an alternative sponsor, and that the need for an alternative sponsor was obvious at the time the contract was made because ABN Amro had already said that that it would be withdrawing.

68. It seems to me that the key to resolving this issue is to identify the time at which the alternative supplier would be required. In commercial terms, the need for an alternative supplier could be said to have arisen on 29th January, 2013 when ABN Amro gave notice of its intention to discontinue providing services. The parties must at that stage have recognised that the business could not be carried on beyond the date – whenever that might be - at which services would not be available from ABN Amro, unless an alternative supplier could be found. In the meantime, cards could be issued and distributed. The critical date was the date beyond which ABN Amro would cease providing services.

69. As of the date of the services agreement on 1st October, 2014 the parties knew that ABN Amro would not commit to providing services for the duration of that agreement, but the basis of that agreement was that it would continue to do so for some time. If the parties had not by then begun to try to identify and secure an alternative supplier, they did so very soon after and by January, 2015 had reached agreement with Raphaels Bank.

70. The triggering events for the termination notice of 4th December, 2015 were the broadcast of (and the participation of the plaintiff in) the *Opgelicht* programme on 20th October, 2015; the plaintiff's e-mail of 23rd October, 2015; and the e-mail of 30th November, 2015 from Raphaels Bank.

71. The e-mail of 23rd October, 2015 was a report by the plaintiff to the defendant of "*a chat*" with ABN Amro, in the course of which ABN Amro was said to have threatened to notify all of the plaintiff's customers that it would terminate the programme in the Netherlands unless it was given an announcement date. The plaintiff's e-mail noted that the bank did not have the contact information, so it was obviously an empty threat. In substance the threat was that the bank, at an unspecified time, would or might do something which it could not do unless, by an unspecified date, it was advised of a date, in the indeterminate future, on which the plaintiff would announce a later date on which the plaintiff's customers would be migrated to an alternative BIN supplier. The e-mail certainly

conveyed a growing impatience on the part of the bank, but I cannot see how it could have immediately rendered impossible the continued performance of the contract between the plaintiff and the defendant.

72. Mr. Howard argues that the authorities show that commercial men do not have to wait and see: but the issue in this case is not how long a delay or war would continue but whether, and if so when, ABN Amro would cease to provide services. It seems to me that the bank's declared position left open the possibility that an alternative provider might be found within such time as ABN Amro might stipulate for an announcement of a date for migration. If the defendant was not obliged to, or could not, secure an alternative provider, it did not necessarily follow that the plaintiff would be unable to do so.

73. Mr. McGrath argues that as of 4th December, 2015 the cards were perfectly lawful and that the transposition date for the Fourth Anti-Money Laundering Directive was eighteen months away. I am not persuaded that these matters are decisive. There is a difference of opinion between the regulatory experts as to the time at which any products on the market would require to be compliant with the proposed new rules, and in my view the proposition that a commercial requirement would arise long before a strict legal requirement is perfectly arguable. So, the impending requirement for change might very well have been an obstacle, even an unsurmountable obstacle, to securing a replacement provider for the products as they stood. But it seems to me that the increasingly urgent need to identify a replacement for ABN Amro would only become critical when ABN Amro ceased to provide services.

74. I observed earlier that the evidence does not disclose what, if any, reason was given by ABN Amro for its decision not to continue providing services, but it was very shortly before the EU Commission announcement of 5th February, 2013. As of 4th December, 2015 ABN Amro had said that it would cease to provide services but not when.

75. While in principle it is perfectly possible to look at alternative potential dates upon which a contract might have been frustrated, I do not believe that this is such a case. The defendant on 4th December, 2015 declared that the contract was frustrated and purportedly terminated it. The plaintiff does not unambiguously make the case that the termination notice was a repudiatory breach which was accepted, but it appears to be common case that the contract was discharged.

76. The legal effect of frustration, argues Mr. McGrath, is that the contract is discharged. That is correct. Once a contract has been otherwise discharged, it is said, no issue of frustration can arise. I accept this argument and I cannot see how the defendant can rely upon any later frustration.

77. I should say for completeness that the pleaded case that the defendant was entitled to summarily terminate the services agreement by reason of the plaintiff's participation in the television programme was not seriously pursued in argument.

The argument that the services were provided

78. I turn then to the second leg of the defendant's argument, which is that notwithstanding the termination notice, it did not in fact cease providing the services required, so that whatever downturn the plaintiff's business may have experienced was not attributable to anything done or not done by the defendant. That, it seems to me, is a plausible argument so the issue is whether it is supported by credible evidence or the prospect of credible evidence.

79. According to the statement of claim, which was delivered on 27th June, 2017, the plaintiff's losses were then being assessed by experts. In replies to particulars dated 16th January, 2018 the plaintiff's "*special damages*" were estimated to be "*in excess of €7,000,000"*. While that figure was said to be "*broken down under the headings at para. 24*" of the statement of claim, there was no breakdown: so that what was really meant was that the global figure encompassed the headings of special damage set out in the statement of claim.

