Neutral Citation Number: [2012] IEHC 426

THE HIGH COURT

[2012 No. 8999P]

BETWEEN

DCR STRATEGIES INC

PLAINTIFF

AND

BISHOPSTOWN CREDIT UNION LIMITED, RAY KENNY AND CUSO IRELAND LIMITED

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 31st day of October, 2012.

Background to application

1. This application for an interlocutory injunction has generated such an extensive volume of affidavit evidence, including exhibits, containing a large degree of conflict that one of the difficult tasks for the Court is to identify the essential factual bases for the application, both uncontradicted and contested. Another is to identify precisely what relief the plaintiff now seeks on the application.

2. The starting point is an agreement dated 24th June, 2008 made between the first defendant (Bishopstown C.U.) and the plaintiff (the 2008 Agreement). The plaintiff is a corporation incorporated in Canada, which provides debit and prepaid cards and related services to financial service providers worldwide, including credit unions. Bishopstown C.U., as its corporate name indicates, is a credit union which is licensed and authorised to carry on business in accordance with Irish law. It is one of approximately four hundred credit unions in the State. It operates in the Cork area and has in excess of twenty thousand members. The role of the plaintiff in its contractual relationship with Bishopstown C.U. is stated as follows in the recitals in the 2008 Agreement:

> "DCR promotes and operates a customized MasterCard debit card and customized coalition loyalty rewards programme under the service mark "TruCa$h" which enables cardholders to access funds in order to purchase products and services pursuant to company provided benefit programmes (the 'Program') and to collect loyalty reward points . . .."

The plaintiff's deponent, Mr. Frank O'Regan (Mr. O'Regan), has taken exception to the characterisation of the plaintiff by the defendants' deponent, the second defendant (Mr. Kenny), in its role under the 2008 Agreement as "Card Program Manager" as "merely a facilitator . . . a broker of sorts". Like all of the factual disputes thrown up by the affidavits, that dispute cannot be resolved on this application.

3. What is important for present purposes is what was expressly provided for in the 2008 Agreement. The primary obligation undertaken by Bishopstown C.U. was to issue the plaintiff's MasterCard debit cards to its members in accordance with the prices and terms set forth in the agreement and to pay to the plaintiff fees and other revenue due to it in accordance with the agreement. Ultimately, the take-up on the card among members of Bishopstown C.U. was that 3,500 members availed of the service. The primary obligation undertaken by the plaintiff was to administer "the Program" which, as specifically provided in the 2008 Agreement, was a MasterCard debit card program.

4. Clause 8.1 of the 2008 Agreement provided that it should be effective from the date of its execution for a term of three years, unless earlier terminated, which did not happen. The three years expired on 23rd June, 2011. Clause 8.2 provided that the agreement should automatically renew upon the expiry of the term and continue in full force and effect provided that –

> (a) neither party had given notice six months prior to the end of the term that it did not wish to renew, which neither had done, so that the arrangements between the parties continued, and
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> (b) the terms and conditions should be re-negotiated through mutual written agreement, such agreement to be reached no later than sixty days prior to the end of the term, which did not happen either, so that the arrangements between the parties continued in practice on the terms and conditions set out in the 2008 Agreement.

In fact, the agreement has continued in operation since 24th June, 2011 on that basis but, in the circumstances which I will outline later, it will terminate on 31st October, 2012.

5. The clause of the 2008 Agreement on which the plaintiff grounds these proceedings is Clause 6.1, which is headed "Confidential Information". That clause provides:

> "In connection with the business relationship contemplated by this Agreement, a party may receive ("Receiving Party") or have access to commercially valuable proprietary information of the other party ("Disclosing Party"), including information, regardless of form, relating to the business of the Disclosing Party that is not generally known or available to others, including without limitation by way of example only, trade secrets, know-how, customer lists, marketing and business plans ("Confidential Information"). The Receiving Party acknowledges and agrees that any Confidential Information received or otherwise obtained from the Disclosing Party shall remain the sole and exclusive property of the Disclosing Party and may not be used, disseminated or disclosed to the extent reasonably commercially possible (both during the term of this agreement and subsequent to the termination thereof) and shall be held by the Receiving Party in confidence except as may be necessary to perform the obligations required under this Agreement or as may be required by law. This confidentiality provision shall not extend to information that is in the public domain or to the use of such Confidential Information by officers, directors or employees of the Receiving Party or authorised third parties with which it deals for the purposes of this Agreement."

In summary, on the wording of that clause, the restriction on the use, dissemination or disclosure of information –

(a) applies to "commercially valuable proprietary information" that is not generally known or available to others, certain examples being given, information that is in the public domain being expressly excluded, and

(b) it applies both during and after the termination of the 2008 Agreement.

