Neutral Citation Number [2008] IEHC 369

THE HIGH COURT
COMMERCIAL COURT

2007 166 P
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BETWEEN

ESL CONSULTING SERVICES LTD. T/A VoIP IRELAND

PLAINTIFF

AND
VERIZON (IRELAND) LTD.
AND
VERIZON (UK) LTD.

DEFENDANTS

Judgment of Ms. Justice Finlay Geoghegan delivered on the 27th day of November 2008

Preliminary
1. The plaintiff is a limited liability company incorporated in the State and at the material time as to these proceedings carried on the business of providing telecommunications services to business and consumer customers.

2. The first named defendant is a limited liability company incorporated in the State, and the second named defendant one incorporated in England. The defendants form part of a group of companies which, in 2006, acquired a group of companies known as MCI WorldCom. The defendants carry on the business of the supply of telecommunications and internet services on a wholesale basis.

3. By agreements entered into in October 2003, MCI WorldCom agreed to provide the plaintiff with services which included internet connectivity, wholesale carrier pre-select services and worldwide termination services for voice traffic and co-location services which included the rental of rack space in its data centre and office accommodation at Clonshaugh, Dublin. It is common case between the parties that the applicable contractual arrangements between the plaintiff and the defendants to the matters in dispute herein are, primarily, two agreements entered into between the plaintiff and MCI WorldCom (Ireland) Ltd., in October 2003, being the Wholesale International Master Services Agreement, and the WorldCom Network Colocation Agreement ("the Agreements").

4. The plaintiff contends that in breach of the terms of the Agreements, the defendants suspended its services to the plaintiff on 17th and 20th November, 2006, and on 9th January, 2007. The plaintiff claims damages in excess of €4 million by reason of such alleged breaches of contract. Whilst the plaintiff had pleaded that a number of technical outages were in breach of contract this was not ultimately pursued but it was contended that the effect of the November 2006 and January 2007 alleged breaches must be considered in the context of the earlier outages. The defendants deny the claim and counterclaim for monies allegedly due for services provided to the plaintiff pursuant to the Agreements and certain service agreements made thereunder. That amount was agreed in the course of the proceedings at €252,000. The defendants make a claim for interest on that amount which has to be determined by the Court.

Issues
5. The issues which have to be determined by the Court in these proceedings appear to be:

(i) Were the defendants in breach of contract in suspending services to the plaintiff in November 2006;

(ii) Were the defendants in breach of contract in suspending services to the plaintiff in January 2007;

(iii) If the defendants were in breach of contract on either, or both, of those dates, what is their liability, if any, to the plaintiff, for damages in respect of such breaches? This issue gives rise to a number of sub-issues including:

(a) The loss and damage suffered by the plaintiff by reason of any breaches of contract by the defendants so found;

(b) Is the defendants' liability for damages excluded or limited by the agreements between the plaintiff and the defendants?

(iv) The defendants' entitlement to interest on the amount of the counterclaim and, if so, from what date?

Background facts
6. The plaintiff was incorporated in 2001 and initially offered consulting services, particularly in the engineering and procurement field. By 2003, it commenced telecommunications services. Part of this was what was described, in evidence, as an established technology, namely, Carrier Pre-Select Services (CPS). The other part of the services was a business class Voice over Internet Protocol (VoIP) to commercial and residential customers. Essentially, this allows telephone data to be transmitted over the internet. The customer is unaware, when using the telephone, that such transmission takes place. Important to the technology is a "soft switch" which connects the telephone technology to the internet. The plaintiff considers this business class service to be using cutting-edge technology.

7. Essential to the provision of such services and, in particular, VoIP, is the provision of internet and other telecommunications services worldwide. The plaintiff was not providing these. It had to enter into arrangements with a wholesale provider such as MCI WorldCom or the defendants.

8. In the plaintiff's business model for the services it intended to provide, the successful delivery of its services to its customers was entirely dependent upon the plaintiff having available to it the wholesale and internet services on an uninterrupted basis. The relationship between the plaintiff and its wholesale provider was therefore crucial to the plaintiff's business model.

9. The plaintiff also developed, between 2003 and 2006, a wireless broadband network which could support its VoIP services and established a first such network in Cork. The development of such networks formed part of the plaintiff's intended business

development and roll out of VoIP services.

10. The evidence on behalf of the plaintiff was that it enjoyed a good relationship with MCI WorldCom and was provided by it with a good quality wholesale internet service. However, it contends that the service provided by the defendants, subsequent to the takeover, deteriorated in a number of respects. First, the plaintiff received, in early 2006, invoices for services alleged to have been provided since 2004 and for which it had not previously been invoiced. This forms part of the background to the dispute in relation to allegedly outstanding invoices, both in respect of internet services and co-location charges. Secondly, the plaintiff contends that the technical services provided reduced in quality and that there was, throughout 2006, a significant number of outages when its service went down for technical reasons, which outages, on occasions, were not remedied by the defendants within a reasonable timescale. The plaintiff contends that it is against such a background that the Court must consider the alleged breaches of contract by the defendants in November 2006 and January 2007.

11. Simply put, the plaintiff's claim in relation to November 2006, is that two suspension notices were served on 9th November, 2006, which referred to two allegedly overdue amounts on specified invoices. The plaintiff contends that both those amounts were then in dispute, and had been in dispute, since prior to April 2006. As bona fide disputes existed in relation to the amounts claimed on those invoices, the plaintiff submits that they are not invoices on which payment was due and, as such, the defendants had no right to suspend the provision of services to it in accordance with the Agreements. Similarly, in relation to January 2007, it contends that all relevant payments were in dispute.

12. The defendants do not accept that the Agreements, properly construed, mean that when the plaintiff disputes the payment claimed on an invoice, such payment is no longer due within the meaning of the Agreements. They contend that the existence of such a dispute does not therefore preclude the suspension of the service under the Agreements. They deny that a dispute existed between the plaintiff and the defendants in relation to the payments claimed on each of the invoices to which the November suspension notices related. They deny that the greater part of the overdue payments in January 2007, was disputed by the plaintiff.

Contractual terms for payment, dispute and suspension

13. It is common case that the internet services provided by the defendants for the plaintiff, and the terms thereof, were governed by the Wholesale International Master Services Agreement between the plaintiff and MCI WorldCom (Ireland) Ltd., signed on 22nd October, 2003. The co-location services were governed by the co-location Agreement entered into at the same time. One of the invoices upon which suspension in November 2006 was based was for internet services and the other for co-location services. Whilst there are small differences in wording between the two Agreements, counsel for neither party suggested that there was any substantive difference in the meaning of the terms of the two Agreements in relation to payment, dispute and suspension. I therefore propose referring to the terms of the Wholesale International Master Services Agreement (WIMS Agreement) in considering the relevant contractual terms between the parties.