80. A report from Mr. Paul Jacobs of Grant Thornton dated 5th October, 2018 which was primarily prepared to deal with the plaintiff's ability to meet an order for costs, indicated that the author's "*preliminary view identifies that a reasonable estimate of losses is, in my opinion, in excess of €3.7 million.*" That figure was made up of €2.4 million for loss of profits on credit card agreement; €0.7 million for loss of profit on Pay.com; and €0.6 million for "*costs of termination.*" It was said that approximately €2.5 million of the €3.7 million related to the period up to and including 31st August, 2018 but not how the €2.5 million was made up. Significantly, I think, there was no date specified as the date from which any of the losses had been calculated. It was said that work was continuing and that the figure might increase or decrease. The Grant Thornton report of 5th October, 2018 does not disclose the basis for the preliminary view and the claim has not since been further particularised.

81. In an affidavit Mr. Jacobs filed on 5th February, 2019 Mr. Jacobs set out a table of projected EBITDA for the years 2018 to 2021. This table was based on projections prepared by the plaintiff and provided to Mr. Jacobs shortly before. Mr. Jacobs then said that while he had reviewed the plaintiff's projections, he had not prepared his own. From this it rather appears that whatever the basis of the preliminary view was, it was not either the plaintiff's projections or any independent projections.

82. From the outset the defendant's solicitors have been complaining that the claim for damages has not been properly or sufficiently particularised. It seems to me that there is substance to this. The premise of the claim for damages must be that the defendant did or failed to do something which it ought not to have done or to have done, which if it had not been done or had been done would have left the plaintiff that much better off. The statement of claim focusses on the notice of 4th December, 2015 but does not say what happened thereafter. Logically, the claim for damages must be based on a number of assumptions, but there is no indication as to what those assumptions are.

83. It is common case that the operation of the agreement between the parties was dependant on BIN sponsoring services. Although the statement of claim might have been clearer, a significant part of the plaintiff's case appears to be that if and when ABN Amro withdrew its services, the defendant was obliged to secure an alternative BIN sponsor. The defendant contests that. The issue as to whether the defendant was obliged to secure an alternative sponsor is an issue of law which will turn on the construction of the services agreement. It seems to me that the defendant has an arguable case to make that it was not bound to secure a BIN sponsor and so has demonstrated a *prima facie* defence to that part of the claim.

84. The premise of the claim for damages appears to be that if the defendant had provided the services it was required to provide, the plaintiff could and would have continued to sell the same products as it previously had, or, perhaps, a modified version of products which would have complied with the requirements of the Fourth Anti-Money Laundering Directive, or the domestic Netherlands legislation implementing that Directive. It appears to be accepted by the plaintiff that the requirements of the Directive meant that the product would have to be modified. There is a dispute between the parties as to whether the defendant was bound by the services agreement to modify the products, and to bear any additional cost associated with any such modification. There is a dispute between the parties, and the regulatory experts, as to when the new requirements would have, or did, affect the availability of BIN sponsoring services for the plaintiff's existing products.

85. The issue as to whether the defendant was obliged to modify the products and/or to bear the additional cost is an issue of law which will turn on the construction of the services agreement. The services agreement certainly contemplates that the products might need to be modified. It provides on the one hand that the agreement may only be varied in writing signed by both parties, and on the other makes provision for "*mandatory variations",* which are to be the subject of written quotations. It seems to me that the defendant has an arguable case to make that it was not bound to modify the products or to bear the cost associated with any modifications and so has demonstrated a *prima facie* defence to that part of the claim.

86. Insofar as the damages claim is based on an alleged failure on the part of the defendant to provide services, it is necessary to examine the evidence as to what services were in fact provided after the termination notice.

87. Mr. James Lillis, in the first of three affidavits which he swore to ground the application, unambiguously deposed that the defendant continued to perform services until 31st January, 2017, when ABN Amro ceased providing BIN sponsorship services, and by when the plaintiff's customers had been migrated to Wirecard.

88. Ms. Angelique Brussel van Grinsven, the managing director of the plaintiff, in her replying affidavit, averred that for several months prior to December 2015, the defendant had been increasingly slow to supply the plaintiff, but she did not deal with the position from

January 2016 onwards. Specifically, Ms. van Grinsven did not contest the averment that services continued to be provided.

89. In a second affidavit, filed on 5th February, 2019 Mr. Paul Jacobs deposed that it was his understanding that from the date of termination in late 2015 the defendant did not supply additional cards. As he thought had been confirmed by Ms. Van Grinsven in her affidavit of 23rd October, 2018, he said that it was his understanding that there were no new customers, nor were customer services provided from September, 2015. I am sure that Mr. Jacobs correctly understands his instructions, but I am equally sure that he has misunderstood Ms. Van Grinsven's affidavit. It is true that Ms. Van Grisnven referred to an inability to get supplies, but what she said was that from the time the defendant was taken over by the Safecharge Group, which was in February, 2015, it had been difficult to get cards and difficult to get calls returned.

90. What Ms. Van Grinsven said in her second affidavit, which was filed on 7th March, 2019, was different to what she had previously said. In her later affidavit she deposed that "*there was no ongoing commercial business*" after December, 2015. She said that the only service provided by the plaintiff related to the wind-down of the existing client base and that "*essentially*" no new cards could be ordered.

91. Mr. Lillis was quick to refute this. In a fifth affidavit, which was prepared by reference to a final draft of Ms. Van Grinsven's second affidavit, Mr. Lillis deposed that between January and May, 2016 thousands of new cards were supplied and that the supply of new cards did not cease until September, 2016. The defendant's case is that during and after this time it was working with the plaintiff to facilitate the migration of the plaintiff's customers to its new product, and that the plaintiff's decision to develop a new product was a business decision.