6. The Court was also referred to Clause 4 of the 2008 Agreement which deals with intellectual property and provides, *inter alia*, that all intellectual property belonging to the plaintiff, including, but not limited to, logos and trademarks, data and software code or systems shall remain the exclusive property of the plaintiff and may not be used by Bishopstown C.U. without the express written consent of the plaintiff, if such use is not in furtherance of the 2008 Agreement. However, the primary focus on the application for an interlocutory injunction was on an alleged breach by Bishopstown C.U. of Clause 6.1 and the plaintiff did not identify any specific alleged breach of Clause 4.

7. As it has operated, the Program embodied in the 2008 Agreement involved, through the relationship of the plaintiff with the service provider, MasterCard, the provision of MasterCard debit cards to members of Bishopstown C.U. The processing of transactions on the cards was enabled by reason of arrangements between the plaintiff and a financial institution, which from the commencement of the Program was Newcastle Building Society, as issuer of the card, and a card processing company, which from 2010 onwards was FIS U.K. Limited (FIS).

8. Although it has been averred to by Mr. O'Regan on behalf of the plaintiff that previously, in order to improve the facility it was providing to its clients, the plaintiff had decided to explore a changeover to Visa debit card, the pivotal event for the purposes of this application was that the plaintiff's operation of the Program for Bishopstown C.U. and of the other programs it managed was disrupted, to use an innocuous term, in February 2011 when Newcastle Building Society agreed to sell its card business to Wirecard AG. As a consequence, to use the plaintiff's deponent's terminology, the plaintiff embarked on a migration of existing MasterCard programs over to Raphael Bank, which I understand is a United Kingdom Bank and was intended to replace Newcastle Building Society, and to Visa, as the service provider, which was intended to replace MasterCard. It is acknowledged on behalf of the plaintiff that had Bishopstown C.U. gone along with the changes proposed, the relationship of the parties would have had to be governed by a new agreement. In fact, ultimately Bishopstown C.U. was not prepared to go along with the change to a Visa card product. Instead, it has entered into a new arrangement with the second defendant (Cuso), as Program Manager, under which MasterCard prepaid cards will be provided to its members by arrangement with MasterCard and with a Gibraltar based financial institution, IDT Financial Services Limited (IDT), as issuer of the card.

9. On a practical level, Bishopstown C.U. has continued to have and will have the benefit of the MasterCard debit card Program provided for in the 2008 Agreement until 31st October, 2012, by arrangement with Newcastle Building Society, whoever is responsible for negotiating the arrangement, a question on which there is also a factual dispute. It is acknowledged by the plaintiff that the 2008 Agreement and the contractual relationship of the plaintiff with Bishopstown C.U. will terminate on that day, because the plaintiff is not in a position to fulfil its obligations under the 2008 Agreement, and Bishopstown C.U. has decided not to participate in a Visa card program. There is controversy as to the legal implications of the decision of the plaintiff to migrate to a Visa debit card in consequence of the departure of Newcastle Building Society on its arrangement with Bishopstown C.U. For instance, it is contended by the defendants that Bishopstown C.U. has been discharged from its obligations under the 2008 Agreement, and, in any event, that the 2008 Agreement has already elapsed by effluxion of time under Clause 8. The controversy as to the implications of the application of Clause 8, having regard to the factual scenario outlined above, and of the plaintiff not being able to continue the Program it contracted to provide in the 2008 Agreement, cannot, and need not, be resolved on this application. Suffice it to say that, whatever the legal implications are, the agreement between the plaintiff and Bishopstown C.U. will be effectively terminated as and from 31st October, 2012.

10. A complicating factor is that some of the factual matters on which the plaintiff relies came to the notice of the plaintiff by reason of the personal circumstances of the plaintiff's deponent on this application, namely, Mr. O'Regan. Until June 2008, Mr. O'Regan was employed by Bishopstown C.U. as an I.T. officer, at which point he ceased and became Head of European Operations of the plaintiff. However, in his personal capacity he remained a member of Bishopstown C.U. and in that capacity availed of the MasterCard debit card provided in accordance with the Program operated under the 2008 Agreement. In his personal capacity he has become aware of a failed attempt by Bishopstown C.U. to roll out a new MasterCard product, which was to be issued by IDT, during August 2012. It is acknowledged on behalf of Bishopstown C.U. that it made an error in August 2012 in issuing a new MasterCard to some of its members without furnishing the terms and conditions of MasterCard applicable thereto, which has been rectified. In the light of the concession made by the plaintiff at the hearing of the application, which I will outline later, that aspect of the plaintiff's case has fallen away.

