BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 0072 OF 2007

BETWEEN:

ALFA TELECOM TURKEY LIMITED

Claimant

AND

(1) CUKUROVA FINANCE INTERNATIONAL LIMITED
(2) CUKUROVA HOLDING AS

Defendants

CLAIM NO. 0073 OF 2007

BETWEEN:

ALFA TELECOM TURKEY LIMITED

Claimant

AND

CUKUROVA FINANCE INTERNATIONAL LIMITED
CUKUROVA TELECOM HOLDINGS LIMITED
CUKUROVA HOLDING AS
HWR SERVICES LIMITED

Defendants

Appearances:

Mr. Michael Fay of Ogier for TeliaSonera (non-party applicant)
Mr. Robert Levy of Walkers for Alfa
Ms. Arabella di Orio of Maples & Calder for the Cukurova Defendants

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2007: June 1st and 4th, July 12th

JUDGMENT

(Practice – Documents – Inspection and copying – application by non-party to inspect and copy entire court file – whether to be permitted – CPR2000 Rule 3.14(1)(d))

[1] JOSEPH-OLIVETTI, J.: I have before me two applications by TeliaSonera Finland OYJ ("TeliaSonera") to inspect and copy documents on the court files in these two actions. The applications can perhaps be viewed as an early skirmish in what promises to be an epic

battle among some of the Titians of the telecommunications industry of Europe. I am told that TeliaSonera is a wholly-owned subsidiary of a Swedish corporation that is the leading telecommunications company in the Nordic and Baltic region, that Alfa Telecom Turkey Limited ("Alfa") is a part of the Alfa Group consortium a diversified Russian financial and industrial conglomerate and that the Cukurova defendants are part of a Turkish group that holds investments in the telecommunications sector in Turkey. By consent the applications were heard together although the actions are not consolidated. I gave an oral decision on the 4th June refusing the applications and now give my full reasons as I had indicated at the time that I would. The court regrets that this took longer than initially anticipated.

[2] TeliaSonera is not a party to these actions. It moved the court by notices of application filed 24th May 2007. It served the parties who attended on the 25th May and objected to the short notice. However, TeliaSonera insisted on its right to move the applications ex parte. The parties objected. The court after hearing the parties and TeliaSonera directed that the applications be heard inter parties on the 1st June and gave directions for the filing of affidavits by the parties if they so wished. These directions were complied with.

[3] The Notices of Application and the supporting affidavits of Ms. Claire-Louise Whiley, a barrister with the firm of Ogier, are identical in all material respects. So too are the affidavits filed in opposition by the Cukurova Defendants (Ms. Yasmin Cetinalp). Alfa Telecom Turkey Limited ("Alpha") did not file an affidavit. For convenience my references are to the Notice and affidavits in Suit 72.

THE BACKGROUND

[4] To put these applications in proper perspective it is necessary to refer briefly to the background giving rise to these actions and to Suit 109/2007 - TeliaSonera v. Alfa, as gleaned from the pleadings, the nature of the claims and the state of the proceedings as at the date of hearing. (Matters have progressed significantly since that date and of course that has not been taken into account). What I say is only by reference to the allegations made bearing in mind that pleadings are not closed in all the suits and what I say here cannot be read as findings of fact.

[5] It appears that by all three actions the parties and TeliaSonera are seeking, albeit by different routes, to protect their alleged interests in a stake-holding in the telecommunications industry of Turkey. At the heart of these disputes lies the issue of control over a Turkish entity, Turkcell Holdings AS ("Turkcell Holdings") which in turn holds a 51% interest in another Turkish entity, Turkcell Iletisim Hizmetleri AS ("Turkcell") which provides mobile telephone services in Turkey.

