THE HIGH COURT

[2018 No. 4981 P.]

BETWEEN

BLUE DIAMOND SPORTS LIMITED T/A DUNDALK BUREAU DE CHANGE AND BLUE DIAMOND SPORTS No. 2 LTD

PLAINTIFFS

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of November, 2018

1. This action was commenced by plenary summons issued on 31st May, 2018. The relief claimed in the general indorsement of claim and in the prayer to the statement of claim, which was delivered on the 17th October, 2018, is:

> 1. A declaration that the first plaintiff, as agent for MoneyGram International Ltd, a payment institution within the meaning of the European Union (Payment Services) Regulations, 2018 (S.I. No. 6 of 2018) ("*the Payment Services Regulations*") and/or Directive (EU) 2015/2366 on payment services in the internal market ("*PSD2*") is entitled to rely on the provisions of Article 44 of the Payment Services Regulations and Article 36 of PSD2, however transposed, and
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> 2. A declaration that the defendant is obliged to permit the first plaintiff access to its payment accounts services on an objective non-discriminatory, and proportionate basis, and in an unhindered and efficient manner, and
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> 3. A declaration that the decision of the defendant communicated by letter of 5th April, 2018 to withdraw services from the first plaintiff and close (two accounts identified by number) is unlawful, and in breach of Article 44 of the Payment Services Regulations, and Article 36 PSD2, and that it is discriminatory and disproportionate,
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> 4. A declaration that the plaintiffs are payment service providers and/or payments services users within the meaning of Payment Services Regulations and PSD2 and as such entitled to rely on Article 43 of the Payment Services Regulations and Article 35 PSD2, however transposed,
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> 5. A declaration that the decisions of the defendant communicated by letter of 5th April, 2018 to withdraw services to the plaintiffs with effect from 5th June, 2018 and close three accounts (identified by number) are unlawful in that they have the effect of preventing the plaintiff's (*sic*.) access to any payment system, in breach of Article 43 of the Payment Services Regulations, and Article 35 PSD2, and that they are discriminatory, and disproportionate,
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> 6. A declaration that to the extent that the defendant's terms and conditions contravene or conflict with the provisions of the Payment Services Regulations, or PSD2, they are unlawful and have no effect,
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> 7. Further or in the alternative, a declaration that the defendant has not given the required contractual notice to the second plaintiff in respect of (one account identified by number),
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> 8. If necessary, orders preventing the defendant from withdrawing services to the plaintiffs, or closing (the three accounts identified by number),
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> 9. Damages for breach of contract and/or wrongful interference with the plaintiffs' businesses,
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> 10. Further or other, including interlocutory relief,
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> 11. Interest,
>
> 12. Costs.

2. An order was made for short service of a motion for interlocutory relief which was originally returnable on 5th June, 2018 and was adjourned from time to time to allow an exchange of affidavits.

3. The interlocutory relief claimed was:

> 1. An order restraining the defendant from restricting in any way the first plaintiff's access to the defendant's payment accounts services pending the trial of the action,
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> 2. An order restraining the defendant from withdrawing its service to the first plaintiff pending the trial of the action,
>
> 3. An order restraining the defendant from withdrawing its service to the second plaintiff otherwise than in accordance with its terms and conditions,
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> 4. Such further interlocutory order as seems meet to the court.

4. On the opening of the application to the court, the application on behalf of the second plaintiff was abandoned and the application on behalf of the first plaintiff was modified so that the court was asked on behalf of the second defendant to make either an order in the terms of the notice of motion, or an order in such terms as seem appropriate in order to allow the first plaintiff, as agent of MoneyGram, to continue access to the payment account systems of the defendant.

5. The plaintiffs are companies based in Dundalk, County Louth. The first plaintiff operates a bureau de change, money transmission, and money remittance business. The second plaintiff operates a gaming hall. For a number of years, the first plaintiff maintained two current accounts with the defendant and the second plaintiff maintained one current account.

6. By letters dated 5th April, 2018 the defendant advised the plaintiffs that it was exercising its right to withdraw the service on each of the accounts within two months of the date of that letter. The plaintiffs were asked to arrange for the accounts to be closed on or before 5th June, 2018, failing which, it was said, the bank would take the necessary steps to close the account.