The plaintiff's complaints against the defendants

11. It is necessary to explain first the basis on which the plaintiff seeks relief against the defendants other than Bishopstown C.U. While Mr. Kenny is the Chief Executive Officer of Bishopstown C.U., as I understand the plaintiff's case, his role in Cuso is the basis on which he had been joined in these proceedings.

12. Cuso is a limited liability company which was incorporated in this jurisdiction on 17th June, 2011. The position of the defendants is that the issued share capital of Cuso is owned as to fifty per cent by Strategic Information Technology (SIT) a Canadian corporation, of which Mr. Geoffrey Robert Leeming (Mr. Leeming), is an officer, and the remaining fifty per cent is held by Mr. Kenny in trust for and on behalf of Bishopstown C.U. There is undoubtedly an inconsistency on the affidavit evidence as to the capacity in which Mr. Kenny has held and now holds fifty per cent of the issued share capital in Cuso, and a question arises as to whether he has been, and still is, the beneficial owner thereof rather than a trustee for Bishopstown C.U., which cannot be resolved on this application. Mr. Kenny and Mr. Leeming are directors of Cuso. As it happens, SIT was the card processing company involved in the Program under the 2008 Agreement, until it was replaced by FIS in 2010.

13. According to Mr. Kenny, Cuso was incorporated to provide a standard integrated banking solution to the credit union movement in Ireland, including the provision of a MasterCard prepaid card to credit union members. It was incorporated as a result of discussions between the senior management of Bishopstown C.U. and SIT. Its registered office is at the address of Bishopstown C.U. in Cork.

14. There is a plethora of unresolveable factual conflicts on the affidavit evidence as to who knew what and when. For example, there is a conflict as to when the plaintiff informed Bishopstown C.U. that Newcastle Building Society would be ceasing to act as issuer of the card under the 2008 Agreement and that the plaintiff's Program was changing from a program based on a MasterCard product to a program based on a Visa debit card product. Another example relates to when the plaintiff became aware that Bishopstown C.U. was looking for an alternative Program Manager to the plaintiff, and when the plaintiff became aware that Cuso was in line for that role. What is not in dispute is that through the first seven months of 2012 there were ongoing negotiations between the plaintiff and Bishopstown C.U. with a view to Bishopstown C.U. participating in the plaintiff's new Visa debit card program, during the course of which information was sought by Bishopstown C.U. from the plaintiff, which furnished the information requested.

15. It is in that context that the plaintiff has made allegations against Bishopstown C.U. and the other defendants that –

> (a) rather than dealing with the plaintiff in good faith, they were conspiring with a view to misappropriating intellectual property and confidential information belonging to the plaintiff,
>
> (b) information (which represents the intellectual property of the plaintiff) and which is confidential was being requested for ulterior purposes by Mr. Kenny and was being utilised unlawfully by Cuso in an attempt to set up a business similar to the plaintiff, and
>
> (c) Bishopstown C.U. and Mr. Kenny were wilfully misleading the plaintiff as to their true intentions, by seeking further information under false pretence of wishing to understand in greater detail the service that the plaintiff was providing, with the ultimate aim of eliciting enough information so that Cuso could attempt to provide a similar service.

The defendants refute each of those allegations, pointing to the fact that it was the plaintiff who could no longer fulfil its obligations under the 2008 Agreement and, in the circumstances, Bishopstown C.U. was entitled to consider commercial alternatives to entering into a new agreement with the plaintiff. The Court cannot form a view as to whether the plaintiff's allegations are well-founded or the defendants' rejection of them are soundly based on affidavit evidence, no more than the Court can form a view as to whether a MasterCard prepaid card is more beneficial to a financial institution such as Bishopstown C.U. than a Visa debit card, both sides of that argument having been canvassed on the affidavit evidence.

16. It is against that background that I propose focusing on the plaintiff's core complaint. It is that the plaintiff furnished documentation, which comprised information generated and/or owned by the plaintiff, to Bishopstown C.U. to assist it in implementing the debit card services provided by the plaintiff. It is alleged by the plaintiff that the said information has been disclosed by Bishopstown C.U. wrongfully and in breach of contract and in breach of common law duty of confidentiality to Mr. Kenny and Cuso, with the result that Mr. Kenny and Cuso have obtained commercially sensitive, confidential, and/or proprietary information without independently sourcing the same, where possible, thus gaining an unlawful advantage over competitors in the same marketplace, including the plaintiff. It is alleged by the plaintiff that the information has been used unlawfully by Mr. Kenny and Cuso to, *inter alia*, provide a template business plan and checklist of industry processes and regulatory requirements. The plaintiff has itemised the confidential documentation in issue as including, but not limited to, the following:

> (a) project plans, timelines, and all associated documentation;
>
> (b) regulatory and compliance documentation and information leaflets;
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> (c) compliance documentation, leaflets and checklists;
>
> (d) "Treating Customer Fairly Procedures";
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> (e) Bishopstown C.U. "Proposal for Visa Product" dated 19th April, 2012;
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> (f) debit card terms and conditions;
>
> (g) debit card "Chargeback" conditions;
>
> (h) communications to Newcastle Building Society "Card Programme Managers";
>
> (i) summary of changes to "Prepaid Card Terms and Conditions" documentation;
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> (j) "Anatomy of a Transaction" documentation;
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> (k) "Cardholder Enquiry Form";
>
> (l) draft communications to members supplied by the plaintiff;
>
> (m) marketing materials; and
>
> (n) pricing structures.

17. The defendants' position is that there is absolutely nothing sensitive or confidential about the information held by the defendants which originated with the plaintiff, all of which was easily obtainable elsewhere. Indeed, in the first replying affidavit sworn by Mr. Kenny on behalf of the defendants, it was asserted that the plaintiff's supposed concern about the information was a "ruse" designed to obtain a court order to compel Bishopstown C.U. to continue to contract with the plaintiff, despite the fact that there was no such legal obligation on Bishopstown C.U. Mr. Kenny set out in that affidavit to demonstrate that there was nothing either confidential or proprietary in the information contained in the documentation itemised in the plaintiff's grounding affidavit, stating as follows:

> (i) the project plans and timelines are not confidential and the project plans used for Cuso were those of IDT and FIS (which, although this point was not raised by the plaintiff, I assume was intended to be a reference to SIT), not those of the plaintiff,
>
> (ii) the regulatory and compliance documentation is available in the public domain;
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> (iii) "Treating Customer Fairly Procedures" are available from hundreds of websites;
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> (iv) Bishopstown C.U. "Proposal for Visa Product" is composed of Visa documentation;
>
> (v) as regards the debit card terms and conditions, they were drafted by Coakley Moloney, Solicitors for Bishopstown C.U., in 2008 with no input or assistance whatsoever from the plaintiff,
>
> (vi) the "Anatomy of Transaction" documentation is MasterCard documentation that was not produced by the plaintiff,
>
> (vii) the "Cardholder Enquiry Form" is a standard MasterCard document;

(viii) the draft communications to members supplied by the plaintiff was in fact documentation issued by Newcastle Building Society directly to Bishopstown C.U.,

(ix) the marketing materials and pricing structures were documentation readily available on the MasterCard website, and

(x) the plaintiff passed four sets of pricing information to Bishopstown C.U., the differing prices in which made it impossible for Bishopstown C.U. to understand why the prices differed, in consequence of which a considerable amount of time was spent in trying to get accurate information from the plaintiff.

18. Predictably, in the next affidavit of Mr. O'Regan filed on behalf of the plaintiff, the assertions in Mr. Kenny's affidavit that the information was not confidential or proprietary were disputed. Just to take one example, it was re-asserted by the plaintiff that the "Proposal for Visa Product" dated 19th April, 2012 is confidential in nature and is proprietary information of the plaintiff, in that it post-dated the European Communities (Electronic Money) Regulations 2011 (S.I. No. 183 of 2011), which resulted in a radical overhaul of card program terms and conditions. The plaintiff had worked extensively with Bishopstown C.U. to ensure that its terms and conditions were compliant and the expertise and information imparted to Bishopstown C.U. through that process is confidential in nature.

19. At the hearing of the application, counsel for the plaintiff strongly urged that the information contained in the documentation relied on by the plaintiff was in fact confidential and proprietary. To take just one example, as regards pricing structures, it was suggested that this confidential information was used by Bishopstown C.U. to "undercut" the plaintiff.

20. It is impossible, and it would be inappropriate, for the Court to attempt to resolve those controversies. However, there is undoubtedly an issue as to whether all or any of the documentation furnished by the plaintiff to Bishopstown C.U. contained "Confidential Information" within the meaning of Clause 6.1 of the 2008 Agreement, which definition encompasses "know-how" and "marketing and business plans", or proprietary information, or confidential information the disclosure of which by the plaintiff to the defendants would give rise to the tort of breach of confidence.

Relief claimed on the application

21. The first relief claimed by the plaintiff in the plenary summons, which was issued on 6th September, 2012, is damages against Bishopstown C.U. for breach of contract and/or breach of confidentiality, which I understand to mean breach of a duty of confidentiality at common law. Damages are also claimed against Mr. Kenny and Cuso for breach of confidentiality. There follows claims for injunctive relief, which were reflected in the notice of motion, which is the basis of this application, which issued on 7th September, 2012.

22. Although to an extent overtaken by events, I think it is useful to consider the reliefs claimed as originally formulated on the notice of motion. First, in paragraph A the plaintiff sought an interlocutory injunction restraining the defendants from –

(i) using or disclosing any confidential information of the plaintiff relating to the provision of debit cards and/or ancillary services obtained by virtue of the provision of the said services and/or information by the plaintiff to Bishopstown C.U.,

(ii) otherwise acting in further breach of contract and/or breach of confidentiality arising from the plaintiff's provision of the said services and/or information,

(iii) otherwise misusing the said confidential information or any of it.

The plaintiff had sought that relief by way of permanent injunction in the plenary summons. Secondly, in paragraph B the plaintiff sought an interlocutory injunction restraining Bishopstown C.U. and Cuso "from giving effect or purporting to give effect to any agreement for the provision by [Cuso] of debit card and ancillary services to [Bishopstown C.U.] for a period of twelve months and/or where the provision of the said services would offend against the foregoing injunction", presumably referring to paragraph A. Thirdly, in paragraph C the plaintiff sought an interlocutory injunction restraining Mr. Kenny and Cuso "from giving effect or purporting to give effect to any agreement for the provision by them of debit card and ancillary services to any third party for a period of twelve months and/or where the provision of the said services would offend the foregoing injunction", again presumably referring to paragraph A. Finally, for present purposes, the plaintiff sought in paragraph D an interlocutory injunction prohibiting Mr. Kenny and Cuso "from dealing with and/or soliciting any clients of the plaintiff for a period of twelve months".

23. As a reaction to the contention of Mr. Kenny in his first replying affidavit on behalf of the defendants that the plaintiff's concern appeared to be a "ruse" designed to obtain a court order to compel Bishopstown C.U. to continue to contract with the plaintiff, despite the fact that it was under no legal obligation to do so, the plaintiff's position was clarified in the next affidavit filed on behalf of the plaintiff, in which Mr. O'Regan averred that the purpose of the application was not to enforce continuation of the 2008 Agreement between the plaintiff and Bishopstown C.U. or to restrain legitimate competition in the marketplace between the plaintiff and Cuso. Rather, the primary purpose of the application and the proceedings is to restrain the defendants from –

(a) using the plaintiff's confidential and/or other proprietary information; and

(b) allowing Cuso to gain a "springboard" into the marketplace based on the defendants' use of information supplied in confidence by the plaintiff.

Mr. O'Regan emphasised later in that affidavit that the plaintiff was not seeking to stop the defendants or any other third party lawfully competing with it in any market where the business of the plaintiff is carried out. He averred that the principal objection of the plaintiff is that the defendants have used information which was agreed to be confidential under the 2008 Agreement for the purposes of setting up in competition with the plaintiff, thus giving Cuso an unfair advantage it ought not to have had, if Bishopstown C.U. and Mr. Kenny had complied with the terms of the 2008 Agreement.

24. An important component of the response of the defendants to the application for an interlocutory injunction from the outset was that, given that from 31st October, 2012 Bishopstown C.U. and its members could no longer be supplied by the plaintiff with the services which the plaintiff contracted to deliver under the 2008 Agreement, if Bishopstown C.U. were to be restrained from implementing the new card program which it has put in place by arrangement with Cuso and IDT, so that in effect it would be compelled to contract with the plaintiff in relation to the Visa debit card, the probability is that there would be a significant delay in making arrangements for the provision to it of the Visa debit card, which would cause untold inconvenience and worry to the members of Bishopstown C.U. and consequent loss of reputation and damage to the business of Bishopstown C.U.

25. In opening the plaintiff's case to the Court, counsel for the plaintiff informed the Court that the plaintiff was prepared to limit the claim at interlocutory stage to restraining Cuso from dealing with credit unions other than Bishopstown C.U. using confidential information obtained from the plaintiff, so that Cuso could issue MasterCard prepaid cards to the members of Bishopstown C.U. from 31st October, 2012. Subsequently, counsel for the plaintiff furnished to the Court alternative formulations of the reliefs claimed at C and D in the notice of motion, which were in the following terms:

> "C. An interlocutory injunction restraining the Defendants, their servants or agents or any of them, acting howsoever from giving effect or purporting to give effect to any agreement for the provision by the defendants (whether acting by their servants or agents or any of them or otherwise howsoever) of debit card and ancillary services to any third party credit union (save [Bishopstown C.U.]) pending the determination of these proceedings and/or where the provision of the said services would offend against the foregoing injunction.
>
> D. An interlocutory injunction restraining the defendants, their servants and agents or any of them, from dealing with and/or soliciting any third party credit unions for the provision of debit card and ancillary services pending the determination of these proceedings."

26. The reformulation of the relief claimed creates some technical difficulties. As I understand the position, the plaintiff is not seeking the second relief set out in the notice of motion, the terms of which I have outlined above, on this interlocutory application. The words "where the provision of the said service would offend against the foregoing injunction" in the re-formulated paragraph C would appear to refer back to the first relief sought. Having considered the matter, my understanding is that what the plaintiff seeks is relief in accordance with the re-formulated paragraph C in circumstances where the provision of the services referred to is in breach of contract (in particular, Clause 6.1 of the 2008 Agreement) or in breach of confidentiality or involves misusing confidential information provided by the plaintiff to Bishopstown C.U. If the Court were prepared to grant interlocutory relief, it would involve omitting paragraph A and further reformulating paragraph C to encompass the alleged wrongs outlined in the previous sentence.

27. In essence the objective of the plaintiff is to prevent Cuso providing a credit card service to credit unions in the State, other than Bishopstown C.U., pending the trial of the action. It is to be noted that the re-formulated relief is not limited to a specific period to bring it into conformity with the most recent authorities in this jurisdiction in which a "springboard" injunction was granted: the decision of Dunne J. in *Net Affinity Ltd. v. Conaghan & Anor.* [2011] IEHC 160 and the decision of Clarke J. in *Allied Irish Bank Plc & Ors. v. Diamond & Ors*. [2011] IEHC 505. The duration of the injunction in the former case was twelve months and in the latter approximately six months.

The law

28. In outlining the legal principles applicable to springboard injunctions counsel for the plaintiff concentrated primarily on the judgment of Clarke J. in *Allied Irish Bank Plc. & Ors. v. Diamond & Ors*. In his judgment (at para. 3.3) Clarke J. explained the underlying rationale for the grant of a springboard injunction as follows:

> "The underlying rationale for the grant of a springboard injunction stems from the need to deal in a fair and just manner with the consequences which may flow from employees acting in breach of contract or in breach of a fiduciary duty in a way which gives those employees an opportunity to obtain a head start in competition with their employer in circumstances where the relevant employees leave their employment and either set up on their own in opposition to their former employer or join a competitor. It should be emphasised that a springboard injunction is wholly different in character from an injunction which seeks to enforce a restrictive covenant in an employee's contract of employment which prevents that employee from competing (within defined parameters) with an employer after the employee's contract with that employer comes to an end."

29. There, Clarke J. was concerned with an employer and employee contractual relationship. However, it is clear on the authorities that the context in which a springboard injunction may be granted is not confined to employer and employee relationships. It applies to any contractual or fiduciary relationship. In the broader context in which a springboard injunction is sought by a plaintiff, what the Court is asked to do is to deal in a fair and just manner with the consequences which may flow from one party to a contract acting in breach of contract by misusing confidential information or in breach of a duty of confidentiality in a way which gives that party an opportunity to obtain a head start in competition with the other party to the contract after the contractual relationship of the parties has terminated. Whether the confidential information obtained by the defendant from the plaintiff relates to the design of a prefabricated portable building, as was an issue in *Terrapin Ltd. v. Builder Supply Company (Hayes Ltd.)* [1961] RPC 375, which is the *fons et origo* of characterising the confidential information in the possession of the defendant as the springboard into the future, or confidential information in relation to the design and implementation, in compliance with regulatory requirements, of a financial product for a regulated financial institution is immaterial. The same principles apply.

30. Later in his judgment, Clarke J. clearly defined the limits of the relief which may be granted by the Court on an interlocutory basis to redress the consequences which may flow from circumstances which give rise to an entitlement to such an order. He stated (at para. 3.6):

> "The springboard injunction can only be directed towards putting in place a reasonable measure or measures which are designed to take away an illegally obtained advantage. The measures cannot go beyond that which is reasonably necessary to achieve that end. It cannot be directed towards preventing competition as such."

31. Having analysed the application of the jurisprudence which flows from the decision of the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] 2 I.R. 88 to applications for springboard injunctions at an interlocutory stage, Clarke J. concluded (at para. 5.16) –

> ". . . that there is an obligation on a plaintiff, seeking to obtain an interlocutory springboard injunction, to satisfy the court of a strong arguable case . . ."

for the reasons he had outlined earlier. He went on to enter a caveat in the following paragraph (para. 5.17) where he stated:

> "However, in the light of the analysis which I have just conducted, it does not seem to me that it is appropriate for the court to enter into a detailed analysis of controversial facts in reaching any assessment as to the likelihood of the plaintiff's claim ultimately succeeding in the context of applying the appropriate tests at an interlocutory stage. The court can, of course, conclude that, even on the facts asserted by the plaintiff, the case would be weak and might fail to reach the strong case test where that test applies. The court can also, for reasons such as clear internal inconsistency in the evidence presented, come to the view that the facts asserted as forming the basis of the issue to be tried lack any

> credibility. So far as the factual element of the plaintiff's case is concerned the court should assess whether, on the basis of the asserted facts for which credible evidence is presented, the plaintiff has a strong arguable case."

On this application, it was accepted by counsel for the plaintiff that the plaintiff must satisfy the Court that there is a strong arguable case of wrongdoing on the part of the defendants.

32. In addressing the application of the *Campus Oil* criterion of the adequacy of damages as a remedy for either party on such an application, Clarke J. stated (at para. 8.1) –

> ". . . I agree with counsel for various of the defendants who emphasised that the harm in respect of which damages may be found to be an inadequate remedy must be harm which is going to occur in the future rather than harm which has already occurred. . . . The harm in respect of which the court needs to assess the adequacy of damages is harm which may be prevented by the granting of an interlocutory injunction."

Clarke J. identified another important factor on the issue of the adequacy of damages as a remedy for the plaintiff. However, it is important to have regard to the context in which he identified that factor. In that case the plaintiffs were seeking interlocutory orders restraining the defendants, some of whom were employees of the plaintiff and the others being corporations incorporated outside this jurisdiction which were involved in a similar type of business to a subsidiary of the plaintiffs, which provided particular services in relation to international financial business, from soliciting customers of the subsidiary, concluding contracts with such customers, and preventing the solicitation of employees of the plaintiffs and precluding the use of what was said to be confidential information allegedly brought by the employee defendants to the competitor corporation defendants. Against that background, Clarke J. stated that, if the plaintiffs were correct in their allegations, the actions of the defendant amounted to wrongful taking of the plaintiffs' property rights in its business, both as to goodwill and as to confidential information concerning its customers. Having stated that the courts have always been anxious to guard property rights in the context of interlocutory injunctions, he stated (at para. 8.2):

> "The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value. Viewed in that way, damages would not be an adequate remedy for AIB. In particular, a failure to grant interlocutory relief at this stage would mean, in practice, that imposing some form of springboard injunction after the trial would be largely redundant. If the defendants are permitted to avail of what transpires to be (after trial) an unlawful head start for the period between now and trial, it will become virtually impossible to undo that head start in any practical way whatever the findings of the court at trial might be. In those circumstances, it seems to me that AIB would suffer irremediable loss to its property rights in the event that it should not obtain an interlocutory injunction now but should succeed at trial."

Application of legal principles

33. The first question to be addressed is whether the Court can be satisfied that the plaintiff has a strong arguable case that the defendants have an opportunity to obtain a head start in competition with the plaintiff in consequence of the availability to the defendants of Confidential Information, within the meaning of that expression in the 2008 Agreement, received by Bishopstown C.U. from the plaintiff, or information which is confidential at common law, which is being utilised by the defendants in breach of Clause 6.1 of the 2008 Agreement and in breach of the common law duty of confidentiality of the defendants. The answer turns primarily on whether the information received by Bishopstown C.U. from the plaintiff is confidential, as contended by the plaintiff.

34. It is not disputed that Bishopstown C.U. got the information. What is disputed is the alleged confidential nature of the information. The position of the defendants is that it is all generic information, which cannot be confidential, and it is mostly material which is generic to MasterCard. The defendants contend that the "springboard" factor is not present because from 31st October, 2012 the plaintiff and the defendants would be offering different products to credit unions: in the case of the plaintiff, the Visa debit card product; and in the case of the defendants, the MasterCard prepaid card product. Further, the defendants point to the fact that Cuso, with the assistance of its own IT provider, SIT, and its own bank, IDT, has done the work necessary to service Bishopstown C.U. with a MasterCard prepaid card. Against that, it was submitted on behalf of the plaintiff that the defendants have used the "know-how" of the plaintiff to effect the changeover to the new product, it being suggested that, on the evidence available, Cuso does not have employees who could garner the relevant information and SIT, being merely a software provider, does not have the type of expertise which the plaintiff has to put in place a program for provision of the MasterCard prepaid card.