14. Clause 4.7 of the WIMS Agreement provides:

> "Any Invoice for Charges shall be due on issue of the Invoice and shall be paid by the Customer within thirty (30) days of the date of the Invoice."

15. Clause 17.2 under the heading of Dispute Resolution provides:

> "If the Customer wishes to dispute any Invoice or part of an Invoice falling due in accordance with Clause 4.7, the Customer shall, before the Invoice is due, deliver a notice in writing to [Verizon] setting out the nature of its dispute, including:
>
> (i) date and number of disputed Invoice;
>
> (ii) amount in dispute
>
> (iii) reason for dispute; and
>
> (iv) supporting documentation, as appropriate.
>
> Any undisputed part of a disputed Invoice shall be paid by the Customer in accordance with Clause 4.7."

16. Clauses 6.1 and 6.1.5 in relation to suspension provide:

> "6.1 [Verizon] may, at its sole discretion and without prejudice to any right which it might have to terminate a Service and/or this Agreement, elect to immediately suspend the provision of a Service (or part thereof) if:
>
> 6.1.5 [Verizon] has reasonable grounds to consider that the Customer will not or is unable to make any payment which is due or is to fall due to [Verizon] hereunder".

17. The suspension notices relied upon by the defendants contended that the relevant payments were then overdue. Accordingly, the only part of clause 6.1.5 capable of being relied upon by the defendants is that part which refers to the defendants having reasonable grounds to consider that the Customer will not make a payment which is due. The issue on the construction of the WIMS Agreement is if the payments on the invoices were disputed by the plaintiffs, should they be considered as payments then due?

18. I have formed the view that construing clauses 4.7, 17.2 and 6.15, in a manner which makes them consistent with each other, that if a Customer delivers a notice setting out a dispute to an invoice of a type contemplated by clause 17 which complies, in substance, with the provisions of clause 17.2, then so much of the payment on the invoice, as is disputed by the Customer, is not considered as a payment then due for so long as the dispute continues. I have formed that view, as whilst clause 4.7 states that an invoice "shall be due on issue of the invoice", it clearly refers to payment being made by the Customer thirty days from the date of the invoice. Accordingly, the payment is only due thirty days from the date of the invoice. Clause 17.2, in its final sentence, makes clear that any undisputed part of a disputed invoice must be paid by the Customer within the thirty days specified in clause 4.7. It appears to me that it must follow by clear implication that the Customer is not obliged to pay the disputed part of the invoice in accordance with clause 4.7. Clause 17 does not set out any time limit during which a dispute can be considered to continue, nor when it should be regarded as at an end. Clause 17.3 simply provides "the parties shall use all reasonable endeavours to resolve such payment disputes as soon as is reasonably practicable".

19. Accordingly, if, on the facts herein, the plaintiff did dispute the invoice or part of the allegedly overdue payments on the invoices to which the suspension notice related, in accordance with clause 17.2, then payment was not due on such invoice in accordance with the WIMS Agreement until the resolution of the dispute.

20. If the relevant payments were not due by the plaintiff, then it follows that the circumstances which permit the defendants to suspend a service under clauses 6.1 and 6.1.5 of the WIMS Agreement, do not exist.

21. The next issue which must therefore be considered is whether the allegedly overdue payments on the two invoices upon which the November suspension notices were based, were properly disputed by the plaintiff, and continued to be in dispute at the time of the suspension of the co-location and internet services such that the payments were not then due?

Suspension of services 17th and 20th November, 2006

22. The suspension of services effected by the defendants on 17th and 20th November, 2006, were pursuant to two suspension notices dated 9th November, 2006. One related to account reference E10101203. That notice referred to a statement of account showing a balance of €36,510.77 of which €32,396.77 was alleged to be overdue. It was stated that the sum of €32,396.77 must be received prior to 16th November, 2006, to prevent suspension of the services supplied.

23. The statement enclosed with the notice indicates that the sum of €32,396.77 is in respect of an invoice number 1800000398, dated 20th March, 2006. I have concluded that the amount claimed on this invoice was an amount in dispute between the plaintiff and the defendants since, at latest, April 2006, and remained in dispute up to and including 20th November, 2006, for the following reasons.

24. The invoice issued on 20th March, 2006, for €32,396.77 was what was termed a "back bill" or legacy charge for co-location and office rental charges. The plaintiff disputed this in writing on the basis that it understood, from the original arrangements it believed it had entered into with the defendants, that these services were free of charge. This dispute formed part of the matters discussed between the plaintiff and the defendants at a meeting held in Dublin in April 2006 between Ms. Hand and Mr. Madigan of the plaintiff, and Mr. Mageean and Mr. Kelly of the defendants, at which those present proposed resolving the dispute by the plaintiff paying 50% of the amount invoiced. Those present agreed to recommend such settlement to their respective principals or senior management.

25. The internal documentation of the defendants subsequent to that date, put in evidence, supports, and is consistent with, such dispute and proposal for settlement. For example, an email of 22nd June, 2006, from Mr. Tanda, the credit controller of the defendants, to Mr. Mageean, encloses a "settlement plan form" for completion and submission for approval to senior management. That records, with specific references and amount, the invoice, and under a heading, "Details of Customer's Claim", records it as "ESL were invoiced for co-location and office space rental. Customer advises that they thought the co-location and office space rental was free of charge. Have offered to make payment for 50% of the invoices". The form then records the value for payment being requested by the customer at €16,198.50 i.e. 50% of the amount of the invoice.

26. I find that the amount of €32,396.77 claimed by the defendants on invoice number 1800000398 remained in dispute between the parties, up to and including 17th November, 2006. No decision was made on the proposal for settlement by senior management of the defendants prior to 9th November, 2006. The evidence of the witnesses for the defendants, which I accept, is that a decision was made on 17th November, 2006, by senior management rejecting the settlement and such rejection was communicated orally to Irish based employees approximately one hour in advance of the suspension being effected by the lock out of the plaintiff's employees from the premises.

27. The fact that senior management of the defendants had rejected the settlement does not, in my view, mean that the amount of €32,396.77 was no longer in dispute between the parties. I am satisfied that the plaintiff had, prior to April 2006, disputed on a specific ground relating to the charge made, its liability to pay the amount claimed on this invoice. The plaintiff had not in any way withdrawn that dispute. The fact that the defendants had rejected the terms upon which the dispute might have been resolved does not alter the existence and continuation of the dispute.

28. The second suspension notice of 9th November, 2006, related to an account reference E10101100 in which it was stated that there was an amount of €26,638.58 overdue which must be received by 16th November, 2006, to prevent suspension of services supplied. This was identified in the enclosed statement as being in respect of an invoice number 1800001363 of 24th July, 2006. I am also satisfied that this is an amount which was in dispute between the parties on 9th November, 2006, and remained in dispute up to and including 20th November, 2006, for the following reasons.