92. Mr. Lillis in his first affidavit, referred to the defendant's counterclaim for €104,489.84 said to be owing on foot of invoices issued between April and October 2016, for services said to have been provided pursuant to the services agreement. While the counterclaim does not unambiguously say so, I understand the services the subject of the counterclaim for €104,489.84 to have been allegedly provided more or less between those dates – that is, long after the contract was allegedly frustrated.

93. I am not on this application to attempt to weigh the prospects of success by either party on any issue but to identify whether there is a credible basis for the defendant's case. In my view the defendant has put forward credible evidence, which if accepted by the trial judge, would lead to the conclusion that the services provided by the defendant after termination were no less than it was, or would have been, obliged to provide under the contract; that the looming regulatory changes would have a significant impact on the viability of the products and the availability of an alternative BIN services provider for the products as they stood; and that the plaintiff's decision to create its new products was a business decision based on market requirements rather than anything done or not done by the defendant.

94. For these reasons I find that the defendant has met the first requirement of demonstrating that it has a *prima facie* defence.

Whether there is reason to believe that the plaintiff will be unable to pay the costs

95. In assessing whether there is substance to the defendant's apprehension that the plaintiff would be unable to pay the costs if the action were to fail, the first logical step is to assess what those costs would be likely to be.

96. There is quite a gap in the estimates. The defendant's estimate is 157% of the plaintiff's estimate.

97. On 5th July, 2018 Behan & Associates, Legal Costs Accounts, on the instructions of the solicitors for the defendant, estimated the defendant's future costs of defending the proceedings at €394,700.00. Behan & Associates estimated the solicitors' fee at €190,000; senior counsel's brief fee at €60,000; junior counsel's brief fee at €40,000; and refresher fees at €4,000 and €2,650, respectively. The estimated duration of the trial was six days. The estimate of counsels' fees for the application for security for costs was €9,000 for senior counsel and €6,000 for junior counsel, in each case expressed to be a brief fee, including affidavits and submissions and so, inferentially, based on an estimate that the application for security for costs could be disposed of in one day. Behan & Associates estimated witness expenses for KPMG at €12,500 and for a regulatory expert at €10,000. Provision was made for €12,000 for stenography services.

98. On 24th September, 2018, on the instructions of the solicitors for the plaintiff, Lowes, Legal Costs Accountants, gave an estimate of the defendant's costs, which came out at €252,000. Lowes estimated the solicitors' instruction fee at €140,000; senior counsel's brief fee at €45,000; junior counsel's brief fee at €30,000; and the refreshers at €3,000 and €2,000. For the application for security for costs, Lowes allowed nothing for senior counsel and a total of €2,000 for junior counsel. Attached to Lowes' report is a summary which showed a total for Behan & Associates' estimate of €358,700, against Lowes' total of €252,000. The difference between the €394,700.00 and the €358,700 is accounted for in the body of the report. Lowes made no provision for the fees estimated for KPMG or the regulatory expert because, they said, they were not privy to the level of work which had been, or was to be, carried out by them. Nor did Lowes make any provision for stenography services, on the basis that the parties might agree to share that cost and that the defendant's share would not be recoverable on a party and party bass unless certified by the court.

99. In my view, the estimate of Behan & Associates is more reliable.

100. By the time the legal costs accountants were engaged, the pleadings were closed. It was quite clear from the statement of claim and replies to particulars that the plaintiff had engaged accountants, specifically Grant Thornton, to formulate its claim. It seems to me that it was inevitable that the defendant would engage an accountant to mark Grant Thornton. If the fact that both sides would call expert regulatory evidence was not spelled out in the pleadings, it was evident from the first affidavit of Mr. Lillis, which was

filed on 6th July, 2018, that the defendant had engaged a regulatory expert, who in all likelihood would have to be marked by an expert on the plaintiff's side. If Lowes did not understand what work had been, or would be, done by the experts they could have asked. No less to the point, if Lowes did not understand the issues which the experts would be asked to address, I find it impossible to understand how they could have accurately assessed the novelty, difficulty and complexity of the case or the skill, knowledge or time which would be required to deal with it. I do not say that the estimate given by Lowes was not the best that could be done on the available information, but it seems to me that the apparent and acknowledged deficiency in the information which Lowes had means that their estimate is not comparable with that of Behan & Associates. It follows that the apparent differences between the allowances made by Lowes for the solicitors' instruction fee, brief fees and refreshers have not been obviously justified.

101. As to the approach of Lowes to the estimated fees for the application for security for costs, this appears to be based solely on O. 52, r. 17(12) of the Rules of the Superior Courts. While the rule provides that only one counsel shall be allowed unless the court otherwise orders, Lowes did not engage with the possibility that the court might otherwise order. The legal costs accountants, on both sides, were engaged at an early stage in the life of the motion for security for costs, and they were not to know that the motion papers alone would balloon as they have. The estimate, on both sides, at that stage was that the application could be disposed of in one day. That said, the defendant's application was for security for €394,700 and if it could not be defeated the plaintiff would have to put up at least €252,000. It was implicit in the estimate of Behan & Associates that senior counsel would be engaged to move the application. It is not evident that Lowes were advised, or gave any consideration to, whether senior counsel would be engaged on behalf of the plaintiff to defend the motion. It seems to me that it could confidently have been expected that a significant factor (of course by no means a determinative factor) in the consideration of the court as to whether it should order otherwise would be whether senior counsel had been engaged on both sides. As to the allowance of a total of €2,000 for junior counsel's fees for a motion for security for costs of €394,700, it seems to me that this was on any analysis very skinny. If Behan & Associates' estimate was high at the time it was made, it has been abundantly justified with the benefit of hindsight.