7. By this action and by the motion before the court, the first plaintiff seeks to forestall the closure of its two accounts.

8. The first plaintiff's case is that its accounts with the defendant are essential for the conduct of its business and that without those accounts the plaintiffs will "*effectively go out of business*". Following receipt of the defendant's letters of 5th April, 2018 the plaintiffs attempted to obtain alternative banking facilities but failed.

9. In the affidavit of Terence Boyle grounding the application it was said that the throughput in the first plaintiff's accounts was in the region of €18 million or €19 million, giving rise to a turnover or commission of between €500,000 and €600,000 per annum. Mr. Boyle did not then give any breakdown of the first plaintiff's earnings by reference to the several stands of its business, but it eventually emerged (in the third affidavit of Owen Kennedy sworn on 27th August, 2018) that the great bulk of the first plaintiff's business comprises foreign exchange and that the MoneyGram business accounted for only about 10% or 11% of turnover.

10. The thrust of the grounding affidavit of Mr. Boyle was that the defendant had withdrawn the plaintiffs' banking facilities without giving any reasons. It was said that the first plaintiff was the authorised agent of MoneyGram, an authorised payment institution within the meaning of the Payment Services Directive, and as such, was entitled to payment services under Article 44 of the Payment Services Regulations. It was said that the threatened closure of the first plaintiff's accounts amounted to a breach by the defendant of its obligations to provide services in an objective, non-discriminatory and proportionate way. It was suggested that the closure of the first plaintiff's accounts would have a negative effect on competition in the north east of Ireland and (if only obliquely) that the defendant's motivation in closing the accounts was to take over some or all of the first plaintiff's bureau de change and money transmission businesses.

11. On behalf of the defendant a replying affidavit was sworn on 27th June, 2018 by Mr. Owen Kennedy, Group Head of Anti Money-Laundering, Counter Terrorist-Financing and Sanctions and Group Money Laundering Reporting Officer.

12. The defendant's position was, and is, that it was entitled to give notice to close the accounts in accordance with the terms and conditions applicable to the accounts and that it had done so in circumstances where the defendant had reasonable grounds to regard certain activity on the accounts as being particularly likely to be related to money laundering. In support of the proposition that the defendant had reasonable grounds for its belief, Mr. Kennedy gave a number of examples but the primary stance of the defendant was and is that it was entitled to give two months' notice to close the accounts without giving any reason and in particular without engaging with the plaintiffs as to why it was doing so or the basis for the belief which prompted the giving of notice.

13. The examples relied on by Mr. Kennedy were challenged by Mr. Boyle and there was a protracted exchange of affidavits in which Mr. Kennedy stood over his belief that the material justified his suspicion and Mr. Boyle stood over his position that it could not.

14. Mr. Kennedy pointed to the high volume and high value of the transactions with several of the first plaintiff's customers who dealt with large amounts of cash, or who were working in industries which dealt in large amounts of cash. Having regard to the volume and value of the business, Mr. Kennedy thought it unusual that it would be conducted through a bureau de change.

15. Mr. Kennedy pointed to what he said was a history of unusually large cash transactions on the first plaintiff's account. Specifically, Mr. Kennedy pointed to cash lodgements of €575,618 over a 21-month period of which €300,000 was lodged in a two-week period by lodgements of €25,000 twice a day on most business days.

16. Mr. Kennedy pointed to lodgements amounting in total to €4,756,660 in respect of MoneyGram transactions in a twelve-month period in which, he said, was unusually high for a business of the nature of that of the first plaintiff.

17. Mr. Kennedy pointed to what he said appeared to him to be high level of payment card terminal transactions of €5,717,483 over a twelve-month period.

18. As to the second plaintiff, Mr. Kennedy observed that all of the credit transactions on the second plaintiff's account were lodgements from one or other of the first plaintiff's accounts.

19. In his grounding affidavit Mr. Boyle had given evidence of a payment on 13th March, 2018 of €1 million into the account of the first plaintiff. This, he had said, was in respect of an agreed sale of a premises and the shareholding of "*the company*" to a Northern Ireland registered company which was wholly owned by his niece. Although that €1 million had been paid over and some of it, at least, used to redeem the first plaintiff's borrowings from the defendant, and although the business was said to have been taken over by the purchaser, there were, said Mr. Boyle, no signed contracts exchanged. Mr. Kennedy in his first affidavit expressed concern that no explanation had been provided as to why monies received in respect of the second plaintiff were paid into the account of the first plaintiff.