[6] Turkcell Holdings was established by Cukurova Holdings As, TeliaSonera and three other shareholders pursuant to a shareholders agreement in 1999 ("the Turkcell Holding shareholders agreement") with the intent to develop more efficiently the business of Turkcell. It is alleged that the Turkcell Holding shareholders agreement placed certain restrictions on the transfer of the company's shares. However, transfers from a shareholder to its affiliate were exempt from these restrictions but it was provided that if an affiliate ceased to be an affiliate after acquiring shares then the shares should be transferred back to the transferor before the affiliate lost that status. It is also alleged that Cukurova Holdings and TeliaSonera contributed their Turkcell shares to Turkcell Holdings in amounts sufficient to provide Turkcell Holdings with its 51% stake in Turkcell. Cukurova Holdings held 52.91% of the shares in Turkcell Holdings and the remaining shares were held by TeliaSonera.

[7] In March 2005 Cukurova Holdings contracted to sell its Turkcell Holding shares to TeliaSonera. However, it is alleged that it refused to close the transaction. As a result, TeliaSonera instituted arbitration proceeding in Geneva in May 2005 and obtained a partial award in January 2007 which found that Cukurova Holding had breached its agreement and they were ordered to proceed in good faith to complete the transaction.

[8] Meanwhile in June 2005 during the pendency of the arbitration proceedings Cukurova Holdings and CFI entered into certain agreements with Alpha whereby they together established Cukurova Telecom Holdings Limited ("Cukurova Telecom") a BVI company. Fifty-one percent (51%) of the shares in Cukurova Telecom were held by Cukurova Holdings through its wholly owned subsidiary Cukurova Finance International Limited ("CFI") another BVI company and the other 49% of the shares were held by Alpha. Cukurova Holdings, pursuant to those agreements transferred its shares in Turkcell Holdings to Cukurova Telecom and Cukurova Telecom agreed to be bound by the Turkcell

Holding Shareholders Agreement. As part of the same arrangements Alpha granted a loan facility of US $1.593 billion to Cukurova Holdings and as security Cukurova Holdings pledged its shares in CFI and CFI's shares in Cukurova Telecom to Alpha. This then is the background as far as I am able to understand it. Now to the nature of the actions.

[9] In Suit 72 Alfa in brief claims that the Cukurova Defendants are in breach of the loan facility agreement as certain events of default have occurred. Alfa seeks inter alia declarations that the amount secured under the facility agreement is due together with interest and that it has validly appropriated the security. It is to be borne in mind that TeliaSonera is not a party to the facility agreement.

[10] On 27th April the Cukurova Defendants obtained an injunction ex parte but on notice restraining Alfa from (i) registering or attempting to register the transfer of the CFI or Cukurova Telecom shares to any person or entity; or (ii) taking any steps to enforce the security. The return date was set for 25th May but Alfa and the Cukurova Defendants subsequently consented to the injunction continuing to a date not earlier than 6th July. The injunction will remain in force until the court delivers its judgment on that hearing.

[11] In Suit 73 Alfa seeks a rectification of the share registers of both CFI and Cukurova Telecom to show Alfa as the registered owner of the security shares. The Cukurova Defendants dispute both actions and defences are due on 8th June. Understandably the registered agent has taken no active part in Suit 73.

[12] Suit 109 was instituted by TeliaSonera. TeliaSonera relying on its alleged rights under the Turkcell Holding Shareholders Agreement and the partial Geneva award obtained against Cukurova Holdings AS claims essentially that Alpha in bringing Suit 72 and 73 is seeking to induce and/or procure CTH and CH to evade the transfer provisions in the Turkcell Holding Shareholders Agreement. In the alternative, TeliaSonera pleads that Alfa has already induced or procured that evasion.