29. Whilst the invoice is dated 24th July, 2006, this amount formed part of invoices on account number E10101100 which were in dispute prior to, and discussed at, the meeting already referred to in April 2006. The dispute related to the delay in raising invoices. In respect of this account, the proposed settlement at the meeting was that the plaintiff would pay part of the amount claimed in full, and in respect of the balance of €26,638.58, the plaintiff should pay 50% thereof. Further, the amount agreed to be paid in full by the plaintiff was to be paid in instalments in accordance with a payment plan. Pursuant to that proposal, a payment plan which is dated 25th August, 2006, but which was signed on behalf of the plaintiff on 18th September, 2006, and on behalf of the defendants on 15th November, 2006, was agreed. This set out six dates between 1st September, 2006, and 1st February, 2007, on each of which a sum in excess of €3,000 was to be paid by the plaintiff to discharge the amount agreed to be paid. The same payment plan, signed on behalf of the defendants on 15th November, 2006, provides at clause 4 thereof:

> "For the avoidance of doubt, the following invoice(s) are currently in dispute between Verizon Business and the Customer in accordance with Clause 17 of the Agreement and are excluded from the Outstanding Amount. On resolution of such invoice dispute, the Parties shall determine how the invoice(s) will be settled, which may require an amendment to this Payment Plan."

The payment plan then identifies the invoice in question as Invoice 1800001363 and the amount as €26,638.58.

30. I find that the proposal that the defendants accept a payment of 50% of this amount was also rejected by senior management of the defendants on 17th November, 2006. Nevertheless, for the same reasons as set out above, I am satisfied that the amount of this invoice, which had been acknowledged by the defendants to be in dispute in an agreement signed on their behalf as recently as 15th November, 2006, remained in dispute. The fact that the defendants rejected the proposed 50% payment to settle the dispute does not mean that the amount did not remain in dispute when internet services were suspended on 20th November, 2006.

31. Accordingly, I find as a matter of fact, that each of the amounts referred to in the two suspension notices of 9th November, 2006, as being overdue for payment by the plaintiff, were amounts which were then in dispute between the plaintiff and the

defendants for the purposes of the Agreements, and that such amounts remained in dispute between the plaintiff and the defendants up to and including 17th and 20th November, 2006, respectively. It follows from this conclusion that on none of the dates of 9th, 17th or 20th November, 2006, circumstances existed which permitted the defendants to suspend services to the plaintiff, pursuant to clauses 6.1 and 6.15 of the WIMS Agreement or clauses 9.1 and 9.1.5 of the co-location Agreement. Hence, the defendants were in breach of contract in suspending services to the plaintiff on 17th and 20th November, 2006.

Nature and impact of lock out and suspension, November 2006

32. The suspensions effected by the defendants in November 2006, were in two parts. On Friday 17th November, 2006, the defendants effectively locked the plaintiff out of the premises it rented from the defendants, at Clonshaugh, pursuant to the co-location Agreement. Graphic evidence was given by Mr. Powell and Ms. Hand, on behalf of the plaintiff, both of whom were in the offices at the time, of the manner in which this was effected. Ms. Hand received a phone call from Mr. Mageean of the defendants at approximately 4.55 p.m., to state that he had been told that UK management had directed that security in Clonshaugh should immediately deactivate the computer access cards of the plaintiff's employees. The cards were deactivated at 5.00 p.m.

33. A series of phone calls then took place between Mr. Powell, on the one hand, and Mr. Kelly, Mr. Mageean, and UK management of the defendants, on the other, as a consequence of which a decision was made, by approximately 6.30 p.m., that the suspension should be rescinded.

34. Whilst the lockout from the premises was of short duration, I accept the evidence of the witnesses for the plaintiff that the fact that the defendants were prepared to effect a lockout by reason of the alleged non-payment of the two legacy debts, both of which had been acknowledged to be the subject of a dispute and a proposal for settlement, in circumstances where no notification was given of the rejection of the settlement and without an opportunity for the plaintiff to consider its position in advance of the lockout, created very significant disturbance amongst the employees of the plaintiff in relation to their continuing business relationship with the defendants. Accordingly, whilst the lockout was short in duration, and does not appear to have impacted directly on customers of the plaintiff, I am satisfied it did impact significantly on the employees of the plaintiff.

35. Having been informed that the suspension had been rescinded on the evening of Friday 17th November, 2006, the plaintiff's employees turned up for work, as normal, on Monday 20th November, 2006. However, immediately, they started receiving complaints from customers that the VoIP service was down and they then ascertained that the defendants' internet connection to the plaintiff's soft switch had been deactivated, which meant that its entire VoIP network was down. This impacted immediately, directly, and seriously on the customers of the plaintiff in its VoIP service and its wireless network in Cork. I am satisfied that, as a matter of probability, this did cause serious damage to the plaintiff's credibility and reputation with its customers, in relation to the VoIP and wireless network service it appeared capable of delivery. Further, that the impact of this disconnection was exacerbated by the fact that it followed shortly on two prior outages on 2nd November, 2006, and 13th November, 2006, when the VoIP system was completely shut down for several hours due to a technical problem on the defendants' network.

36. Discussions took place during Monday 20th November, 2006, and a conference call was held between relevant employees of the plaintiff and the defendants. As a consequence, an instruction to reconnect the plaintiff was given in the late afternoon on 20th November, 2006, and the reconnection took place thereafter. The plaintiff was unable to provide the VoIP or wireless broadband service to its customers for a full business day, on 20th November, 2006. This damaged the plaintiff's standing and reputation with its customers.

37. The internet disconnection on 20th November, 2006, coming immediately after the lockout on 17th November, 2006, and in circumstances where the plaintiff had been informed that the suspension had been rescinded on the evening of 17th November, 2006, also created further significant disquiet amongst the employees of the plaintiff and fractured further the continuing business relationship between the plaintiff and the defendants. I am satisfied that the senior employees of the plaintiff, at this time, believed that the defendants had acted in breach of contract in the lockout and disconnection of internet services, believed that serious damage had been done to the business and reputation of the plaintiff, and had a strong sense of grievance that they had been treated in this way by the defendants.

Suspension on 9th January, 2007

38. The defendants again closed down internet services to the plaintiff, including its own office access to the internet, on the morning of 9th January, 2007. The plaintiff contends that such suspension was in breach of the WIMS Agreement. The defendants contend that they were not in breach of the WIMS Agreement in suspending the internet services on 9th January, 2007, as there was then a sum in excess of €180,000 due and owing to the defendants, by the plaintiff, which was then due and which the plaintiff had indicated it was not willing to pay.