20. In his second affidavit sworn on 4th July, 2018, and his third sworn on 15th August, 2018 in response to a second affidavit of Mr. Kennedy sworn on 20th July, 2018, Mr. Boyle endeavoured to explain the transactions. Mr. Kennedy was satisfied with the explanation given for the substantial cash sums received by the first plaintiff from two of its customers but not the others.

21. It is not necessary or useful to go into all the the details but the upshot of the exchange of affidavits was that Mr. Kennedy's concerns were in several instances unallayed and in others heightened.

22. Mr. Kennedy's evidence is that the cash lodgements of €576,618 and in particular the lodgement of the €300,000 over the two week period had not been explained at all. In this I believe that Mr. Kennedy is correct. It is clear that the first plaintiff takes in large quantities of cash which in turn it lodges with the defendant. The explanation for the plaintiff receiving this cash is that its cash handling charges are lower than the defendants. So they may very well be but it is puzzling to contemplate that the first plaintiff charges its customers less for handling cash than it, in turn, is charged by the defendant when the same cash comes to be lodged to the first plaintiff's account with the defendant.

23. The credits from the first plaintiff's account to the second plaintiff's account were explained by Mr. Boyle to be the electronic equivalent of the cash taken from the machines in the second plaintiff's gaming arcade, which was brought next door to the first plaintiff. The defendant submits that what this amounts to is that the cash from the gaming arcade is literally washed through the

first plaintiff's account and observes that no receipts are exhibited and no explanation offered as to how anyone keeps track of the cash.

24. Mr. Boyle acknowledged that there had been some confusion in the account he had given of the €1million lodgement into the first plaintiff's account on 13th March, 2018. The premises in which the gaming hall business was carried on and which had been sold to Mr. Boyle's niece's company did not, after all, belong to the second plaintiff but to the first plaintiff and the shareholding belonged to Mr. Boyle personally. In his third affidavit Mr. Boyle explained that the error in his original affidavit was as a result of stress but if there was, by then, any paperwork in relation to the sale either of the premises or the shares, Mr. Boyle did not refer to it. The first plaintiff complains that the notice given by the defendant to close its accounts was given shortly after the first defendant's loan was repaid. So it was, but the source of the funds to repay the loan was the €1 million lodgment and so, as a matter of objective fact, the notice given to the plaintiffs came hot on the heels of a €1 million lodgement for which conflicting explanations have been given and for which no vouching documentation has been produced and for which, as far as the evidence goes, no documentation exists.

25. It will be recalled that one of Mr. Kennedy's concerns was in relation to lodgements amounting in total to €4,756,660 in a twelve-month period in respect of MoneyGram transactions. In his second affidavit Mr. Boyle undertook a point by point rebuttal of Mr. Kennedy's evidence. The figure of €4,756,660 referred to by Mr. Kennedy was in respect of the twelve-month period from 15th June, 2017 to 15th June, 2018. Mr. Boyle used a slightly different reference period of 1st June, 2017 to 1st June, 2018 and exhibited marked TB10 "*a list of all lodgements to the Moneygram account from 1st June, 2017 to 1st June, 2018*" which amounted in total to €5,776,615. There was, said Mr. Boyle, a differential between that sum and the figure of €5,717,483 referred to para. 40 of Mr. Kennedy's affidavit.

26. It appears that here (as elsewhere) Messrs. Kennedy and Boyle may have been to some extent at cross purposes. The figure of €5,717,483 referred to at para. 40 of Mr. Kennedy's affidavit was a figure in respect of Elavon Merchant Services transactions, that is, payment card transactions, rather than MoneyGram transactions. The figure he had given for MoneyGram transactions was in para. 37 and it was €4,756,660.

27. Mr. Kennedy in his second affidavit averred that he had conducted a further analysis of the plaintiff's accounts. While he does not say so, I surmise that that further analysis was perhaps by reference to or perhaps prompted by, Mr. Boyle's TB10. Mr. Kennedy said that he could see no evidence that the lodgements to the plaintiff's account marked, variously, "*Moneygram*", "*Monegram*" or "*Moenygram*" were in any way associated with actual MoneyGram transactions or transfers.