35. There is unquestionably a fair issue to be tried as to whether the capacity of the defendants to have the new card product available after 31st October, 2012 is a consequence of the use of confidential information which Bishopstown C.U. received under the 2008 Agreement and that the utilisation of this information by the defendants is in breach of Clause 6.1 of the 2008 Agreement and the defendants' duty of confidentiality at common law. However, taking an overview, rather than conducting a detailed analysis, of the evidence presented by both sides and the arguments advanced by both sides, some of which I have already outlined for illustrative purposes, there is such a degree of controversy that it is impossible to conclude that the plaintiff has surmounted the threshold of establishing a strong arguable case. It must be emphasised that this does not mean that I have formed any view as to whether or not the plaintiff will be successful at the trial of the action.

Adequacy of damages

36. From the outset the plaintiff has distinguished between harm which it alleges it has already suffered, in respect of which it proposes to pursue a claim for damages, and harm which it anticipates it will suffer in the future. Essentially, the case made by the plaintiff on the adequacy of damages as a remedy for it has two limbs. The first is that, if the defendants are permitted to use the alleged confidential information which Bishopstown C.U. received from the plaintiff and the plaintiff's proprietary information, that may jeopardise the plaintiff's attempt to expand into the Irish market. The second limb is that it was also asserted that the actions of the defendants would also irreparably damage the reputation of the plaintiff, the suggestion being made that Cuso's operations would "throw the whole market into turmoil". Having regard to the sensible approach ultimately adopted by the plaintiff in not resisting the changeover by Bishopstown C.U. to the MasterCard prepaid card, in accordance with the program which Cuso has put in place, I am of the view that the argument in relation to reputational damage has fallen away.

37. As regards the first limb of the plaintiff's contention that damages are not an adequate remedy, the response of Mr. Kenny in his first affidavit was that, despite being four years in the Irish market, the plaintiff had only succeeded in entering into an agreement to provide a credit card program for only one other credit union in this jurisdiction. Further, Mr. Kenny asserted that, as regards Bishopstown C.U., the plaintiff's gross income per annum is €70,000, out of which, it was suggested the expenses of providing the service have to be paid, before the net income is arrived at. That being the case, it was submitted that it would be a simple matter

to calculate the loss accruing to the plaintiff, if the Court were to refuse an injunction. That evoked further evidence from Mr. O'Regan in his next affidavit, in which he averred that the plaintiff would be commencing the provision of card services in respect of two more credit unions in the immediate future, thus doubling its presence in, and income from, the market in this jurisdiction within the next four months and, further, it has letters of engagement in place in respect of four more credit unions, and seven more credit unions are close to putting proposals on behalf of the plaintiff to their boards of directors. Mr. O'Regan averred that, in total, there is a potential turnover of €2.5m in the event that the thirteen credit unions, with a combined membership of roughly 150,000 customers, with whom negotiations are at an advanced stage, enter into agreements with the plaintiff. It is not clear whether the turnover figure referred to represents one year's turnover or more. Mr. O'Regan has acknowledged that the business with Bishopstown C.U. and the other credit union which has a contractual relationship with the plaintiff produces "an income of roughly €140,000", which I assume means per annum.

38. Unlike most situations in which the Court has to consider the adequacy of damages on an application for a springboard injunction, the loss to the plaintiff if it loses its existing business, that is to say, the one credit union with which is has a continuing contractual arrangement at present, or potential business, as a result of the defendants' alleged wrongdoing, appears to be readily quantifiable, because of the nature of the service in question and the fact that it is designed for financial institutions in this jurisdiction which are regulated by statute. Moreover, it seems to me that, in assessing damages one would not have to resort to quantifying the value of property rights lost by the plaintiff, if such loss was established. It would be possible to assess the real loss to the plaintiff without undue difficulty. In the circumstances, it is not possible to conclude that, in the event of an injunction being refused, damages would not be an adequate remedy for the plaintiff.

39. The defendants have raised issues about the adequacy of the undertaking as to damages proffered by the plaintiff, given that the plaintiff is a corporation incorporated outside the State. The plaintiff's response is that it is a company which employs between thirty and forty people worldwide, and has an annual turnover of US$5m to US$10m. I have not attached weight to this aspect of the defendants' response to the plaintiff's application.

Balance of convenience
40. Finally, in the light of the findings already made on the adequacy of damages, I consider that the balance of convenience lies in favour of refusal of an injunction.

Order
41. For the reasons outlined above, there will be an order refusing the plaintiff's application.

42. However, counsel for the defendants indicated the willingness of the defendants to co-operate in procuring an early hearing of the substantive action. The Court will facilitate that approach.