39. These competing claims must be considered in the context of what occurred after the restoration of internet services, on 20th November, 2006. Notwithstanding that services were restored, each of the parties continued to maintain their prior position i.e. the defendants maintained the position that they were entitled to suspend services on 17th and 20th November, 2006, and the plaintiff contended that they were in breach of contract in so doing, and that the plaintiff had suffered very serious damage as a consequence of such breach.

40. The plaintiff, through its solicitors, William Fry, wrote a formal letter of claim dated 23rd November, 2006, in which it called upon the defendants to agree to compensate the plaintiff for all losses flowing from the allegedly improper actions of the defendants, on 17th and 20th November, 2006, sought an undertaking not to interrupt the plaintiff's services again, without just cause, and sought discharge of legal costs. Proceedings were threatened in default of an agreement to that effect. No such agreement was forthcoming.

41. Subsequent to 20th November, 2006, upon receipt of invoices for current services provided by the defendants to the plaintiff, both in respect of co-location and internet services, Ms. Hand, on behalf of the plaintiff, sent emails disputing all invoices received. The first such email was sent on 23rd November, 2006, in which Ms. Hand stated that she wished to "formally raise a dispute process regarding the following invoices". She then listed a number of invoices and their amounts, and then stated:

> "We have instructed William Fry Solicitors in Dublin to issue proceedings against MCI/Verizon arising out of the improper action and breach of contract of MCI/Verizon Business which has caused direct and substantial damage to our company. William Fry have already been in correspondence with your solicitor, Kahl Oozeerally regarding this matter.
>
> The above invoices should all be regarded as being in dispute as part of this process and I await a Bits ticket number from you regarding this.
>
> No other action should be taken by MCI/Verizon Business on foot of these invoices without reference to our solicitors,

William Fry. In the event that any such action is taken, we put you on notice that we will be taking any and all legal remedies necessary against your company, and shall be holding you liable for the costs of same."

42. The "Bits ticket" system was the procedure then in place with the defendants where a customer raised a dispute in relation to an invoice. It identified the dispute with a number and it was then separately identified in statements of account. The defendants did not issue Bits tickets in relation to any of the invoices disputed in the above manner by Ms. Hand in November 2006. Similar type disputes were raised by Ms. Hand, on behalf of the plaintiff, on receipt of further current invoices and, similarly, no Bits tickets were issued.

43. In the meantime, there were some further exchanges in relation to the two disputed invoices which had formed the basis of the November suspensions. There were also a limited number of invoices in respect of which there were specific disputes raised in relation to the charges on the invoice. One suspension notice was sent in December in relation to a small amount of just in excess of €400, and withdrawn on the basis that it had been an automated suspension notice, and an undertaking was given that no further such automated notices would occur.

44. In this period, the only payments made by the plaintiff to the defendants were in accordance with two payment plans of 25th August, 2006. On 2nd January, 2007, one such payment of €11,289 was made. This payment appears to have elicited a query from Mr. Mageean, for the defendants, as to why current payments (other than those disputed) were not being made. Ms. Hand immediately responded, making clear that pending satisfaction from the defendants of the claim for compensation in respect of the allegedly unlawful suspensions on 17th and 20th November, 2006, all current invoices were being treated by the plaintiff as being in dispute and by implication were not being paid.

45. On 4th January, 2007, Mr. Oozeerally, the in-house solicitor of the defendants, sent what was described as a "demand for payment, notice of suspension and termination". In that lengthy communication, he asserted that the amount due to be paid immediately was €286,102.02, and identified certain small disputed amounts aggregating €23,849.97. It was also alleged that the plaintiff was in breach of the terms of the payment plans and that the total balance outstanding was due thereunder.

46. There were further exchanges between William Fry and Mr. Oozeerally which focused, in particular, upon amounts aggregating €186,489.38 invoiced since 20th November, 2006, and whether those amounts were in dispute such that payment was not due thereon. The plaintiff's position was that dispute notices had been raised in respect of each of the invoices, and simply ignored by the defendants. The basis of the dispute was repeated as being the compensation to which the plaintiff was entitled by reason of the alleged illegal suspensions of 17th and 20th November, 2006. The defendants' position was, simply put, that such invoices were not the subject of any valid dispute between the parties and that the amounts claimed were due. On 8th January, 2007, the defendants indicated that they were prepared to accept 50% of the amounts which were in dispute prior to November 2006, i.e. what had been proposed in April 2006.This did not affect the current invoices aggregating €186,489.38 referred to above.

47. The plaintiff did not agree to make any payments, and ultimately the defendants disconnected internet services on the morning of 9th January, 2007. The plaintiff immediately sought, and obtained, an interim injunction and services were restored later that day. The subsequent interlocutory application was compromised on the basis *inter alia* that the defendants would continue to provide services on certain terms to a date which ultimately became June 2007 when the Agreements would terminate.

48. At the hearing before me, the submissions of the parties in relation to the defendants' entitlement, or otherwise, to suspend services on 9th January, 2007, centred on the issue as to whether the invoices in relation to amounts invoiced since November 2006, *i.e*. €186,489.38, were amounts due as at 9th January, 2007, within the meaning of the WIMS Agreement, having regard to the disputes raised by Ms. Hand on behalf of the plaintiff in respect of such invoices, and repeated in substance by the plaintiff's solicitor, on its behalf.

49. I have concluded that the plaintiff has not established that, as a matter of probability, the defendants were in breach of contract in suspending internet services on 9th January, 2007, for the following reasons. As already concluded, clause 17.2 of the WIMS Agreement expressly permits a Customer to dispute any invoice, or part of an invoice, and provides that such Customer must, before the invoice is due, deliver a notice in writing, setting out the nature of the dispute, including: (i) the date and number of the disputed invoice, (ii) the amount in dispute, (iii) the reason for dispute and (iv) supporting documentation, as appropriate. Where this is done, for the reasons already explained, I have concluded that the Customer's obligation is only to pay an undisputed part of a disputed invoice, or where the entire invoice is disputed, the Customer is not under an obligation to pay until that dispute is resolved.

50. The issue is what type of disputes fall within clause 17.2. *Prima facie* the notices served by Ms. Hand in December 2006, complied with clause 17.2 insofar as it gave details of the disputed invoices, the amounts and the reason. The reason given, however, did not relate to the service provided to which the invoice related, nor the amount charged on the invoice, nor any issue relating to the manner in which the invoice had been raised. The invoice, as such, was not being disputed by Ms. Hand, rather, she was contending that by reason of the obligation of the defendants to compensate the plaintiff for losses it suffered by reason of the alleged illegal acts on 17th and 20th November, 2006, the plaintiff was not liable to pay the defendants the amounts on the invoices. To put it another way, what was disputed by the plaintiff was its liability to make a payment to the defendants in respect of amounts stated on invoices by reason of the plaintiff's alleged entitlement to set off against such sums an alleged liability of the defendants to it. However, the amounts on the invoices were not disputed as being inappropriate amounts to charge the plaintiff for the service, nor was there any dispute in relation to the service to which the charge related or timing of, or way in which, invoices were raised.