28. In his third affidavit Mr. Boyle "*by way of assistance and clarification*" set out the "*concepts and processes relating to the operation of Moneygram*". He explained that in the financial year ended 31st August, 2017 the two branches of the first plaintiff made payments on behalf of MoneyGram customers amounting in total to €582,263 and received MoneyGram money for customers amounting to €53,732. In the same period, said Mr. Boyle, a sum of €4,348,630 was lodged to the first plaintiff's account with the account number ending 613, which Mr. Boyle called "*the Bureau de Change account*" from the first plaintiff's account with the account number ending 020, which Mr. Boyle called "*the Bureau de Change No. 2 account*". Mr. Boyle says that "*…this latter account is sometimes referred to as 'Moneygram account'*". Mr. Boyle does not elaborate by explaining why or by whom or how often the Bureau de Change No. 2 account is referred to as the MoneyGram account.

29. If Mr. Boyle's clarification went some way towards explaining the transactions, it did nothing to assuage Mr. Kennedy's concerns. In his third affidavit Mr. Kennedy says (and it appears to be so) that none of the transactions on the first plaintiff's account with the defendant to which the first plaintiff applied the narrative MoneyGram (or any variation of it) had any connection whatsoever to MoneyGram but rather represented the proceeds of foreign currency purchases. Not without some justification, Mr. Kennedy takes umbrage at the characterisation by Mr. Boyle as "*erroneous and incorrect assumption*" Mr. Kennedy's belief, by reference to the narrative applied by the first plaintiff to the lodgements to its Bank of Ireland accounts, that the lodgements labelled "*Moneygram*" (or the variations thereof) were MoneyGram transactions.

30. All that Mr. Kennedy originally said about the MoneyGram transactions was that the figure of €4,756,660 for a twelve-month period seemed unusually high for a business of the nature of that of the first plaintiff. Now that it has emerged that the first plaintiff's money remittance business accounts for only 10% of that, it rather appears that Mr. Kennedy's initial impression was perfectly correct.

31. As to the first plaintiff's Bureau de Change No. 2 account, it is submitted that the first plaintiff "*has chosen to camouflage*" and "*has chosen to disguise*" the transactions on that account as MoneyGram transactions. I am bound to say that the explanation offered for why the transactions on this account were labelled as they were is not immediately compelling but I do not need to find that there was any intention to deceive. What I do find is that what emerged in evidence in relation to this account reasonably and properly heightened Mr. Kennedy's concern as to the manner in which the account was being managed.

32. In assessing whether the first plaintiff has made out a case for interlocutory relief, the starting point must be to identify the applicable principles of law.

33. The orders sought by the notice of motion are framed in the negative but counsel for the plaintiff accepts that, however framed, what is sought is an interlocutory mandatory order or orders requiring the defendant to provide services pending a trial of the action.

34. Because of the diametricaly opposed positions taken by counsel on the substance of the case, there was no real engagement on the applicable principles of law. Counsel for the plaintiff argued that the case was very strong, perhaps approaching the unanswerable. Counsel for the defendant, on the other hand, argued that the case was very weak, perhaps approaching the unstateable.

35. As I understand the law it is tolerably clear that the threshold tests for the granting of an interlocutory mandatory injunction is higher than that for a prohibitory injunction. It was said in argument that the authorities are not altogether consistent and I was urged by counsel for the plaintiff, without demur by counsel for the defendant, to adopt the approach taken by Kelly J. in *Shelbourne Hotel Holdings Limited v. Torriam Hotel Operation Co. Limited* [2010] 2 I.R. 52. In that case, at paras. 86 and 87, Kelly J. said:

> *"Faced with these conflicting approaches and pending a final determination of the issue by the Supreme Court, I am much attracted by the approach of Hoffmann J. (as he then was), in Films Rover case [1987] 1 W.L.R. 670 where he took the view that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the 'wrong' decision.*

> *Whatever standard applies it is clear that the grant of mandatory interlocutory relief is exceptional. In many if not all cases, the mandatory nature of the relief will also be a factor to be taken into consideration when the balance of convenience falls to be considered."*

36. Having propounded a slightly different test to that more usually applied in the more recent cases, Kelly J. went on to find that the plaintiff had met the higher threshold; that damages would not be an adequate remedy; and that the balance of convenience lay in favour of granting the injunction.

37. As Delaney points out on p. 646 of the 6th edition of her work on "*Equity and the Law of Trusts in Ireland"* if the court were to focus on asking which decision on an interlocutory application is less likely to lead to an injustice, this would almost inevitably lead to the application of a higher standard where mandatory interlocutory injunctions are sought, subject perhaps to the qualification that the court might not insist on the higher standard in a case where the withholding of an interlocutory injunction would carry with it a greater risk of injustice than granting it.

38. There is a difference in this case between the reliefs claimed in the summons and statement of claim, on the one hand, and the notice of motion of the other. The claim in the action is for an order preventing the defendant from closing the plaintiff's bank accounts. The first interlocutory order sought is directed to the defendant's payment account services. The second is directed to the defendant's "*service*" in general. In the plaintiff's written submissions the court was asked, as a possible alternative to the orders sought by the notice of motion, for an order in such terms as seem appropriate to allow the first plaintiff, as agent of MoneyGram, continue access to the payment account systems of the defendant. In the course of argument it became clear that the counsel for the first plaintiff could not make the case that it was entitled to any wider order than would protect its money remittance business.

39. The focus of the legal argument made on behalf of the plaintiff was very much on Regulation 44 of the Payment Services Regulations, 2018. This provides:

> *"44. (1) A credit institution shall permit a payment institution to have access to the credit institution's payment accounts services on an objective, non-discriminatory and proportionate basis.*
>
> *(2) The access referred to in paragraph (1) shall be sufficiently extensive as to allow payment institutions to provide payment services in an unhindered and efficient manner.*
>
> *(3) Where a credit institution rejects a request for access to its payment accounts services from a payment institution, the credit institution shall provide the Bank without delay with duly motivated reasons for the rejection."*

40. On an application for an interloocutory injunction, the starting point is to identify the substantive right asserted.

41. The issue identified by counsel for the plaintiff as the issue to be tried was whether the defendant acted in an objective, non-discriminatory and proportionate basis in deciding to terminate the first plaintiff's access to its payment services. In my judgment that is potentially a second issue but the primary and fundamental issue is whether the Regulations impose any obligation on the defendant to act in an objective, non-discriminatory and proportionate basis in deciding to terminate the first plaintiff's access to its payment services. It is only if there was such an obligation that any issue can arise as to whether the defendant met it.

42. It was argued that the defendant had given notice to close the accounts without warning and without giving sufficient reasons. The plaintiff relied on the fact that the notice had been given two weeks after the first plaintiff's loans had been repaid and that there had been no response to correspondence from the first plaintiff solicitors challenging the notices.

43. In substance, the first plaintiff's argument is that the defendant was obliged to give the first plaintiff warning that it was considering closing the accounts; to invite the first plaintiff's submissions on any issues of concern to it; and in the event of a decision to close the accounts (or withdraw payment services) to provide the first plaintiff with those reasons.

44. There is Regulation 44 of the 2018 Regulations an obligation to provide duly motivated reasons. That obligation arises in case a credit institution rejects a request by a payment institution for access to its payment services. Significantly, however, the obligation imposed on the credit institution is to provide the reasons not to the applicant but to the Central Bank of Ireland.

45. It is not clear on the face of Regulation 44(3) that the obligation to provide duly motivated reasons applies also to a decision by a credit institution to cease to provide payment services but if it does, it is an obligation owed to the Central Bank of Ireland and not the credit institution's customer.

46. There is further fundamental problem with the first plaintiff's argument that it was entitled to a warning, inquiry, and reasons.

47. Regulation 79(5) of the Payment Services Regulations provides that:

> *"(5) If agreed in a framework contract, a payment service provider may terminate a framework contract concluded for an indefinite period by giving not less than 2 months' notice in the same manner as information is to be provided in accordance with Regulation 75(1) and (2)."*

48. The requirements of Regulation 75(1) and (2) are for paper or other durable medium and clear and comprehensible language. On its face, Regulation 79(5) contemplates agreement between the payment service provider and the payment service user that the contract may be terminated simply by notice. I find it impossible to contemplate how Regulation 79(5) or an agreed framework contract might be supplemented or varied by a requirement, before any such notice is given, of a warning; followed by an objective, non-discriminatory and proportionate enquiry; followed by either duly motivated reasons or, perhaps, objective, non-discriminatory, and proportionate reasons.