[13] The relief sought by TeliaSonera is an injunction retraining Alfa from (i) taking any further steps either in Suit 72 or Suit 73 until Cukurova Telecom has transferred its shares in Turkcell Holding AS back to Cukurova Holdings; (ii) otherwise procuring, causing or inducing Cukurova Telecom and/or Cukurova Holdings to breach the Turkcell Holding Shareholders Agreement; (iii) taking any or any further steps to effect or complete a transfer of ownership of Cukurova Telecom from Cukurova Holdings to Alfa unless

Cukurova Telecom has transferred its shares in Turkcell Holding back to Cukurova Holdings. Further or alternatively TeliaSonera claims damages for the loss of its contractual rights under the Turkcell Holding Shareholders Agreement

[14] TeliaSonera made application for an interim injunction on the 17th May. That was scheduled for 25th May. However, on that day TeliaSonera consented to its application being adjourned to a later date on Alfa undertaking in essence not to take steps to discharge the injunction obtained in Suit 72 by the Cukurova Defendants prior to the hearing of TeliaSonera's application for an injunction and to inform TeliaSonera forthwith of any application taken by the Cukurova Defendants to disclose it.

The Relief Hereby Sought

[15] The relief sought in the Notice is framed thus:-

> "the Applicant ... applies to the court for an order pursuant to CPR 3.14(1)(d) permitting inspection of court documents, including the pleadings, notices of application, affidavits, exhibits ad skeleton arguments filed in this matter."

The Grounds

[16] Ms. Whiley gave five main grounds for justifying the orders sought:- (i) that TeliaSonera has brought Suit 109 against Alfa;(ii) that the injunctive relief sought by TeliaSonera in Suit 109 and by the Cukurova Defendants in Suit 72 is substantially the same; (iii)that the arbitration award made in Geneva in arbitration proceedings between TeliaSonera and some of the Cukurova entities is referred to by Alfa in Suit 72 and that the same award also "forms part of the background" to Suit 109; (iv) that TeliaSonera's rights will be directly affected by the outcome of the applications in Suit 72 and Suit 73;(v) that TeliaSonera's protection pending the hearing of its own adjourned application for an injunction having regard to the terms of the consent order made between TeliaSonera and Alfa is completely dependant on the Cukurova injunction remaining in place and TeliaSonera needs to assess the risk that such protection might be removed. And finally (v) that, "in order to assess the risk that such protection as that provides might be removed

and to prepare for the hearing of its own application, it is necessary for TeliaSonera to be aware of and to take into account the evidence and submissions filed with the court in the Alfa/Cukurova actions."

Court's Analysis

[17] The application were opposed by both parties on essentially the main points that having regard to the grounds set out in Ms. Whiley's affidavit TeliaSonera had not identified any documents or class of documents that it wished to inspect and that it had not established that it had a legitimate reason for inspecting and copying the files and that therefore its applications amounted to no more than a fishing expedition. It must be emphasised that TeliaSonera had expressly acknowledged that it was not seeking inspection in reliance on the principles of open justice as it related to the monitoring of the decision–making process as it takes or with reviewing it long after the event as explained in Dian AO v. Davis Frankel & Mead (a firm) and another (OOO Alfa-Eco and another intervening)[1] an English case relied on by the parties and TeliaSonera but that it was seeking inspection to assist it in other litigation. The parties and TeliaSonera also referred to a number of other authorities including The Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co[2], Mansell v Acton[3], and Gio Personal Investment Service Ltd[4] and the text "Documentary Evidence" Charles Hollander Q.C. 9th edn. pp. 129-131.

[18] First it is helpful to advert to the relevant rule. Rule 3.14 provides:

> "3.14 (1) On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of any of the following documents filed in the court office, namely –
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> (a) a claim form;
> (b) a notice of appeal
> (c) a judgment or order given or made in the court; and

[1] 2004 EWHC 2662 (Comm.)
[2] [2003] EWHC 2297 (Comm.)
[3] [2005] EWHC 3048
[4] [1999] 1 WLR 984

(d) with the leave of the court, which may be granted on an application made without notice, any other document.

(2) … (provision that paragraph 1 does not apply to a party)

(3) … (provision that any document filed in or in the custody of a court office must not be taken out of the court office without the leave of the court)." (Emphasis added).