51. I have concluded that in December 2006 and early January 2007, the plaintiff was not disputing (with limited exceptions which are not relevant to the general issue) the current invoices issued since 20th November, 2006, within the meaning of clause 17.2 of the WIMS Agreement. It was, rather, disputing its liability to make payments on those invoices by reason of an implied entitlement to offset against those payments, sums which it contended the defendants were liable to pay to it to compensate for damages suffered by reason of the events of 17th and 20th November, 2006.

52. I have reached this conclusion, not by reason of a literal interpretation of clause 17.2, which undoubtedly refers to disputing an invoice (as distinct from a liability to pay the amount of the invoice), but rather, by construing the substance of what is intended by clause 17.2. I have also taken into account the *contra proferentem* principle insofar as this appears to be a standard form agreement and therefore in the case of ambiguity, should be construed against the defendants. It does not, however, appear to me ambiguous. Clause 17.2 appears, clearly, to be directed at, and only at, disputes which may be raised by a Customer in relation to the amount of the payment sought on an invoice in respect of the services to which the invoice allegedly relates. A dispute to come within clause 17.2 must be fact specific to the potential liability of the Customer to the defendants for the amount stated on the invoice as the payment due for the service referred to therein. Such disputes may be of many kinds and would include, for example, disputes in relation to the quality of the service provided, the quantification of the amount claimed, the fact that the same service had already

been included in another invoice and paid, the absence of liability for the invoice because of a failure to furnish the invoice in a timely manner, and other matters, but all of which relate to the question as to whether or not the invoice correctly sets out an amount potentially payable by the Customer to the defendants in respect of the services referred to in the invoice. Clause 17.2, having regard to its express terms, does not include the type of dispute between the parties to these proceedings in January 2007, in relation to the current invoices aggregating €186,489.38. That dispute, in essence, was whether or not the plaintiff was then obliged to pay this amount to the defendants by reason of its claim to be entitled to set off against its undisputed liability to the defendants for the amounts on the invoices the damages it alleged the defendants were liable to pay to it by reason of the alleged breaches of the Agreement in November 2006. It was a dispute relating to the plaintiff's right to set off against an undisputed liability on the invoices a debt alleged due from the defendants to it, as distinct from a dispute as to its liability to the defendants for the amount specified in the invoices.

53. Accordingly, I have concluded that in January 2007, there was due by the plaintiff to the defendants a sum of €186,489.38 on current invoices which payment was due and which the plaintiff had indicated it was not willing to pay. Hence, the defendants were not in breach of the WIMS Agreement on 9th January, 2007, in suspending the internet services to the plaintiff. They were permitted to terminate or suspend the service pursuant to clauses 6.1 and 6.15.

54. For completeness, I should add that whilst notice of the proposed suspension was only given on 4th January, 2007, no point was taken in my view, correctly by the plaintiff that a longer notice period was required by the Agreements. The battle lines had been clearly drawn. The plaintiff had indicated a definitive unwillingness to pay the current invoices until compensated for the November lock out and suspension.

The plaintiff's loss and damage

55. The plaintiff's claim for damages in respect of the loss and damage allegedly suffered by it, by reason of the breach of contract of the defendants, was made in respect of the breaches alleged to have occurred, both in November 2006, and January 2007. Nevertheless, in evidence, the plaintiff's witnesses did seek to identify the damage which they allege occurred by reason of the breaches of contract in November 2006, separate from that which occurred after the alleged breaches in January 2007. By reason of the findings made above, any assessment of the plaintiff's claim to damages is confined to loss and damage alleged to have occurred by reason of the breaches of contract now found in November 2006.

56. The basis of the plaintiff's claim for damages, as pleaded and pursued was essentially as follows. In the summer of 2006, the plaintiff, for the purposes of a potential investor, had been valued at €4.5 million. It is alleged that the breach of contract in November 2006, led directly to the loss of key employees of the plaintiff and the loss of confidence in its customers and the marketplace, as a consequence of which the plaintiff was unable to continue in business. It is alleged that it was obliged to sell the component parts of its business to mitigate its loss and realised, therefor, only approximately €290,000. The plaintiff claimed, on this basis, that it was at a loss of in excess of €4 million by reason of the defendants' breaches of contract in November 2006.

57. There are multiple difficulties with this claim. The manner in which it is put forward fails to recognise the essential difference between the plaintiff, as a legal person, and its shareholders. Whilst there was some recognition of this difficulty in the closing submissions made on behalf of the plaintiff, there was no other evidence adduced by the plaintiff which sought to quantify the loss and damage allegedly suffered by the plaintiff by reason of the breaches of contract in November 2006. I will return to the impact of this on the plaintiff's claim for damages.

58. The defendants have been found to be in breach of contract and the plaintiff undoubtedly has a potential entitlement to be awarded damages for the loss and damage, if suffered, by reason of the breaches of contract. However, each of the relevant Agreements contain clauses which seek to limit the liability of the defendants to the plaintiff inter alia for any breach of contract committed by the defendants in the performance of the Agreements or the provision of services thereunder.

59. The plaintiff contends that such limitation clauses do not apply to the plaintiff's claim for damages by reason of the application of the doctrine of "fundamental breach" or "breach of fundamental obligation" as applied in this jurisdiction by the Supreme Court in *Clayton Love & Sons (Dublin) Ltd. v. The British and Irish Steam Packet Company Ltd.* [1970] 104 I.L.T.R. 157. The defendants contend that the limitation clauses in the Agreements do apply and the Court should not disapply them in reliance upon the so-called doctrine of fundamental breach for a number of reasons. First, they contend that the breach which occurred in November 2006, was not a "fundamental breach" within the meaning of the case law relied upon in Clayton Love. Secondly, the application by the Supreme Court of the doctrine of fundamental breach to the appeal in Clayton Love, was obiter as it was not in issue before it and therefore this Court is not bound by that decision to apply the doctrine of fundamental breach. Thirdly, assuming that this Court is free to determine the issue, even if it were to conclude that the breach which occurred was a fundamental breach, or breach of a fundamental obligation, that it should follow the approach of the House of Lords in *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] 2 W.L.R. 283, to this dispute. It is submitted that the Agreements at issue are agreements negotiated between two commercial entities and that the distribution of liability provided for in the Agreements should be upheld and applied by the Court.