102. In my view, the failure of Lowes to make any provision for stenography fees is similarly flawed. The €12,000 provided for by Behan & Associates was clearly intended to cover an overnight transcript. The premise of Lowes' report was that both sides would want an overnight transcript. I find it difficult to understand why it might have been contemplated that the court would not certify for the cost of a shared overnight transcript which the parties had agreed was necessary.

103. Left to my own devices I think that I might have pared back the nominal amounts estimated by Behan & Associates for the lawyers' fees, but I am satisfied that those amounts are nearer the mark than the plaintiff's figures and the allowances made for the

expert witness fees strike me as very modest. I take into account also that the estimate of six days for the trial of this action appears to be very optimistic.

104. By the way, the costs incurred by the plaintiff in relation to this litigation up to August, 2018 (by when the pleadings had closed but before work had begun in earnest on the motion for security for costs) came to €178,822,

105. For those reasons, I will deal with this application on the basis that if the action were to fail and the defendant to be awarded its costs, those costs would be likely to tax between party and party at something in the order of €394,700.

106. It is common case that the onus is on the defendant to make out the case that there is reason to believe that the plaintiff will be unable to pay to pay the costs if the action fails.

107. By letter dated 17th October, 2017 the defendants' solicitors made a demand for security for costs. The last published financial statements for the plaintiff, it was said, showed a limited surplus. The costs of the litigation, it was said, would be substantial. And the plaintiff, it was said, had failed to pay an outstanding debt to the defendant of €104,489.84.

108. I pause here to observe that in the initial demand for security for costs and repeatedly since, the defendants' solicitors have been complaining that the plaintiff's accounts are in Dutch. Of course they are. It is a Netherlands corporation. I see no merit in this criticism.

109. I will try not to dwell too much on the correspondence but for a long time the defendants' solicitors' request for security for costs or evidence of the plaintiff's financial position was met by demands for delivery of a defence.

110. Eventually, by letter dated 7th February, 2018 the request for security was declined on the basis that any inability on the part of the plaintiff to provide security (sic.) was principally due to the wrongful actions of the defendant in wrongfully terminating the services agreement. The plaintiff's solicitors explained that the plaintiff had been taken over in 2015 and was not since obliged to publish individual accounts because its figures were included in consolidated accounts published by its parent. When it was put to the plaintiff's solicitors in correspondence that the consolidated financial statements must have been based on individual financial statements for each of the companies in the group, they did not demur: but took the position that the defendant was not entitled to them.

111. The explanation for the absence of published accounts was perfectly proper but the refusal to provide the information, implicitly acknowledged to exist, which would have allowed the defendant to make some assessment of the plaintiff's current financial position was calculated to, and inevitably did, fuel the defendant's concern. I do not believe that the refusal necessarily, in and of itself, demonstrated an inability on the part

of the plaintiff to meet an adverse costs order, but it was a proper basis for reasonable concern.

112. In the first affidavit of Mr. James Lillis grounding this application, that concern was expressed, and it was later supported by a report from Mr. Andrew O'Leary of KPMG dated 26th July, 2018. KPMG addressed the issue by reference to the out of date published information and some figures provided by the defendant.

113. In answer to the application, the plaintiff commissioned a report from Mr. Paul Jacobs of Grant Thornton dated 5th October, 2018. Mr. Jacobs looked at the financial position of the plaintiff as of 31st August, 2018 by reference to management accounts which had not been (and were not for a long time after) provided to the defendant. He opined that the plaintiff had a surplus of assets over liabilities of €533,521, of which €322,702 was cash, and that it would be able to "*fund*" an adverse costs award of €252,000 and was "*likely to be able to fund*" an award of €394,700. In the same report, Mr. Jacobs gave his provisional view as to the amount of the plaintiff's claims for loss of profits, and his estimate that the losses up to 31st August, 2018 were €2.5 million. Mr. Jacobs identified the inactivity fees as a substantial source of revenue to the plaintiff over the following years which would culminate in what was variously described as a balloon or a bullet of €556,856 at the end of 2021.

114. Mr. Jacob's report was relied on by Ms. Angelique Brussel Van Grinsven in support of an averment that the plaintiff (in the unlikely event that the action were to fail) had enough assets to meet any potential costs order.

115. Now for two important reasons to which I will shortly come, the fact that the plaintiff had the cash on 31st August, 2018 did not necessarily mean that the cash would be available to meet an adverse costs order but, inferentially at least, that appeared to be the plaintiff's position. The defendant's solicitors tested that position by suggesting that the cash might be ring-fenced as security for the defendant's costs. That suggestion was declined.

116. The first of the two good reasons to which I have referred is that it is settled law that the relevant date upon which the ability of the plaintiff to meet an order for costs is that date on which such order would likely be made. The later affidavits showed that the cash was otherwise needed for the conduct of the plaintiff's business and that a good deal of it was indeed used for that purpose.

117. The second reason was identified and developed in a second report of KPMG dated 12th December, 2018. The figures relied on by the plaintiff, said Mr. O'Leary, had failed to take account of the plaintiff's costs. The estimates for the defendant's party and party costs were, at one end, €252,000 and at the other €394,700. The plaintiff's costs, said Mr. O'Leary (and this is one of the few issues which is not disputed) would be 150% of whichever of those estimates was correct (or whatever the correct estimate was) partly because party and party costs are routinely measured at significantly less than the costs actually incurred, and partly because plaintiffs' costs tend to be higher than defendants'

costs. That put the range of the plaintiff's costs at between €378,000 and €592,050. Mr. O'Leary estimated the range of future costs for both parties as between €463,828 and €820,578.

118. Mr. O'Leary made a number of other points in relation to the available information and Mr. Jacobs' assumptions and analysis. He pointed in particular to the fact that the calculation of the plaintiff's assets included a figure of €97,599 for web development which he thought was not a realisable figure, and to the absence of any projections as to future income or profits. Mr. O'Leary appears to agree with Mr. Jacobs that the inactivity income is crucial to the plaintiff's financial stability. Mr. O'Leary also then suggested that a question arose as to whether the cash of €322,702 had been "*rested*" in the plaintiff's account to facilitate the review but this was rejected by Ms. Van Grinsven in a later affidavit and was never revisited. The cash was drawn against, but I proceed on the basis that it was at all times properly held and used by the plaintiff. The immediate availability of the cash to the plaintiff, however, could never have given the defendant much comfort as to its ability to meet an adverse costs order after the trial of the action eighteen months or two years later.

119. By reference to the available information, Mr. O'Leary expressed the view that the plaintiff would be unlikely to be able to meet an award of €394,700 and would be unlikely to meet an award of €252,000 without significant cashflow pressure.

120. Mr. O'Leary's report was answered in an affidavit of Mr. Jacobs filed on 5th February, 2019. Mr. Jacobs carefully parsed Mr. O'Leary's report, arguing that his colleague's findings as to possibilities did not support his conclusions. By then Mr. Jacobs has been provided with his client's projections by reference to which he showed, in a table, total projected EBITDA for the years 2019 to 2021 of €888,132, with a big spike in 2021 of €698,406, when the balance of the inactivity money was forecast to come in. Earlier in his affidavit Mr. Jacobs had looked at Mr. O'Leary's argument that the inactivity money should be split 75:25 and had offered the view that even allowing for the disputed 25% claim there would be profits of €822,073 between 2018 and 2021.

121. I am not on this application to make any assessment as to the likely ability of the plaintiff to meet a costs order or to attempt to resolve any difference of opinion between the experts. I do, however, observe that Mr. Jacobs mixes inactivity revenue over a four-year period and estimated profits over a three-year period. He takes account of the disputed 25% claim in his assessment of the inactivity revenue, but not in the projected EBITDA. If that were done for the relevant three years, the total EBITDA would be reduced by €264,651 to €623,480.

122. To prepare his affidavit, Mr. Jacobs asked for, and was given, up to date management accounts for the year ended 31st December, 2018 and budgets for the years ending 31st December, 2019 to 31st December, 2021. The budgets referred to and relied on by Mr. Jacobs were not exhibited but were later provided, in Dutch, and translated and reviewed by Mr. O'Leary. In a further affidavit filed on 8th March, 2019 Mr. O'Leary challenged the reliability of some of the plaintiff's previous projections by reference to outcomes and

expressed serious doubts whether the forecasts relied upon by the plaintiff, which had been reviewed but not verified by Mr. Jacobs, were achievable.

123. It seems to me that the plaintiff's projections are founded on a significant assumption that is wrong. Mr. Jacobs' table projects total EBIDTA for the years 2019 to 2021 of €888,132, which, it is said will or should be sufficient to cover the total future costs of the litigation, on both sides, of between €463,828 and €820,578. It follows, then, that the projections on which the table is based do not take account of the plaintiff's future costs. The assumption, then, is that the plaintiff's solicitors will stand out of their fees and will carry the outlay until the action has been concluded. That in my view is not only highly unlikely but inconsistent with the evidence that until August, 2018, at least, the plaintiff was paying the costs on an ongoing basis. The object of Mr. Jacobs' affidavit was to counter Mr. O'Leary's report of 12th December, 2018. But the figures used by Mr. O'Leary were based on estimates of the defendant's likely costs and an extrapolation from those figures as to what the plaintiff's likely future costs would be. It seems to me that any reliable projections as to the plaintiff's future profits would have to take account of the fact that the plaintiff would be paying its own costs on an ongoing basis, by reference to the plaintiff's estimate of what those costs would likely be.

124. The last affidavit on this application was an affidavit of Ms. Van Grinsven. The declared object of this affidavit was to update the evidence as to the financial position of the company. In a table, Ms. Van Grinsven set out on a month by month basis a reconciliation of the amounts collected for inactivity fees against a calculation of the income due on the basis of a charge of €1.50 per month. She did not deal with Mr. O'Leary's challenge that the projected inactivity income and EBITDA in the previous management accounts had not been met by the income.

125. Counsel are agreed that the relevant date on which the plaintiff's ability to meet an adverse costs order is the date on which such an order might be made, or, perhaps more accurately, the date on which the liability would be quantified and final.

126. Mr. Howard voiced an apprehension that the defendant might have a taxed and enforceable certificate of costs before the end of 2021 when the rump of the inactivity income would be available. Mr. McGrath questioned the reality of that apprehension. The motion for security for costs had taken nearly a year to be heard. He pointed to the possibility of an appeal – by one side or the other – against the decision on the motion for security for costs and foresaw the possibility of a further row about discovery. I do not believe that I need to come down on one side or the other of this debate, but I am satisfied that there is at the very least a real risk that litigation will drag on well beyond the end of 2021. I am satisfied, also, that there is good and sufficient reason to apprehend that there may be an appeal against this ruling, and a battle about discovery. Any such further battles will be costly, eventually for the loser, but in the meantime will have to be funded. The costs estimates which are now before the court are premised on the action coming directly to trial.

127. If there is, as I believe there is, reason to believe that the costs will be greater than the current estimates, it follows that there is reason to believe that the plaintiff, on its own figures, will be unable to pay them if the action fails.

128. The experts are agreed that the inactivity income from the dormant cards is, at the very least, an important source of income to the plaintiff. That will be gone after the end of 2021. If the litigation has not been disposed of by then, it will continue to be a significant drain on the plaintiff's resources and the prospect of an inability to pay costs will increase.

129. There is a difference of opinion between the experts as to the likely ability of the plaintiff to meet an order for costs against it should this action fail. The proposition that the plaintiff would be able to pay the costs is predicated upon a disputed entitlement to 100% of the inactivity income; the accuracy of projections for future income and profits which have not been independently verified by Mr. Jacobs and which are doubted by Mr. O'Leary; the reliability of extrapolations from an estimate of the defendant's costs as to what the plaintiff's costs will be; and an assumption that the action will be disposed of before the end of 2021, without any further interlocutory applications, and without an appeal by the plaintiff should it lose.

130. In my view the defendant has made out its case that there is reason to believe that the plaintiff would be unable to pay the costs should the action fail.

Whether the plaintiff's impecuniosity is attributable to the defendant

131. It is submitted on behalf of the plaintiff that any risk that it would be unable to pay the costs is attributable to the wrongful acts of the defendant. It is agreed that the onus of proof on this issue is on the plaintiff. It is agreed, also, that the applicable principles are set out in the judgment of Clarke J. (as he then was) in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7.

132. The onus is on the plaintiff to show:-

> *"(i) that there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);*
>
> *(ii) that there was a causal connection between the actionable wrongdoing and a practical consequence or consequences for the plaintiff;*
>
> *(iii) that the consequence(s) referred to in (ii) had given rise to some specific level of loss in the hands of the plaintiff which loss was recoverable as a matter of law (for example by not being too remote); and*
>
> *(iv) that the loss concerned was sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."*

133. Mr. McGrath reminds the court that the standard, again, is a *prima facie* standard and refers to a passage from the decision of the Court of Appeal in *Tír na n-Óg Projects (Ireland) Ltd. v. P.J. O'Driscoll & Sons (A firm)* [2019] IECA 154 where Peart J. (McGovern and Costello JJ. concurring) said:-

> *"It seems to me that in order to satisfy the requirement that special circumstances be established on a* prima facie *basis, as opposed to a balance of probabilities, the plaintiff must do more than merely assert the proposition on affidavit but must bring forth some evidence which is cogent and credible, which corroborates the contention being made. Any affidavit filed in response by the defendant may affect the trial judge's view as to that cogency and credibility, but the trial judge's task remains to decide if* prima facie *evidence has been adduced, and not to determine as a matter of probability whether the impecuniosity of the plaintiff has or has not been brought about by the wrongdoing alleged against the defendant. That seems to me to be what is intended by the requirement to establish the matter and has been consistently stated to be the level of proof required by the decided cases from Jack O'Toole Ltd. v MacEoin Kelly Associates in 1986 up to Connaughton Road in 2009, which has been consistently followed in later cases."*

134. Mr. McGrath also reminds the court of the need for caution in assessing the issue of causation, both as to evidence and inferences, and of the summary in the judgment of Haughton J. in *Quinn Insurance v. PricewaterhouseCoopers (A firm)* [2018] IEHC 16 of the correct approach to be taken in the application of the test:-

> *"In overall terms I am satisfied for the purposes of this application that the exercise to be undertaken by the plaintiff is one of reasonable hypothesis which is supported by known facts."*

135. The first stage is to examine the alleged actionable wrongdoing. The plaintiff sails over the bar of establishing a cogent and credible case that the defendant was not entitled to terminate, or purport to terminate, the services agreement on 4th December, 2015 but I find a real difficulty in understanding what it is the defendant is alleged to have done, or not done, thereafter.

136. It seems to me that the plaintiff's evidence is inconsistent. The plaintiff makes the case that from the time the defendant was taken over in late 2014 it (the plaintiff) encountered problems, variously said to have been an inability to obtain supplies (without any indication of what those supplies were) and a difficulty (which must have been somewhere short of an inability) in getting cards. These difficulties are ascribed to the change of management of the defendant. The plaintiff acknowledges that there was a drop off in sales in the fourth quarter of 2015 which it attributes to an inability to get supplies, but there is no claim for damages for breach of contract in respect of anything allegedly done or not done before 4th December, 2015. It is said that in the months prior to the termination of the agreement the defendant was "*increasingly slow to supply us and difficult to contact and deal with*" but there is no evidence as to what happened thereafter or how, if at all, the day to day dealings between the parties changed. It is

true that Ms. Van Grinsven says in her first affidavit that "*the decrease in the plaintiff's profitability and any difficulty that the plaintiff might face in meeting an order for costs are entirely and only attributable to the defendant's breach of contract*", but that, it seems to me, is mere assertion.

137. In her second affidavit, Ms. Van Grinsven deposed that following the termination in December, 2015 no new cards could be ordered. Mr. Jacobs' affidavit of 5th February, 2019 records his understanding that no additional cards were supplied. Mr. Lillis countered that between January and May 2016 thousands of new cards were supplied, and that cards continued to be supplied until September, 2016. Ms. Van Grinsven swore a further affidavit but did not contest what Mr. Lillis had said about the supply of cards. Mr. McGrath, in argument, conceded that what Mr. Jacobs had been told about new cards appeared to be wrong but suggested that there was evidence that there were no new customers, and that all that the plaintiff got post-termination were cards and services on a wind-down basis. It seems to me that once it is acknowledged that Mr. Jacobs was wrong about the issue of new cards, it follows that Ms. Van Grinsven's evidence that no new cards were provided must be wrong as well.

138. The second leg of the *Connaughton Road* analysis is to identify a causal connection between the alleged wrongdoing and the alleged practical consequence. It seems to me that to get to that, the plaintiff must identify, at least in general terms, the nature of the wrongdoing. In the case, such as this, of a requirements contract, the assertion, or proof, that goods were not supplied does not establish a breach of contract. A breach can only arise if an order is placed within the parameters which the supplier is obliged to meet. Leaving aside the inconsistency in the evidence, it is not said that orders for cards were placed which were not met, or which were not met on time, or that particular services were ordered or required which were not provided, or not provided in time.

139. Mr. McGrath argues that it is not necessary to get bogged down in questions of what services were provided, what level of services was provided, what cards were supplied, how many cards were supplied, whether the supply was to new customers or old customers or whatever. It is sufficient, he says to look at the figures to see the enormous impact that the termination had on the plaintiff company.

140. I cannot agree. The figures show a decline in sales in 2016 and 2017 against 2015 but it simply does not follow that because the decline came after the termination notice that it was caused by it. On the evidence, the defendant has a cogent argument to make that the writing was on the wall for the cards, as they were, probably from the time of the EU Commission announcement on 5th February, 2013 and certainly from the promulgation of the Fourth Anti-Money Laundering Directive on 20th May, 2015. The cards, as they were, were the subject of some debate and criticism in the media in the Netherlands. There must have been competing products in the market. The evidence is that almost immediately after the services agreement was terminated the plaintiff applied itself, in partnership with Safecard, to developing a new or alternative product. It seems to me to

be perfectly arguable that any one or more of these factors could have caused or contributed to the decline in sales.

141. I can easily contemplate that the plaintiff might have had a requirement for so and so many cards for so and so many existing or new customers which it asked the defendant to supply but which it did not supply: but that is not the case made. Even if that were the case made, it seems to me that it would be necessary to look at what precisely cards were required – whether it was for cards with an annual limit of €2,500 or €250 without customer due diligence, or with a limit of €2,500 with a requirement for due diligence which would be met by the plaintiff or the defendant. I think that a claim that the defendant failed to meet a requirement for cards on precisely the terms set out in the product schedules might very well be different to a claim that the defendant failed to provide cards on modified terms.

142. In my view the evidence now before the court does not support on a *prima facie* basis the argument that there was a practical consequence of the defendant's termination of the services agreement.

143. The third leg of the *Connaughton Road* analysis is to see whether the plaintiff has pointed to some specific level of loss.

144. The plaintiff's initial estimate of loss was in excess of €7 million. This estimate was made, or conveyed to the defendant, on 16th January, 2018, upwards of two years after the termination but I acknowledge that the reliable estimation of loss might have been a complex task. The next, and last, estimate was made by Mr. Jacobs on 5th October, 2018 when he expressed a preliminary view that the losses might exceed €3.7 million: a figure made up of €2.4 million for loss of profit on credit cards; €0.7 million for loss of profit on Pay.com; and €0.6 million for "*costs of termination*".

145. I cannot discern from Mr. Jacobs' report what the basis is of this estimate. In the way of these things, the estimate must be based on a number of assumptions as to what, but for the matters complained of, the plaintiff's position would have been over a particular period. Mr. Jacobs' later report tends to suggest that he did not when he wrote his earlier report have any projections from the plaintiff and that he had not made up his own projections. To the extent that Mr. Jacobs was working on instructions that no new cards had been provided by the defendant after the date of termination, that is acknowledged now to have been wrong. To the extent that the estimate may have been based upon the failure of the defendant to secure an alternative BIN sponsor, the case is not made that the plaintiff had a market for products requiring BIN services beyond those which ABN Amro was providing, or willing to provide.

146. As to the estimate for loss of profit on Pay.com, it is common case that that product was never launched. As I understand the evidence, it is accepted that Pay.com was, or was to have been, an internet-based product that did not require a BIN sponsor, but it did require payment processing services and it would not, without modification, have complied with the requirements of the Fourth Anti-Money Laundering Directive. There is

no indication as to the dates from which or to which this estimate is made or the assumptions – as to the availability of payment processing services, or the defendant's alleged obligation to provide those services, or sales, or level of profitability – on which the estimate was made.

147. It is of some significance to note that the head of loss claimed for Pay.com is a claim for losses arising out of the exclusion of the plaintiff from carrying on the new business. If that is the basis of the claim, the basis of the estimate may be an estimate of the profitability over a particular time of a product being sold by the defendant. There is no evidence of any such estimate.

148. As to the estimate for "*costs of termination*" there is simply no indication of what these costs were, or when they were incurred. The figure of €0.6 million may or may not include something in respect of one or other of "*refunds to 3V customers*" or "*Migration costs of 3V customers to pay2d*" which are heads of special damage in the statement of claim but whatever, if any, costs were incurred by reason of the termination must have been incurred and must have been readily ascertainable long before the exchange of affidavits on this application was complete.

149. Mr. McGrath draws attention to two Court of Appeal decisions. In *CMC Medical Operations v. Voluntary Health Insurance* [2015] IECA 68 the Court of Appeal took the view that the trial judge had been too exacting in his application of the *Connaughton Road* test. That was a case in which a private hospital which had opened in 2010 closed the following year because the VHI refused to provide cover for patients in it. The court concluded that the time between opening and closing was so short that the judge's reliance on precise figures in seeking to understand the reason for its demise was problematic. The Court of Appeal cautioned that the High Court should be slow to take any step which has the effect of curtailing litigation or unduly restricting the constitutional right of access to the courts.

150. I acknowledge the warning about unduly restricting the constitutional right of access to the courts, but it seems to me that this case is the very antithesis of *CMC Medical Operations.* The trial judge in that case delved too deeply. In this case, there is nothing to delve into.

151. The second case is *National Private Hire and Taxi Association Ltd. v. AXA Insurance* [2015] IECA 75. That was a case, as this is, in which the plaintiff had derived all or substantially all of its income over many years from the defendant but there, I think, the similarity ends. The plaintiff had a contract with the defendant, terminable by two years notice, which entitled it to a bounty of €27.50 for each motor policy issued to each of its taxi driver members. That payment was first reduced by the defendant to €15.00 per policy, and then stopped altogether. The plaintiff's case was that its inability to pay the costs if the action should fail was attributable to the fact that the readily quantifiable commission was not paid. This, in my firm view, is not such a case. In this case the defendant gave notice that the contract was terminated but it, and ABN Amro, continued providing services. The plaintiff has put up a number of figures for alleged losses but has not, in my view, made a cogent case, supported by credible evidence, that those alleged

losses, or the decline in its income, was caused by any shortfall or deficiency in the products or services which were available to it.

152. Mr. McGrath points to the drop in revenue and says that the defendant has not offered an alternative explanation to that offered by the plaintiff, that it was attributable to the termination. Mr. Howard counters that he has, and that in any event the onus is not on him to show that any decline in income is not attributable to the termination. I think that Mr. Howard is right. On this issue the onus is on the plaintiff to make the link.

153. I cannot find any basis for the estimated losses. It follows inexorably that I cannot find any causal connection between the alleged wrong and the alleged consequences. That being so, the fourth leg of the *Connaughton Road* test does not arise.

Summary and conclusions

154. I am not satisfied that the defendant has discharged the onus of establishing that it has a *prima facie* defence on the basis of frustration.

155. In my view, the argument that the contract in this case was frustrated falls squarely into the category of mere assertion. I find it difficult to contemplate that a contract might be frustrated by the broadcast of a television programme or by an indication by a third party that it would – at an unspecified time in the future – do something that it had previously said that it was its intention to do, but had not done. What is relied on as the unexpected supervening event in this case was something which had been presaged long before, and it was a difficulty which was well known to the parties at the time of making the contract. The supervening event relied on by the defendant's latter of 4th December, 2015 was, variously, a threatened withdrawal of BIN services by ABN Amro, and the inability to obtain an alternative BIN supplier. On the evidence, any threat to withdraw services was not followed through. The parties' need to identify and secure an alternative supplier was a commercial necessity from before the conclusion of the services agreement. In my view, the performance of the contract by reason of the unavailability of BIN services could not conceivably have been frustrated until the time when ABN Amro in fact declined to provide services.

156. The defendant's letter of 4th December, 2015 not only declared the contract to have been frustrated but purportedly terminated it. It is common case that the letter was effective to determine the contract. If the contract was discharged on 4th December, 2015, the defendant cannot rely on any later alleged frustrating event or events.

157. I am however satisfied that the defendant has established that it has a *prima facie* defence on the grounds that it did not cease to provide the services it was obliged to provide and was not obliged to secure an alternative BIN service provider. The defendant's case is that, albeit on an ad hoc basis, it provided the services it would otherwise have been obliged to provide pursuant to the services agreement and I find that there is a credible basis upon which the trial judge might so find.

158. For the reasons given, I am satisfied that the defendant has established that there is reason to believe that the plaintiff will be unable to pay the costs of the action if it fails.

159. Again for the reasons given, I am satisfied that the plaintiff has established on a *prima facie* basis that there was actionable wrongdoing on the part of the defendant in terminating the services agreement but I am not satisfied that it has adduced evidence or pointed to the availability of evidence that there was a causal connection between the alleged wrongdoing and a practical consequence or consequences for the plaintiff, or that the plaintiff has succeeded in identifying a specific level of loss which is recoverable as a matter of law.

160. My conclusion is that the defendant is entitled to the order for security of costs which it claims.

161. It was agreed that the amount of the security would be left over, and I will hear counsel further on that issue.