[19] Clearly, under sub-rule 1(d) the court has a discretion whether or not to allow a non-party to inspect and copy documents on a court file. However, Rule 3.14 itself gives no specific guidance on how this discretion is to be exercised. One therefore needs to be guided by CPR 2000 Rule 1.2 which provides that when a Rule falls to be construed or a discretion granted under CPR 2000 is to be exercised one must do so in a manner which gives effect to the overriding objective of dealing with cases justly as explained in Rule 1.1. In exercising its discretion therefore the court must consider all the relevant circumstances before it including those specifically adverted to in Rule 1.1(2).

[20] First, I remark that Rule 3.14 is premised on the underlying basis that access to documents filed in court is generally restricted. Next, the Rule draws the distinction between parties and non-parties. Certain documents namely – claim forms, notices of appeal, judgments or orders are available to anyone upon payment of the prescribed fee but other documents are only available for inspection by a non-party if the court grants leave. A party on the other hand has access to all documents filed in the proceedings whether before or after its commencement.

[21] This concept is evidence elsewhere in CPR. For example, witness statements filed in court can only be used in the matter in which they are filed except where the Court gives permission. See CPR 29.12. The same is true about documents discovered or disclosed under CPR Parts 34 and 28 although a distinction is made between documents read by the court or referred to in open court and documents which are not so read or so alluded to. There is no similar rule relating to affidavits but no doubt the same restriction would apply as they are akin to witness statements. Thus it can safely be said that access to

court files and use of the information therein is restricted and that a non party has no unfettered right to inspect and copy documents.

[22] It follows then that a non-party must show good reason for justifying the making of such an order. No local authorities were cited presumably as there are none. However, Dian AO provides useful guidance as although the English rule considered there is not on all fours with Rule 3.14 it is substantially similar and stems from the same the underlying concept that the public does not have an unfettered right to access to court files. (Interestingly the application in Dian AO was related to the IPOC litigation which is well known in this jurisdiction.)

[23] In Dian AO non-parties to an action sought permission under the English CPR r. 54(2)(c)[5] to inspect the whole of the court file and take copies of documents which might be of assistance to them in subsequent litigation. The applicants subsequently made a limited application to inspect and copy various orders made in the action and affidavits sworn in support of, and in opposition to, the applications in question.

[24] It was held allowing the applications in part, "that CPR r 5.4(2)(c) did not entitle an applicant to seek the permission to search the whole of the court file to see what it contained and to copy anything he considered to be of interest; that the applicant must identify with reasonable precision the documents in respect of which he sought permission and lay before the court he grounds upon which he sought it; that in the case of documents read by the court as part of the decision-making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice, but it should not be as ready to give permission to search for, inspect or copy affidavits or statements that were not so read and should only do so if there were strong grounds for thinking that it was necessary in the interests of justice; and that, accordingly, it was appropriate to allow the applicants to search for, inspect and copy the affidavits sworn in support of the application for a freezing order, the application to serve out of the jurisdiction and the application for security for costs and the pleadings but not

[5] Rule 5.4(2) provides:-
"and any other person who pays the prescribed fee may, during office hours, search for, inspect and take a copy of the following documents, namely – (a) a claim form which has been served; (b) any judgment or order given or made in public; (c) any other document if the court gives permission. (Emphasis added to show difference between that rule and Rule 3.14(1)(d).)

those affidavits or statements relating to the application for summary judgment which was disposed of without a hearing."

[25] In arriving at his decision Moore-Bick J considered two main issues – whether the rule required a person who seeks permission to identify with some precision the document he or she wishes to inspect or whether he or she is entitled to ask for permission to search the whole file to see what it contains and to copy anything of interest and what factors are to be taken into account when exercising its discretion.

[26] One of the arguments advanced before Moore-Bick, J was that inspection should be allowed in accordance with the principles of open justice as enunciated in the cases of GIO Personal Investment Services Ltd. v. Liverpool and London Steamship Protection and Indemnity Association Ltd.[6] and Scott v Scott[7].