60. *Clayton Love* concerned a failure to load last and transport quick frozen scampi in a refrigerated hold at certain temperatures. In the High Court, Davitt P. concluded that such terms were fundamental and on the facts (which were that the cargo was not so carried and defrosted), "[t]he service which the plaintiffs got under their contract was . . . something radically different from the service for which they had contracted". The Supreme Court held that the fact that the defendant had been in breach of a fundamental term was not in issue.

61. The plaintiff submits on the facts herein that the provision of an uninterrupted internet service and access to the offices under the Agreements were fundamental terms of each Agreement. Further that the suspensions effected in breach of contract were in breach of such fundamental terms. I do not accept that this is the correct characterisation for the purpose of the doctrine of fundamental breach.

62. The provision of internet services under the WIMS Agreement and access under the co-location Agreement were fundamental terms of each of the Agreements. However, the uninterrupted provision of such services or access must be regarded as subject to the suspension provisions in each of the Agreements. The defendants, under the terms of the Agreement, were given an express right to suspend those services in certain circumstances. It follows that there must be an implied term that the defendants would not deliberately suspend services, save in accordance with the provisions of the Agreements which permitted them to suspend services.

63. The suspensions which occurred in November 2006, were suspensions effected by the defendants in purported application of the suspension provisions in the two Agreements. For the reasons already set out, the suspensions were not, in fact, permitted by the terms of the Agreement. It does not appear to me that the temporary suspension of services or temporary exclusion of access under the co-location Agreement in purported exercise of a contractual right to suspend, notwithstanding that, in fact, there was no such

contractual right at the relevant time, amounts to what the Courts have considered to be a "fundamental breach" or "breach of a fundamental obligation" for the purposes of the doctrine of fundamental breach. In the words of Davitt P., considering the performance of the defendants under the Agreements over the period of the Agreements, the service provided was not so "radically different" from that contracted for by reason of the temporary suspensions and exclusion in November 2006, to justify a conclusion of fundamental breach.

64. Having regard to this conclusion, it is not strictly necessary for me to consider the further submissions of the defendants on fundamental breach. However, in case it were to become relevant, I have formed the view that I cannot consider the judgment of the Supreme Court in *Clayton Love* as being only *obiter* on the application of the doctrine of fundamental breach and therefore not binding on me. It appears to me that Ó Dálaigh C.J., with whom the other members of the Court agreed, approved of the application of the doctrine (albeit that it was not in dispute between the parties) and applied it to the one issue in dispute. At p. 170, he stated:

> "In my opinion the basis on which this doctrine rests requires that a party, who like the defendants, has been held to be in breach of a fundamental obligation cannot rely on a time bar in the contract to defeat a claim for damages. Equally with other exempting provisions such a time clause cannot be prayed in aid."

I would add, that if I was free to decide the issue in the light of subsequent judgments in other jurisdictions, as has been observed already by a number of my colleagues in the High Court, there appear to be strong arguments in favour of the reconsideration of the application of the so-called doctrine of fundamental breach to agreements between two commercial entities for the reasons outlined by the House of Lords in *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] 2 W.L.R. 283.

65. Accordingly, as I have concluded that the defendants were not in fundamental breach of the Agreements it follows that the clauses which limit the liability of the defendants to the plaintiff for breach of contract in each of the WIMS and co-location Agreements apply to the determination of the plaintiff's claim for damages herein. The relevant clauses are clause 9 of the WIMS Agreement and clause 13 of the co-location Agreement. Insofar as relevant, these provide:

WIMS Agreement

> "9. Liability
>
> 9.1 Subject to Clause 9.5 but otherwise notwithstanding anything else in this Agreement, each Party's total liability to the other . . . in contract, tort . . . or otherwise arising in connection with this Agreement, except in respect of any liability arising pursuant to the Customer's obligation set out in Clauses 4 and 8.5, shall be limited to:
>
> 9.1.1 €1,000,000 (one million Euro) per event or series of connected events, and
>
> 9.1.2 notwithstanding Claus 9.1.1, a maximum of €2,000,000 (two million Euro) in aggregate in any twelve (12) month period.
>
> For the avoidance of doubt, for the purposes of this Clause 9.1, the limits on liability expressed above are cumulative and apply across all Services.
>
> 9.2 Subject to Clause 9.5 but otherwise notwithstanding anything else in this Agreement, neither Party shall in any event be liable to the other for indirect or consequential losses or otherwise for harm to business, loss of revenues, loss of anticipated savings or lost profits, whether or not reasonably foreseeable at the time when the Agreement was entered into . . .
>
> 9.5 Nothing in this Agreement shall serve to limit either Party's liability in respect of death or personal injury caused by or arising from its negligence."

The co-location Agreement

> "13. Liability
>
> 13.1 Subject to Clause 13.3 but otherwise notwithstanding anything else in this Agreement, each Party's liability to the other in contract, tort (including negligence, misrepresentation or breach of statutory duty) or otherwise arising in connection with this Agreement, save in respect of any liability arising pursuant to the payment obligations set out in Clause 5, shall be limited to:
>
> 13.1.1 €1,000,000 (one million Euros) per event or series of connected events, and
>
> 13.1.2 notwithstanding sub-clause 13.1.1, a maximum of €2,000,000 (two million Euros) in aggregate in any twelve (12) month period.
>
> 13.2 Subject to Clause 13.3 but otherwise notwithstanding anything else in this Agreement, neither Party shall in any event be liable to the other for indirect or consequential losses including, but not limited to, harm to business, loss of revenues, loss of anticipated savings or lost profits.
>
> 13.3 Nothing in this Agreement shall serve to limit either Party's liability in respect of death or personal injury caused by or arising from that Party's negligence."

66. The parties were in agreement that the exclusion of "indirect or consequential losses" does not operate to exclude "direct losses". As will appear from the conclusions reached below, the only relevant issue in dispute on the construction of clauses 9 of the WIMS Agreement and 13 of the co-location Agreement, is whether these clauses exclude direct losses of the plaintiff where such loss is in the nature of loss of revenue or loss of profits or harm to business.

67. Clause 13 of the co-location Agreement is clear. In my view, having regard to the words used, only liability for indirect or consequential losses are excluded from liability. Direct losses are not excluded by the express terms of clause 13.2, even if they are in the form of loss of revenue, harm to business, etc.

68. The wording of clause 9.2 of the WIMS Agreement is less clear. Insofar as it is ambiguous, it must be construed against the defendants. The express primary exclusion is for "indirect or consequential losses". Notwithstanding the words "or otherwise for harm to business . . ." it appears to me that such wording is not clear enough to exclude liability for direct losses which might come within this category. The opening words of the sub clause appear to me to intend a distinction between direct and indirect losses and only to exclude the latter.