49. In this case the defendant's terms and conditions provided by clause 10.2 for termination by the defendant on two months' notice in writing and that is what the defendant says it did.

50. The terms and conditions went on, in clause 10.4 to provide for the immediate termination of the agreement between the defendant and the customer and closure of the account in a number of specified events, including where the customer might fail security checks in a manner that the bank might deem unacceptable, or there is reasonable suspicion of unauthorised or fraudulent activity on the account. In clause 11.9 provision was made for the bank to take whatever action it might consider appropriate under any law against fraud, money laundering or terrorism.

51. Counsel for the defendant contrasts the provision for summary termination, which contemplates reasonable suspicion or consideration on the part of the bank with the simple requirement for notice in clause 10. Mr. Kennedy in his first affidavit outlined the defendant's anti money-laundering and counter terrorist-financing policies and explained that the defendant's policy, in the event of concerns, to "*exit the customer relartionship*", without explanation, by invoking clause 10.2.

52. I am reluctant on an interlocutory application such as this to say that the first plaintiff has no case to make that it is entitled to a warning, or inquiry, or reasons but if it has, it is certainly not clear to me: even on a *prima facie* basis.

53. The defendant's case is that it was entitled as a matter of contract to close the first plaintiff's accounts on two months' notice without assigning any reason and that this is what it did. The evidence of what is said to have been the defendant's reasonable suspicion of money laundering is not offered in support of the decision but as an explanation of why the defendant made its decision and why (even if there was any substance in the plaintiff's argument) it is not obliged to justify the decision.

54. Counsel for the defendant relies on the interaction of the Payment Services Regulations and money laundering legislation, which he submits are tethered together, as further demonstrating that the argument advanced on behalf of the first plaitniff is untenable.

55. Counsel for the defendant points to Recital 62 to Directive (EU) 2015/2366 and to a number of the provisions of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010.

56. Recital 62 to the Directive provides, insofar as is material, that:-

> *"This Directive should be without prejudice to the payment service provider's obligation to terminate the payment service contract in exceptional circumstances under other relevant Union or national law, such as that on money laundering or terrorist financing, any action targeting the freezing of funds, or any specific measure linked to the prevention and investigation of crimes."*

57. Section 35 of the 2010 Act imposes on a designated person (and the defendant is such a person) an obligation to monitor dealings with a customer including, to the extent reasonably warranted by the risk of money laundering or terrorist financing, by scrutinising transactions and the source funds.

58. Section 54 imposes obligations on every designated person to adopt internal policies and procedures and training to prevent and detect money laundering and terrorist financing.

59. Section 39 contemplates the application by a designated person of additional measures to a customer for the purpose of preventing or detecting money laundering or terrorist financing.

60. Chapter 4 of the Act obliges a designated person who knows, suspects or has reasonable grounds to suspect that another person has been engaged in money laundering or terrorist financing to make a report to the Garda Síochána and the Revenue Commissioners.

61. Section 42(7) provides that a designated person who is required to make a report shall not proceed with any suspicious transaction or service connected with the report unless it is not practicable to delay or stop the transaction or service, or the designated person is of the reasonable opinion that a failure to proceed will alert the other person that a report may be, or may have been, made or that an investigation may be, or is in the course of being, conducted.

62. Section 49 of the Act prohibits a designated person who knows or suspects that such a report has been made, or is required to be made, from making any disclosure that is likely to be prejudicial to an investigation.

63. The Act provides that any failure to comply with the requirements of sections 35, 42, 49 or 54 commits an offence.

64. Counsel for the defendant argues (and I do not understand this to be seriously contested) that the rights and obligations created by the Payment Services Directive and the Payment Services Regulations are without prejudice to the duties and obligations imposed on designated persons by the 2010 Act. That is precisely what is contemplated by the Directive.

65. It is submitted that the first plaintiff's case that it is entitled to a warning, followed by an appropriate, objective and non-discriminatory inquiry, and a reasoned decision, is irreconcilable with the defendant's obligations under the 2010 Act, not least the prohibition of tipping off. The defendant, it is said, cannot go into an explanation of what information it has. That appears to me to be so. The disclosure by a bank to its customer of the basis of a suspicion of money laundering might very well prejudice not only an investigation into the bank's customer's business but an investigation into the customer's business with its customers.

66. The defendant does not make the case that the first plaintiff has been engaged in money laundering, rather (if it arises at all, which the defendant argues it does not) that the defendant at the time it gave notice to close the accounts had, and that it continues to have, reasonable grounds for believing that it might have been. Having carefully considered the evidence of both Mr. Boyle and Mr. Kennedy, I could not conclude that Mr. Kennedy's belief was not based on reasonable grounds.

67. I do not believe that the first plaintiff has made out a *prima facie* case that the defendant was not entitled to give notice of the closure of the accounts. If I am wrong in that, I am quite satisfied that any case that might be made is far short of a strong case.

68. On application of the the tradititonal sequential test for an interlocutory injunction the first plaintiff falls at the first hurdle. To the extent, however, to which the adequacy of damages and the balance of convenience are ingredients in the *Films Rover* approach I will consider those.

69. The first plaintiff's case is that without the intervention of the court it will be forced to cease business with the result that seven employees will lose their employment. In argment is was further submitted that unless the court made the orders sought, that would be an end to the case because, it was said, there would be no business to bring the case to trial.

70. In *Lynch v. Health Service Executive* [2010] IEHC 346, Irvine J., having reviewed the authorities, was satisfied that there is no principle of law which establishes that insolvency or going out of business per se should be deemed to amount to proof that irreperable harm will necessarily be occasioned so that damages will not be an adequate remedy.

71. In my view the proposition that the first plaintiff's business might be saved by the intervention of the court is not supported by the evidence. I accept that without banking facilities the first plaintiff's business is in danger of collapse. The evidence establishes

that the first plaintiff conducts a good deal of business in cash but a lot of that cash is lodged to its bank accounts. Moreover, a good deal of the first plaintiff's business is conducted by card transactions which have to be processed through a bank account. The fundamental flaw in the case, in my view, is that the first plaintiff does not and cannot contend that it is entitled to an order compelling the defendant to provide banking services. The height of the case is that the defendant is obliged to provide payment services to enable the first plaintiff to carry on so much of its business as is its money remittance business. On the evidence, the first plaintiff's MoneyGram business accounts for only about 10% of its overall business. In my view there is no evidence from which I could conclude that the making of the orders along the lines claimed would avoid the need for the first plaintiff to close its doors. Moreover, it is difficult to see how such orders could be sufficiently clearly crafted as to provide that precise direction, to which the defendant would be entitled, as to what it would be required to do.

72. In my judgment the effect of the closure of the first plaintiff's accounts on so much of its business as comprises Moneygram business could be fairly readily measured and, if it came to it, compensated by an award of damages.

73. As to the proposition that jobs may be lost, the decision in *Lynch v. Health Service Executive* [2010] IEHC 346, is also clear authority for the proposition that the effect of an alleged breach of contract on third parties, specifically employees, is not a matter which can be taken into account in considering whether damages are an adequate remedy.

74. Finally, in considering the balance of convenience, I come to the argument that the case could not come to trial in the absence of the orders sought. Leaving aside the question of the effect of the orders sought on the viability of the first plaintiff's business, which I have already dealt with, what this argument boils down to, it seems to me, is the novel proposition that an interlocutory mandatory order might be made to enable a plaintiff to build up a war chest to prosecute its action. I know of not authority for that. In any event, I do not believe that there is any evidence to ground the argument. If the plaintiffs' circumstances are such that unless an interlocutory order is made they will be unable to prosecute the action, it follows that there is no substance to the undertaking as to damages offered.

75. I do not see any necessary link between the plaintiffs' ability to stay in business and their ability to fund the further progress of the action. There is no evidence as to the resources available to either of the plaintiffs, apart, perhaps, from the fact that the sale of the first plaintiff's premises in Dundalk for €350,000 generated a surplus of about €70,000 over the €280,000 or so used to pay off the first plaintiff's bank loan.

76. Sometimes on applications such as this the balance of convenience can be finely balanced. This is not such a case. If the court were to make orders in the terms sought this would not save the first plaintiff's core bureau de change business but would compel the defendant to do business which it believes, on what I find to be reasonable grounds, to be highly questionable.

77. For completeness there are two further issues that I need to deal with. They are linked and it is convenient that I should deal with them together.

78. It is submitted on behalf of the defendant that in considering the balance of convenience, the court should weigh the potential risk that the defendant might incur criminal liability against any potential prejudice to the first plaintiff. It is further submitted that there is a public policy interest in the prevention of money laundering which should be weighed in the balance.

79. In *Lennon v. Ganly* [1981] I.LR.M. 84 O'Hanlon J. cited with approval a dictum of Evershed M.R. in *Pride of Derby v. British Celanese Ltd.* [1953] Ch. 149 at p. 181, where the Master of the Rolls said:-

> *"Equally, of course, the court will not impose on a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful."*

80. It seems to me that the principle that the court will not impose an obligation on anyone to do something which is unlawful, must extend to the imposition of obligations that put the person at risk of doing something that might be unlawful. While in my view this principle engages public policy considerations as well as the interests of the parties before the court and is something which must carry considerable weight, it is not clear to me that the making of an order would expose the defendant to a risk of incurring criminal liability.

81. The Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010, on pain of conviction of a criminal offence, imposes a number of obligations on designated persons. By s. 42(1) of the 2010 Act, a designated person who knows, suspects or has reasonable grounds to suspect, that another person has been or is engaged in an offence of money laundering or terrorist financing is required to make a report to the Garda Síochána and the Revenue Commissioners. By s. 42(7) a designated person who is required to make such a report is prohibited from proceeding with any suspicious transaction prior to sending such report, unless it is not practicable to stop or delay the transaction, or to do so would tip-off the other person that a report might be, or might have been, made.

82. In principle, any order directing the defendant to provide services to the first plaintiff for its money remittance business (or restraining the defendant from refusing to provide such services) could not affect the defendant's obligations to comply with the 2010 Act.

83. On the defendant's case, it not only suspects but has reasonable grounds to suspect money laundering or terrorist financing. To a large degree the transactions which the defendant has found to be suspicious are transactions in connection with its business other than its money remittance business, mostly its bureau de change business, but as I have set out at paras. 25 - 31, the first plaintiff has in the past labelled and described as "*MoneyGram*" business that is now acknowledged not to have been money remittance business at all.

84. The defendant submits, and I fully agree, that if an order were to be made directing the defendant to provide banking or payment services to the first plaintiff, it could only take effect subject to the defendant's obligations under the money laundering legislation. The defendant submits, and I fully accept, that if an order were to be made and the defendant were to suspect money laundering, it would be bound to make a report and bound not to proceed with the transaction. Thus, it seems to me, the substance of the argument made is not that an order would expose the defendant to a risk of incurring criminal liability, but rather that it would generate compliance work for the defendant without achieving anything for the first plaintiff.

85. I accept the submission on behalf of the defendant that, apart from any apprehended risk that the defendant might be exposed to a risk of committing an offence, there is a further public policy interest in this case. On the facts of this case, I think that that interest is not, strictly speaking, an interest in the prevention of money-laundering but rather a public interest that the court should

not interfere with the defendant's compliance with its statutory obligations. In this case the court is not asked to decide, or even to express a provisional view as to, whether the plaintiffs have been engaged in money-laundering. The defendant's case is not that the plaintiffs have been engaged in money-laundering but only that it suspects, on reasonable grounds, that they are or have been so engaged.

86. It seems to me that the prospect that an order might give rise to an obligation on the part of the defendant to undertake a great deal of compliance work is something that I can properly take into account, *a fortiori* if, as it does, the requirement in s. 42(1) to make a report triggers a prohibition, in s. 42(7), on proceeding with the transaction or service connected with the report. I accept the defendant's argument that as long as its suspicions are unresolved, it would have to report transactions initiated by the first plaintiff and not process them. Any order directing the defendant to provide services to the first plaintiff would generate compliance work for the defendant and would not achieve anything for the first plaintiff: with the result that any order would be in vain. Moreover, by reason of the tipping-off provisions of the Act, if the defendant found itself obliged to decline a transaction, it might not be able to say why and might be embarrassed in answering a complaint by the first plaintiff that it was not complying with the court order.

87. For all of these reasons the first plaintiff's application must fail.