[27] With regard to that principle Moore-Bick, J observed that it should be given the highest importance as 'it has long been recognized that if justice is to be properly administered it is essential that the decisions of the courts and the decision making process itself be open to public scrutiny. It is for that reason that in all but exceptional cases hearings are conducted in public, judgment is delivered in public and proceedings can be freely reported." See p. 2958 B-C.

[28] He also recognized that it is for that reason, as the use of written rather than oral procedures has become more prevalent that the courts have seen it necessary to give the public access to documents that have been put before the judge but not read out in open court as was once the case. The reason being that without access to such material the public attending at a hearing could not form any reliable view about the propriety of the decision making process. (See para. D-E p. 2958).

[29] In Dian AO the court held that notwithstanding the court's predisposition in favour of allowing inspection an applicant must establish that it has a legitimate interest in inspecting the documents and must identify the document or class of documents that he or she wishes to inspect. Thus a general request to inspect as that case initially here and in that case is not good enough. In my judgment the same principle holds good in this jurisdiction although we do not have a practice direction as that before the English court

[6] 1999) 1 WLR 984 by Potter LJ at 993B
[7] (1913) AC 417

specifically requiring an applicant to identify the document or the class of document that he wishes to inspect. This must follow from the finding that the public does not have an unfettered right to inspect court files and from the rule itself which gives the court a discretion. Such a discretion can only be exercised if proper reasons are given and this to my mind must translates into an applicant having to show that he or she has a good or legitimate reason for inspecting the file and this must include being able to identify the document or class of document in which he or she is interested. Of course one recognizes the limitations and the difficulties involved in such an exercise as the applicant is to an extent working in the dark. That the initial application was too widely cast was impliedly conceded by Mr. Fay as he in his submissions sought to restrict the scope of his request as set out in para 17 of his written submissions and in his draft order.

[30] Now, has TeliaSonera established that it has a legitimate reason for seeking permission to inspect and copy the files? Its first and indeed its primary ground methinks is the existence of Suit 109 against Alfa. This in essence is for the tort of inducing a breach of contract by the Cukurova Defendants. The wrongful acts relied on by TeliaSonera as having been committed by Alfa are the actual bringing of suits 72 and 73. Having regard to this and to the nature of the claims in Suits 72 and 73 and to the pleadings in so far as there are pleadings. I fail to see how access to these files can assist TeliaSonera in Suit 109. It is also significant to note that TeliaSonera has not identified any particular or specific issues arising in Suit 109 on which it thinks any document in Suits 72 and 73 will assist. This may be contrasted with Dian AO where the applicant identified the issue on which it was hoping to extract some assistance from the file to aid it in other litigation, which was the connection if any that Mr. Galmond and Mr. Reiman had with IPOC.

[31] TeliaSonera's second ground is the fact that it and the Cukurova Defendants seek substantially the same injunctive relief against Alfa. Mr. Fay learned counsel for TeliaSonera contended throughout his submissions that the actions were "inextricably linked" but he failed to demonstrate to the court any substantial link by reference to the pleadings. To use Moore-Bick J's words, TeliaSonera cannot be permitted to trawl through the files just in case it might find something helpful in them. The mere fact that the same relief is sought in another action by another person without more is not to my mind sufficient as we cannot overlook the fact that that relief is based on wholly different

grounds. In any event if the actions are so inextricably linked one would have expected an application for consolidation rather than this for inspection.