69. Accordingly, I have concluded that both Agreements should be construed as not excluding the liability of the defendants for any direct losses suffered by the plaintiff by reason of breach of contract, even if such direct losses are in the form of loss of revenue, harm to business or loss of profits. What is actually permitted or excluded by clauses such as clauses 9 and 13 of the Agreements, is primarily a matter of construction in the context of the subject matter of the contract and the nature of the breach which occurred. Nevertheless, it is possible to deduce a general approach of the Courts to such contractual distinctions between direct and consequential losses. Counsel for the defendants drew attention to what is considered as a general approach of the English Courts to consider contractual provisions referring to "direct loss and/damage" or some similar phrase as intending to refer to those damages which could be claimed under the first of the two limbs in *Hadley v. Baxendale* (1854) 9 Exch. 341 i.e. loss foreseeable to any reasonable person in the defendants' position. He also drew attention to criticism of this approach by the Court of Appeal of Victoria in *Environmental Systems Pty. Ltd. v. Peerless Holdings Pty. Ltd.* [2008 VSCA 26].

70. On the facts of this case, it appears to me unnecessary to consider in any detail what counsel has correctly submitted to be the general approach of the English Courts and its criticisms by Nettle JA in the above decision from Victoria. It is sufficient to say that I would agree with Nettle JA that certain losses which might come within the first of the two limbs in *Hadley v. Baxendale* may be "consequential losses" rather than "direct losses" where that distinction is made in a commercial contract. In *Environmental Systems Pty. Ltd.*, Nettle JA was concerned with the meaning of "consequential loss" and for the purposes of the agreement at issue in those proceedings, stated at par. 93, "in my view, ordinary reasonable business persons would naturally conceive of 'consequential loss' in contract, as everything beyond the normal measure of damages, such as profits lost or expenses incurred through breach". Whilst I think any general definition presents certain difficulties, I think the formulation for what he terms the "normal measure of damages" is a useful expression for what comes within direct loss where the plaintiff is an entity carrying on business and the potential damage is to the business. There must be a direct causative link between the breach and the profits lost or expenses incurred. I propose applying this to the facts of this case.

71. As already stated the primary loss claimed by the plaintiff is the loss it suffered on the sale of its business assets as compared with a valuation of the plaintiff for the purposes of investment in it. Apart from any other problems with such claim, I am not satisfied that any loss suffered by the plaintiff on the sale of its business assets, following the decision to cease carrying on the VoIP, CPS and Cork broadband businesses, even if such decision was caused by loss of valuable employees whose departure, in turn, was caused by the defendants' breach of contract in November 2006, would be a 'direct loss' within the meaning of the Agreements.

72. The potential direct damage and losses claimed of which some factual evidence was given were:

> • damage to the plaintiff or loss suffered by it by reason of the level of upset and disquiet caused to employees in general by the lock out on 17th November, 2006, followed by the suspension of internet services on 20th November, 2006, and, in particular, the loss of two valuable employees, namely, Mr Kernan and Ms Mangan; and
>
> • damage to the plaintiff by reason of damage to its reputation and to customer confidence in its ability to provide a reliable service, which manifested itself in loss of revenue by reason of a combination of loss of customers, reduced trafficking by customers and a failure by customers to pay by reason of the quality of service.

73. The defendants submit that, as the plaintiff has not adduced evidence which quantifies such alleged damage and losses, the Court should only award nominal damages even if satisfied, as a matter of probability, that such direct damage or loss occurred. They also dispute the fact of such alleged direct damage or loss.

74. A plaintiff must always adduce evidence which establishes, as a matter of probability, the fact that damage occurred by reason of the alleged wrongful act. However, there may be circumstances in which, notwithstanding that a plaintiff fails to adduce evidence which quantifies the amount of the damage, such evidential failure may not preclude a Court from measuring, in more than a nominal amount, the amount of the award which should be made to compensate the plaintiff for the damage the fact of which has been proved. The plaintiff drew attention to the following statement in *Chitty on Contracts* (28th edition), volume 1, para. 27-006, which sets out the principle, as applied by the Courts in this jurisdiction:

> "The fact that damages are difficult to assess does not disentitle the plaintiff to compensation for loss resulting from the defendant's breach of contract. Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. Similarly, the fact that the amount of that loss cannot be precisely ascertained, as, for example, where it depends on a contingency, does not deprive the claimant of a remedy. Where, if the defendant had fully performed his undertaking, there was only a chance that the claimant would acquire a benefit or make a profit; the court will discount the damages to reflect the likelihood that the benefit or profit would have been received. The loss of profit suffered by a claimant as a result of the defendant's breach of contract frequently depends on many speculative factors, but the courts will always attempt to assess the amount of the loss."

75. The plaintiff relies upon the decision in *Chaplin v. Hicks* [1911] 2 K.B. 786, referred to by O'Flaherty J. in the Supreme Court in *Callinan and Others v. The Voluntary Health Insurance Board* (Unreported, Supreme Court, 28th July, 1994), where he stated at page 8:

> "The fact that the actual figure to which they [the plaintiffs] may be entitled may not have been presented to the satisfaction of the judge does not mean that the plaintiff should not get any damages at all under this heading."

I am satisfied that the failure by a plaintiff to adduce evidence to demonstrate, as a matter of probability, the amount of the loss in financial terms to a plaintiff in respect of damage, the fact of which has been established in evidence, will not necessarily deprive the plaintiff of an award of damages. I agree with the view expressed by Finlay P. in *Grafton Court Limited v. Wadson Sales Limited* (Unreported, High Court, 17th February, 1975) at p. 21 of the transcript:

> "Having regard to the decision of the Court of Appeal in *Chaplin v. Hicks* reported in 1911 2 Kings Bench division 786 and in particular to the judgments of Lord Justice Vaughan Williams and Lord Justice Fletcher Mouton in that case, I am satisfied that the true underlying principle is firstly that the Court must be alert, energetic and if necessary ingenious to

assess damages where it is satisfied that a significant injury has flowed from a breach of contract. Secondly, the principle, as I understand it, is that whereas there are definite rules for the assessment of damages in a great number of cases of breach of contract, there are cases and category of cases to which these rules are clearly not applicable but that does not absolve the party who has committed the breach from the responsibility to pay compensation."

76. It follows from the above, that it remains a matter for the plaintiff to establish, as a matter of probability, the fact of the damage or loss suffered by the plaintiff, but, having done so, the Court may, in appropriate circumstances, assess the amount of the damages to be awarded in respect of that damage without necessarily evidence having been given which seeks to quantify in financial terms the loss caused by the damage. Whether it is appropriate to do so in any one case, will, of course, depend upon the relevant facts. On the facts herein, I have determined that the plaintiff is entitled to an award which is more than nominal by reason of proof of some probable damage and loss, albeit not quantified.

77. Relevant to the subsequent conclusions on the award of damages I have concluded, on the evidence adduced, that there were difficulties in relation to the plaintiff's business by late October which were known, inter alia, to senior employees and which must affect the measure of damages to be awarded. These include the following:

- outside investment had been sought from a number of sources during 2006 and for varying reasons not achieved;

- the existing shareholders (or certain of them) had already advanced an additional €300,000.00 during 2006;

- whilst VoIP customer numbers had increased significantly from January to September 2006 they had levelled in October 2006 and revenue from VoIP was then approximately €10,000 per month;

- whilst the Cork broadband network was a technical success market penetration had not been achieved and it was costing the plaintiff approx €35,000 per month and attempts had been made to sell it. It had originally been flagged as the first of a number of similar networks intended, in part, to support;

- the plaintiff was in need of cash;

- there was increasing concern about the vulnerability of the plaintiff by reason of its total dependency on the defendants and the perceived deterioration in the quality of the services being provided by them.

78. The plaintiff has established, by the evidence of Ms. Hand and Mr. Powell in particular, that the events of 17th and 20th November, 2006, did cause serious disquiet and upset amongst employees and a lowering of morale which, as a matter of probability damaged the plaintiff. No evidence of financial loss caused to the plaintiff thereby was given. However, as a matter of common sense, employees who are upset in the manner described and have to deal with irate customers are distracted from their normal work such that the plaintiff must have been at some added expense or loss of the benefit of work which might otherwise have been done for it by those employees. However in absence of evidence of financial loss have concluded that the damage whilst real was not great.

79. The plaintiff has also established that both Mr. Kernan and Ms. Mangan were very valuable employees to the plaintiff with special skills and knowledge relevant to the VoIP and broadband network elements of the plaintiff's business. Having carefully reconsidered, in particular, both their witness statements and their oral evidence, which I fully accept, I cannot be satisfied that the plaintiff has established, as a matter of probability, that either of them left the employment of the plaintiff by reason of the defendants' breaches of contract in November 2006. In the case of Ms. Mangan, I have concluded, as a matter of probability, that she had already considered seeking alternative employment prior to 17th November, 2006, by reason of her uncertainty as to the future of the plaintiff and the fact that both she and her spouse were both employed by the plaintiff. I have concluded that, as a matter of probability, she would have left even if the breaches had not occurred and that they did not significantly alter the timescale of her leaving.

80. In the case of Mr. Kernan, I have concluded that prior to 17th November, 2006, he was becoming increasingly concerned about the vulnerability of the plaintiff by reason of its total dependency on the defendants for the provision of its VoIP service and what he perceived to be a continuing deterioration in the quality of the service being provided by the defendants. Two serious outages in early November for technical reasons appear to have been of particular concern. The lock out and suspension of internet services in breach of contract probably heightened Mr. Kernan's already existing concern about the vulnerability of the plaintiff by reason of its total dependency on the defendants in its chosen VoIP business model. I have concluded that the defendants' breaches of contract in November as a matter of probability caused Mr. Kernan to leave the employment of the plaintiff earlier than he might otherwise have done, but were not the cause of his leaving. Having regard to the importance of Mr. Kernan to the business of the plaintiff, I am satisfied that the plaintiff was, as a matter of probability, damaged by even such earlier leaving but, in the award, whilst more than nominal, also should not be great.

81. I have decided to allow €15,000 in respect of the direct loss suffered by the plaintiff by reason of the upset to employees in general and early departure of Mr. Kernan.

82. The plaintiff offered no evidence of the amount of the loss loss of revenue alleged to have been suffered by reason of the impact of the break in service on 20th November, 2006, to its VoIP and broadband customers. Mr. Powell, the managing director of the plaintiff, who is a very successful and experienced businessman, admitted in cross-examination that no calculation had ever been done as to what the damage which the plaintiff alleged occurred in November had cost it in financial terms. Also, whilst both Ms. Hand and Mr. Madigan, the chief financial officer, gave some evidence of reduction in minutes trafficked in December 2006, loss of customers (principally CPS not directly affected by the break in internet service) and Mr. Madigan gave evidence of some customers being unwilling to pay for services received because of poor service, no attempt was made to quantify these alleged losses in evidence. Further, Mr. Powell agreed in cross-examination that the plaintiff continued to trade after November 2006 at "roughly" the same levels at which it previously traded. For a start-up company, this fact would not preclude the plaintiff establishing a loss if evidence established that as a matter of probability prior or anticipated increases ceased by reason of the breach of contract but no such evidence was given herein.

83. Accordingly, whilst I am satisfied, as a matter of probability, on the evidence adduced that the plaintiff did suffer direct damage and loss in terms of damage to its reputation and loss of confidence by customers, which manifested itself in some loss of revenue by reason of the limited loss of customers and customers' unwillingness to pay, I have also concluded, as a matter of probability, that such losses in financial terms were relatively small. Some of these probable losses are of a type which it is not difficult to quantify, albeit others are. The failure of the plaintiff to quantify those which should have been capable of quantification appears to support the conclusion that they were relatively small.

84. The additional amount of damages to which I have determined that the plaintiff is entitled, having regard to the above conclusions, the level of business in November 2006, and the fact that it only continued in business for approximately a further six months, is €10,000.

85. It follows that the total damages to which the plaintiff is entitled to compensate it for the direct loss and damage suffered by reason of the defendants' breaches of contract in November 2006, is €25,000.

Defendants' counterclaim
86. It is agreed that the defendants are entitled to recover €252,000 from the plaintiff on their counterclaim. This must now be reduced by the award of €25,000 to €227,000. The defendants claim interest on the balance, pursuant to the Courts Acts.

87. The Court has a discretion to grant interest from the date upon which the cause of action accrued and very often will exercise that discretion to award interest to a plaintiff from the date of commencement of the proceedings. The defendants are, of course, the counterclaimants in these proceedings. I have concluded that the defendants should be allowed interest, pursuant to s. 22 of the Courts Act, 1981 from the date of commencement of the proceedings i.e. 10th January, 2007. The primary reason for which I have so concluded is that the plaintiff was aware, from early January 2007, that it owed the defendants a sum which it computed to be approximately €221,000 (Mr. Madigan gave evidence to this effect) but denied its liability to pay by reason of its claim for damages which it perceived to be significantly in excess of this amount. I am satisfied that the defendants did not delay in their dealing with these proceedings and in such circumstances it appear to me that they must now be entitled to interest, pursuant to the Courts (Supplemental Provisions) Acts, 1961 to 2007, on the sum of €227,000 from 10th January, 2007.

Relief
Throughout the proceedings, no distinction was made between the defendants and no issue taken by either side as to their individual relationship with the plaintiff. I will hear counsel as to which of the defendants is entitled to judgment against the plaintiff in accordance with the above conclusions.