[32] TeliaSonera's third ground is the reference to the Geneva award in Suit 72. However, it expressly accepts that the award forms only "the background" to Suit 109. The award is not in issue in Suit 72 nor for that matter is it an issue in Suit 73. Furthermore, Alfa was not a party to the Geneva arbitration and therefore could have no pertinent document or knowledge that it is relying on in these actions that TeliaSonera would not be cognizant of as the arbitration was between TeliaSonera and Cukurova entities. The same is true of the Cukurova Defendants. And, to the extent that TeliaSonera relies on the Geneva award in Suit 109 TeliaSonera as a party to that arbitration is fully seised of all aspects of the arbitration and can need no help from Alfa who was not a party or the Cukurova entities. It seems to me that to hinge the application on this ground is merely a clever-seeming device to inspect documents on the court file and so gain an advantage which it is not entitled to. In any event if TeliaSonera has reason to believe that Alfa has relevant document or information it can utilize the procedures available under CPR for obtaining disclosure and further information in Suit 109 itself. Thus, TeliaSonera would suffer no prejudice if it is not permitted to inspect these court files.

[33] TeliaSonera's fourth ground is that it will be directly affected by the outcome of the applications in Suits 72 and 73 because of the consent order in Suit 109 and that it needs to inspect the documents to assess the risk that the protection provided by the consent order may be removed

[34] I agree with Mr. Levy that the protection given by the Consent order cannot be enhanced by giving TeliaSonera access to the documents on the files. TeliaSonera can only hope to obtain 100% protection if it proceeds with its own application for an interim injunction and succeeds as this injunction will stand whatever happens to the interim injunction in Suit 72. One also harbours no doubt that having regard to the experienced legal team representing TeliaSonera that if they were in any way dubious about the protection afforded by the Consent order they would not have hesitated to insist on Alfa providing them with all the documents filed in both suits prior to them entering into it. They did not do so and the obvious inference is that they were satisfied with the interim protection given by the Consent order. The likelihood that the Cukurova Defendant's injunction might be

discharged was a factor which obviously would have had to be taken into account before the consent order was made. These considerations relied on by TeliaSonera do not now amount to good reasons for permitting inspection.

[35] Finally, TeliaSonera says that it needs to inspect the documents to prepare for the hearing of its own application for an injunction. The short answer is that TeliaSonera ought not to have filed for an injunction against Alfa if it did not have the evidence to support it. If the application were not adjourned on the 25th May it would have had to proceed and what then – would TeliaSonera have asked the court to stand down its application until it sought and obtained permission to inspect? I think not.

[36] Having considered all the circumstances hereinbefore adverted to, in my judgment, TeliaSonera has not established that it has a legitimate interest in inspecting the court files and therefore it is not in the interests of justice to allow it to do so. No doubt, in due course, if Alfa has relevant documents that TeliaSonera thinks it is entitled to see then TeliaSonera will be entitled to seek disclosure of them as the matter progresses at the appropriate time but it cannot seek to steal a march by employing this tactic now. TeliaSonera's application is therefore dismissed with costs to Alfa and Cukurova to be assessed under CPR 65.11 if not agreed.

[37] In closing I observe that under CPR 3.14(1)(a) and (c) that TeliaSonera can obtain copies of the claim form and of all orders in both Suits upon paying the requisite fee and that in fact it has as a matter of courtesy been given copies of the pleadings in both suits by the Cukurova Defendants. I also recall that Mr. Levy, in the interests of practicality did at the very outset offer to provide certain documents from Suit 72 and Suit 73 to TeliaSonera if TeliaSonera were minded to accept this offer and to not pursue the applications. The Court had even stood the matter down to enable this to be further explored. It must also be remarked that Mr. Levy's offer was not as altruistic as it appeared as it was made with the express hope that a similar pragmatic approach would be taken by TeliaSonera and the Cukurova Defendants on Alfa's request for disclosure of documents including the arbitration documents.

[38] However, TeliaSonera was not tempted by the offer and chose to proceed with the applications. Thus, Mr. Levy is not bound by his offer and I will make no order in that respect as mooted hopefully by Mr. Fay after the oral decision was rendered. The stakes

are high and TeliaSonera chose to go for the whole loaf rather than settle for half or as Mr. Levy put it to eschew the bird in the hand in favour of the one in the bush. There is always an inherent risk in so doing which no doubt was well appreciated.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands