THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

(CIVIL)

CLAIM NO: BVIHCV2007/0109

BETWEEN:

TELIASONERA FINLAND OYT

Claimant

And

ALFA TELECOM TURKEY LIMITED

Defendant/Respondent

Appearances:

Mr. Nicholas Stalden, QC and with him Mr. Ben Valentin for the Claimant
Mr. Stephen Smith, QC and with him Mr. Robert Levy and Mr. Oliver Clifton for the Defendant

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2007: September 18, 19, 21,
October 9, November 15
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JUDGMENT

Thomas J (Ag.): The nature of these proceedings dictate that there must be an outline of certain facts and contentions *ab initio*

Background

[1] The Claimant, TeliaSonera Finland Oyt of Tcollisuusrata, 15 PL 106, 0051, Senera, Helsinki, Finland ("TeliaSonera") is a company incorporated under the laws of Finland. It is a wholly-owned subsidiary TeliaSonera AB, a Swedish corporation and a leading telecommunications provider in the Nordic and Baltic regions.

[2] The Defendant, Alfa Telecom Turkey Limited ("Alfa") is a part of the Alfa Group which is a diversified Russian financial and industrial conglomerate.

[3] Alfa owns a 49% equity in Cukurova Telecom Holdings Limited ("Cukurova Telecom") being a company incorporated under the laws of the British Virgin Islands. In turn Cukurova Finance International Limited ("Cukurova Finance"), a wholly owned subsidiary of Cukurova Holdings AS ("Cukurova Holding").

[4] On 21st October 1999 TeliaSonera and Cukurova Holding together with three other shareholders executed the Turkcell Holding Shareholders Agreement. This Agreement provided for the formation of a company called Turkcell Holding A ("Turkcell Holding") being a Turkish holding company that owns 51% of Turkcell Iletisim Hizmetleri A.S. ("Turkcell"), a Turkish corporation which provides mobile telephone service in Turkey.

[5] Based on its interpretation of the Agreement, the Claimant contends that the said Agreement placed certain restrictions on the transfer of shares in Turkcell Holdings to a third party by requiring certain notices to be issued to the other party giving rise to the right of first refusal. It is further contended that the restrictions regarding the transfer of shares do not apply as between shareholders or their affiliates provided that affiliates become parties to the Agreement. Another alleged restriction relates to the creation of any lien with respect to the shares in Turkcell Holding without the prior written consent of the other party.

[6] The Claimant also contends that in March 2005, Cukurova Holding contracted to sell its Turkcell Holding shares to it. However, rather than completing the transaction, Cukurova Holding publicly announced publicly that it was seeking possible alternatives to the transaction with the Claimant. Then on 1st June 2005 Cukurova Holding and Cukurova Finance International executed a Subscription Agreement with the Defendant, Alfa. This resulted in the incorporation in the BVI of Cukurova Telecom Holding ("Cukurova Telecom"). Fifty-one percent of the shares of Cukurova Telecom were held by Cukurova

Holding, through its wholly owned subsidiary, Cukurova Finance International Limited, which was also incorporated in the BVI, and the other forty-nine percent of the shares were held by Alfa.

[7] Pursuant to the arrangements under the Subscription Agreement, Alfa agreed first to acquire bonds convertible into a 49% equity interest in Cukurova Telecom, a wholly-owned subsidiary of Cukurova Holding, to which the said Cukurova Holding would transfer its shares in Turkcell Holding. For this Arrangement Alfa paid US $1.593 billion. The other part of the arrangement under the subscription Agreement is that Alfa also agreed to enter into a Secured Facility Agreement whereunder it would grant a loan of US $1.35 billion to Cukurova Holding subject to certain conditions precedent.

[8] The Secured Facility Agreement was executed on 28th September 2005 between Alfa, Cukurova Holding and Cukurova Finance. The Agreement provided for, inter alia, the taking of the shares covered by the arrangement on the occurance of an ‘‘Event of Default.”

[9] The Claimant contends that at the time when the Security facility was executed, the conditions precedent to it as set out in the Subscription Agreement had not been satisfied.

[10] In the meanwhile Alfa commenced proceedings in the High Court of the British Virgin Islands against Cukurova Holding and Cukurova Finance[1] on the one hand and Cukurova Finance, Cukurova Telecom, Cukurova Holding and Hevd Sevices[2], on the other. In these proceedings Alfa is seeking a declaration that under the Secured Facility Agreement an ‘Event of Default’ had occurred and rectification of the Register of members of Cukurova Finance and Cukurova Telecom so as to record Alfa as a shareholder.

[1] Claim No. BVIHCV 2007/0072
[2] Claim No. BVIHCV 2007/0073

PRINCIPAL PROCEEDINGS

[11] It is against the foregoing background that the Claimant ("TeliaSonera") on the 17th May 2007 filed a claim form in which Alfa was named as Defendant. The nature and extent of the relief sought is as follows:

> "1. An injunction restraining the Defendant, by its servants, agents or otherwise from:
>
> a. Pursuing or taking any steps in its Claim No. BVIHCV 2007/0072 and/or its Claim No. BVIHCV 2007/0073 unless and until Cukurova Telecom Holdings Limited has transferred its shares in Turkcell Holding AS to Cukurova Holding AS;
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> b. Otherwise procuring, inducing or causing Cukurova Telecom Holdings Limited and/or Cukurova Holding AS to breach the provisions of the agreement made between the Claimant, Cukurova Holding AS, Yapi ve Kredi Bankasi AS, Pamukbank TAS, Turkiye Genel Sigorta AS and Pamuk Factoring AS dated 21 October 1999 ("the Turkcell Holding Shareholders Agreement"); and
>
> c. Taking any further or other steps to effect or complete a transfer of ownership of Cukurova Telecom Holdings Limited directly or indirectly from Cukurova Holding AS to the respondent unless and until Cukurova Telecom Holdings Limited has transferred its shares in Turkcell Holding AS to Cukurova Holding AS.
>
> 2. Further or alternatively, damages in an amount to be determined sufficient to compensate the Claimant for the loss of its contractual rights under the Turkcell Holding Shareholders Agreement; and
>
> 3. Costs;
>
> 4. Further or other relief."

INTERLOCUTORY PROCEEDINGS

[12] On 17th May 2007 also the Claimant filed an application seeking an order in terms of the draft annexed to the said application. Effectively the relief sought in these proceedings are the same as those sought in the claim form and reproduced above as sub-paragraphs 1(a) – (c).

[13] In the application it is stated that the grounds of the application are set out in the affidavit of John Louis Hardiman dated 17th May, 2007. And at paragraphs 53 to 55 of that affidavit the following is deposed:

> "53. If an interlocutory injunction is not granted in the terms sought by the Claimant, but it is held at trial that Alfa Turkey is not entitled to rectification of the register, the Claimant will suffer loss which cannot adequately be remedied by an award of damages. The Claimant will be deprived of its ability to enforce its contractual right recognized in the Partial Award in the Geneva Arbitration to buy the Turkcell Holding shares and its right sought in the Vienna Arbitration to require Cukurova Holding to secure the prior transfer to it by Cukurova Telecom of these shares thereby putting Cukurova Holding in a position to honour its agreement to sell them to the Claimant. The Claimant will also have lost the contractual protection afforded to it in the Shareholders Agreement against being forced to be a minority shareholder in Turkcell Holdings with a majority shareholder without the protection of its rights under Clause 3.02 of the Shareholders Agreement. The Claimant would not have entered into the Shareholders Agreement, as executed, if it had been exposed to the risk, without contractual protection, of the Turkcell Holding shares being transferred to Alfa Turkey and/or Alfa or any third party as a majority partner.
>
> 54. By contrast, if an interlocutory injunction is granted, and it is held at trial that Alfa Telecom was entitled to rectification of the register, it would then take the benefit of 100% of the Cukurova Telecom shares. There is no risk of these shares being dissipated by the Claimant in the meanwhile. Nor is there any evidence of any damage that Alfa Turkey would suffer by a temporary delay in the register being rectified, still less any damage incapable of being remedied by an award of damages.
>
> 55. For these reasons, I believe that the balance of convenience plainly lies in favour of granting the Claimant the injunction relief it seeks."

[14] On 25th May 2007 the parties by their legal practitioners appeared before Madam Justice Rita Olivetti at which time a consent order was approved.

[15] This order "the first order" has an important bearing on the procedural aspects of the application and for this reason it warrants full reproduction. It is in these terms:

> "ORDER

AND UPON the Defendant, by its legal practitioners, Messrs Walkers giving an undertaking that (1) it will not make any application (or cause or consent to the making of an application by Cukurova Finance International Limited or Cukurova Holding AS, collectively "Cukurova") which could result in the injunction dated 27 April 2007 in BVI HC 2007/0072 being discontinued prior to the effective hearing date of the Claimant's application for an injunction dated 17 May 2007, and (2) it will give the Claimant notice forthwith of any application made by Cukurova independently to discontinue the injunction dated 27 April 2007 in BVI HC 2007/0072 prior to the effective hearing date of the Claimant's application for an injunction dated 17 May 2007 upon receiving notice of such application and (3) it will give the Claimant notice forthwith of the effective date of Cukurova's application to continue the injunction dated 27 April 2007 in BVI HC 2007/0072 upon receiving notice of such date and (4) it will not take any steps to seek to fix the effective date for the hearing of Cukurova's application to continue the injunction dated 27 April 2007 in BVI HC 2007/0072 for a date prior to the effective hearing date of the Claimant's application for an injunction dated 17 May 2007 and if Cukurova takes any such step, it acknowledges that, notwithstanding paragraph one below, the Claimant may need to take steps necessary to protect against the scheduling of the effective date of such application for a date prior to the effective hearing date of Claimant's application for an injunction dated 17 May 2007 and the Defendant reserves its rights on such application by the Claimant.

AND UPON the entering of an order dated 24 May 2007 in BVI HC 2007/0072 continuing the injunction granted therein dated 27 April 2007 to a date to be fixed for hearing after 6 July 2007.

UPON HEARING Michael J. Fay, Counsel for the Claimant, with him Robert Foote, and S. Jack Husbands, Counsel for the Defendant, with him Oliver Clifton

IT IS ORDERED BY CONSENT THAT:

1. The Claimant's application dated 17 May 2007 seeking injunctive relief be adjourned to a date to be listed for hearing after Friday 6 July 2007 at a date convenient to the parties and the Court.

2. The Defendant's evidence in response to the First Affidavit of John Hardiman dated 17 May 2007 shall be served by 4pm on Friday 15 June and the Claimant's evidence in reply, if any, shall be served by Friday 22 June 2007.

3. The parties' skeleton arguments shall be exchanged by 4pm on Friday 29 June 2007.

4. The parties shall agree and lodge bundles in Court at least 3 business days before the hearing.

5. Costs in the cause.

BY THE COURT
Sgd.
DEPUTY REGISTRAR"

[16] The sequel to the first order is that the following affidavits were filed:

1. 6th July 2007: Affidavit of Christopher George Hardiman (on behalf of the Defendant)

2. 10th July 2007: Affidavit of Gul Orutan Nilsson (on behalf of the Defendant)

3. 27th July 2007: Second affidavit of John Louis Hardiman (on behalf of the Claimant)

4. 30th July 2007: Affidavit of Hans Mikael Savola (on behalf of the Claimant).

5. 3rd August 2007: Affidavit of Professor Dr. Nami Barlas (on behalf of the Claimant

6. 14th September 2007: Third affidavit of John Louis Hardiman (on behalf of the Claimant)

7. 10th September 2007: Second affidavit of Gul Orutan Nilsson (on behalf of the Defendant)

8. 10th September 2007: Affidavit of Hans Sundblad (on behalf of the Defendant)

[17] Given the dates on which some of the above-mentioned affidavits were filed and the content of the Court's order of 25th May 2007, it is recognized by both sides that rulings on admissibility will have to be made in some cases.

LEGAL CONTEXT OF INTERLOCUTORY INJUNCTION

[18] Given the nature and complexity of these proceedings, it is considered necessary to outline the legal context of an interlocutory injunction.

[19] It begins appropriately with David Bean, INJUNCTIONS (7th ed.) at page 28 with this learning:

> "The hearing of an application for an interlocutory injunction is not a trial or its merits. There is usually no oral evidence and no opportunity for cross-examination. The full pre-trial processes of discovering and inspection of documents have not occurred; indeed the statement of claim and the defence may not yet have been served. The criteria applied must inevitably be different, because neither sides case can be 'proved' as at a final hearing.
>
> Nevertheless it must not be thought that interlocutory injunction are in any way a secondary or temporary remedy in practice."

[20] In the celebrated case of AMERICAN CYANAMID v ETHICON (1975) 2 WLR 316 Lord Diplock explored the issue in some detail. The following relevant dicta are to be found at pages 320 – 323:

> "The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence as to the facts on which the claim's of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature consideration. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing: *Wakefield v Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[21] After a serious analysis of the AMERICAN CYANAMID case, Mr. Justice Laddie in SERIES 5 SOFTWARE Ltd v CLARKE ET AL (1996) 1 ACL ER 853, 64 tendered the following:

> "Accordingly it appears to me that in deciding whether to grant relief, the court should bear the following matters in mind. (1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts in the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view that the court may reach as to the relative strength of the parties' cases."

[22] While all of the foregoing is without a doubt relevant to these proceedings, the immediate principle that needs to be stressed at this juncture is that it is not the duty of the Court in interlocutory proceedings to determine questions of law or fact.

[23] The learning is that the matter of interlocutory injunctions is usually analized under the following heads: a serious question to be tried; inadequacy of damages, balance of convenience and special cases. However, a unique feature attends this application in that it involves both substantive and procedural law.

[24] The matters of procedural law are raised in the written submissions tendered on behalf of the Defendant and are such a nature that they must be overcome by the Claimant in order that the substantive matter may be considered.

[25] The following are the matters raised in the written submissions of the Defendant: 1. the claim is based on inadmissible evidence; 2. the first affidavit of John Louis Hardiman is in breach of Rule 30.3(2) of CPR 2000, 3. the Claimant lacks standing to bring the proceedings. These matters must be considered seriation.

CLAIM IS BASED ON INADMISSIBLE EVIDENCE

[26] The submissions on behalf of the Defendant are directed at Rules 30.5(3) and 30.3 of CPR 2000. In terms of the former rule the submissions run thus:

" *(i) Breach of CPR 30.5(3)*

21 BVI CPR 30.5 (3) provides that:

> 'An affidavit may not be admitted into evidence if sworn or affirmed before the legal practitioner of he party on whose behalf it is to be used or before any agent, partner, employee or associate of such legal practitioner.'

22 Mr. Hardiman, the Claimant's London Lawyer, is a partner of Sullivan and Cromwell LLP. Their offices are at 1, Fetter Lane, London. His first affidavit was sworn before Oliver Harker at that address. Oliver Graeme Harker is an associate solicitor at Sullivan & Cromwell LLP's London offices. Mr. Hardiman's second affidavit was sworn before the same Mr. Harker, this time at an address in Islington, North London. Both these affidavits were clearly sworn in breach of the BVI CPR (and also the English CPR provisions). The swearing of an affidavit before a member of one's own firm is unheard of in England (and the BVI). There is an age old practice of solicitors attending before another firm in order to swear their evidence.

23 The BVI rule is mandatory; the "affidavit[s] may not be admitted into evidence" if sworn in breach of the rule. The Rules do not give the Court a discretion to admit such affidavits in evidence. Quite simply, those affidavits are inadmissible. With that, the Claimant's entire application falls away. There is no evidence to support it and it should be dismissed."

[27] In his oral submissions Mr. Stephen Smith, QC further elaborated on the written submissions in so far as the swearing of the affidavits of Mr. John Louis Hardiman is concerned. This is what he said[1]:

> "Now what's been suggested is that Mr. Hardiman's firm Sullivan & Cromwell are not the legal practitioner of the Claimant for the purposes of that rule. Well, that in our respectful submission can't possibly be right. There is no restriction in the CPR 30.3 to legal practitioners within the jurisdiction; and if one looks at Mr. Hardiman's two affidavits in the file, the first one in Tab 5, page 41, having said that he is a partner in Sullivan & Cromwell, an international law firm. So, the first paragraph of Mr. Hardiman's first affidavit, sentence one: 'I am a partner of Sullivan & Cromwell LLP, an international law firm.'

[1] Transcript of Chambers Proceedings for September 19, 2007 at page 14, lines 18 – 25 and page 15, lines 1-2

> Sentence two: 'The firm represents the Claimant in these proceedings on whose behalf I am authorized to make this affidavit. The firm represents the Claimant in these proceedings.
>
> There can't be any doubt that Sullivan & Cromwell are a legal practitioner of the Claimant that second sentence couldn't be clearer."

[28] Learned Queen's Counsel Smith ended his oral submissions on the point by saying that affidavits were re-sworn before another person but that in the circumstances of the case that is completely unacceptable.

[29] Mr. Nicholas Stadlen, Q.C. in his principal oral submissions in the point on the matter of the affidavits said that "…most astonishing point has been taken that because it was sworn in front of a member of a solicitor, an attorney in Mr. Hardiman's office in London, that for that reason it is simply [in] admissible…and what would otherwise be a case for an injunction…simply crumbles because of that technicality." In any event it is contended that the affidavits were re-sworn before a solicitor from another firm.

[30] In his rebuttal, Mr. Stadlen further addressed[1] the point by noting the critical words in Rule 30.5 (3) of CPR 2000 and the definition 'legal practitioner' in Rule 2.4. He continued as follows[2]:

> "In other words it isn't- - a legal practitioner is not a firm. Sullivan & Cromwell is not a legal practitioner. A legal practitioner has to be an individual.
>
> So,…'Sullivan & Cromwell'…is not the legal practitioner of the party but most important of all, the person in front of whom Mr. Hardiman's affidavit were sworn wasn't a legal practitioner of Telia either because he is not the legal practitioner of TeliaSonera nor a fortiori is he an agent for the legal practitioner of the party the legal practitioner for these purposes is Mr. Fay of Ogrer. The idea that the employee of Sullivan and Cromwell in front of who Mr. Hardiman swore his affidavit is an agent of Ogrer is, of course, fanciful. Now it's just, therefore, a thoroughly bad technical point. But…it goes way beyond that. What this is simply saying is that if Mr. Fay is the legal practitioner of TeliaSonera, you can't swear an affidavit in front of a solicitor employed Sullivan & Cromwell if you happen to be a partner of Sullivan & Cromwell. It simply doesn't bite, because the person in front of whom the affidavit was sworn in London if it was Sullivan & Cromwell, is not a legal practitioner of TeliaSonera."

[1] Transcript of Trial Proceedings for September 21, 2007, at page 44, lines 7-19
[2] Ibid at lines 20-24, page 45 lines 9-25 and page 46, lines 1-5

CONCLUSION

[31] As noted above, Rule 30.5 (3) is couched in these terms:

> "An affidavit may not be admitted into evidence if sworn or affirmed before a legal practitioner of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such legal practitioner."

[32] On 17th May 2007 John Louis Hardiman swore and filed his first affidavit. The material parts of the affidavit are as follows:

> "I, JOHN LOUIS HARDIMAN of Sullivan & Cromwell LLP, I New Fetter Lane London, El4A 1AN, United Kingdom, MAKE OATH and say as follows:
>
> 1. INTRODUCTION
>
> 1. I am a partner of Sullivan & Cromwell LLP, an international law firm. The firm represents the Claimant in these proceedings on whose behalf I am authorized to make this affidavit."

[33] In the jurat it is stated that the swearing took place at "one New Fetter Lane, London EL4A 1AN" before a Mr. Oliver Harker, a solicitor.

[34] It is clear that Rule 30.5 (3) constitutes an absolute prohibition so that as long as it is offended there is no discretion vested in the Court. It is equally clear that the objective of the Rule is to avoid conflicts of interest, collusion and in-breeding in the name of fairness and justice.

[35] Learned Queen's Counsel, Mr. Stephen Smith has no doubt that the impugned affidavit offends the rule because it is sworn by Mr. John Louis Hardiman of Sullivan & Cromwell before a solicitor of the same firm which represents the Claimant in this matter. On the other hand, Mr. Stadlen, QC resists these submissions by saying that the Rule addresses legal practitioners and as such Sullivan and Cromwell, not being a legal practitioner is outside the mischief of the Rule. But that distinction is both fanciful and optimistic. The fact of the matter being that a law firm is simply a group of legal practitioners operating a

partnership or otherwise. And it is clear that Mr. John Louis Hardiman is a partner in the firm of Sullivan & Cromwell which represents the Claimant. He says so.

[36] The fact that the business addresses of Mr. Hardiman and Mr. Harker are the same is critical in the equation and Mr. Smith in his submission goes on to say that Mr. Harker is in fact an associate solicitor at Sullivan & Cromwell LLP's London offices. But even if the 'evidence' of Mr. Smith is unacceptable, the mere fact that this affidavit was re-sworn before the same solicitor at a different address does not change the legal position in relation to Rule 30.5 (3). What it does is to lead to the reasonable inference that there was a legal difficulty with respect to the swearing. But the re-swearing on 14th September 2007 did not address the difficulty as Rule 30.5(3) prohibits the swearing of an affidavit before a legal practitioner of a party on whose behalf it is to be used or before any agent, partner, employee or associate of such legal practitioner regardless of where is it sworn.

[37] To argue, as Mr. Stadlen does, that the Rule is directed at legal practitioners rather than law firms, is equally fanciful. Indeed Mr. Smith countered by saying that the Claimant's action is also prohibited in England. This is borne out by David Beane who in the context of 'affidavits' says this: "Note that no oath or affirmation may be administered by a partner, agent or clerk of the solicitors for the party on whose behalf the affidavit is being filed."[1] It is not without significance that no case was cited on this point.

[38] In the circumstances the Court is prohibited from admitting the first affidavit of Mr. John Louis Hardiman into evidence. The second affidavit, apart from offending Rule 30.5 (3), it was also filed without the authority of the Court. The fact is that the order dated 30th May 2007 does not authorize the filing of a further affidavit by the Claimant beyond 22nd June 2007. Nor is there any record of leave being granted to the Claimant to file further affidavits beyond that date. And given the legal context, the admissibility of the re-sworn affidavit cannot be an "affront to justice"[2] as Mr. Stadlen asserts.

[1] Op. cit, at page 81
[2] Transcript of the Trial Proceedings for September 21st 2007 at page 47, lines 1 and 2

[39] Although the case of CASIMIR v SHILLINGFORD and PINARD (1967) 10WIR 269 has no direct bearing on CPR 2000, having been decided on 10th June 1967, it does reflect the attitude the Court in relation to the related question of the swearing of affidavits by legal practitioners appearing in a matter. The relevant dictum is that A.M. Lewis CJ at pages 269-270:

> "During the course of the argument, I made reference to the fact that it was not proper (I put it no higher than that) for a barrister who is going to appear in a cause to swear an affidavit in the same cause, even if he swears in his capacity as solicitor. In England, of course, barristers do not practice as solicitors and the rule without the rider which I have added may be found at the back of the white book relating to the conduct of barristers. It puts the court which has to pronounce upon the acceptability of the affidavit in an embarrassing position, when the person who made this affidavit as solicitor appears before it in the same cause as counsel…"

BREACH OF RULE 30.3(2) OF CRP 2000

[40] Learned Counsel for the Defendant also attacks the affidavits of Mr. John Louis Hardiman on the ground that their contents violate the requirements of Rule 30.3(2) of CRP 2000. Having outlined the provisions Mr. Smith, QC advanced the following:

> "25 These provisions are long established. Affidavits which do not comply with them are inadmissible, see *Re J L Young Manufacturing Co [1900] 2 Ch 753.*
>
> 26 The decision in *Re JL Young Manufacturing* was applied more recently by the Court of Appeal of Guyana in *Ramson v Barker* (1982) 33 WIR 183.
>
> 27 Neither of Mr. Hadiman's affidavits discloses the source of his information. In para. 1 of his affidavit he simply says:
>
> > 'The contents of this Affidavit are either within my own knowledge and are true or are derived from information accumulated during the period since May 2005 my firm has acted for the Claimant, inter alia in two related arbitrations to which I refer in this Affidavit, and are true to the best of my information and belief.'

> 'Information accumulated during the period since May 2005 my firm has acted' describes how-in a quite unacceptably general way-information has been acquired, but it does not identify the source of the information, it does not even identify the information which is being referred to, and it does not say that it is information gathered by Mr. Hardiman himself (in other words, it could be information received by some entirely different members of the firm, possibly at several steps removed). There can be little doubt that Rigby LJ would have found this evidence totally unacceptable and refused to admit it, and so should this Court.
>
> 28 The first paragraph of Mr. Hardiman's second affidavit is in materially identical terms to the first paragraph of his affidavit, and therefore that second affidavit is equally inadmissible.
>
> 29 This omission on the part of Mr. Hardiman is particularly troubling where his attempts to blacken the name of Alfa before this Court have been shown to be, to the knowledge of his clients, quite inaccurate. TeliaSonera has been involved in the IPOC proceedings that Mr. Hardiman describes and has access to information that will show beyond doubt that his evidence is wrong. ATT is entitled to know who provided the misleading account to Mr. Hardiman and confirmed its accuracy."

[41] In his oral submissions Mr. Smith revisited paragraph 1 of the first affidavit sworn on 17th May 2007 and contends that in terms of the source of information the words: 'are derived from information accumulated' and the words 'during the period since May 2005 my firm has acted for the Claimant,' do not constitute an acceptable description of the sources of the sources of information which he is giving to the Court on information and belief. All it is saying is that there is information accumulated by someone, we do not know who, during a particular period.

[42] Mr. Stadlen's response to the submissions of the Claimant were made in the rebuttal[1]. He contends that there is no infringement of the normal rule that the sources of factual assertions must be identified. It is further contended that learned counsel for the Defendant was unable to identify a single factual assertion that was not sourced. According to learned Queen's Counsel, Mr. Stadlen, the sources are identified in the relevant paragraphs of the affidavit as there is no rule that says you have to identify the sources at a particular part of the affidavit.

[1] Transcript of Trial Proceedings, for September 21st 2007, at page 48, lines 20-25 and page 49, lines 1-13

CONCLUSION

[43] The Court agrees with learned Counsel for the Claimant that there is no rule that requires the identification of sources at any particular part of an affidavit. And as far as Mr. Hardiman's first affidavit is concerned a perusal of same reveals that of its paragraphs that contain factual assertions only paragraph 17 does not identify a source. In any event this conclusion is academic as the affidavit has already been ruled inadmissible.

CLAIMANT'S STANDING TO BRING CLAIM

[44] It is the Defendant's contention that the Claimant has not established its standing to bring the claim. The submissions are as follows:

> "30 The TURKCELL Holding shareholders agreement of 1999 which is at the heart of the Claimant's claims of inducing breach of contract was executed by Sonera Corporation (*exhibits, tab 1, page 1 of JLH1).* The Claimant pleads that it was "formerly" Sonera Corporation 9see Amended Statement of Claim para 1). Paragraph 3 of the Defence does not admit that allegation (volume 1, tab 4, page 24). Furthermore, the Defence (para 5), makes no admissions about the due execution of the 1999 agreement and puts the Claimant to strict proof (*volume 1, tab 4, page 25).*
>
> 31 Notwithstanding these issues taken on the pleadings, the Claimant has chosen not to prove (beyond Mr. Hardiman's mere assertion) either that it was formerly Sonera Corporation or that Sonera Corporation executed the Shareholders Agreement, its claim does not therefore get off the ground: it has not established that it is entitled to bring these proceedings."

[45] In his oral submissions on the issue Mr. Stephen Smith QC elaborates further[1]. He contends that evidence reveals three companies: 1. In the Turkcell Shareholders Agreement dated October 21st 1999, one of the parties is Sonera Corporation organized under the laws of Finland the others are Cukurova Holdings and other Turkish companies. 2. In the said Agreement at clause 2.02 'Sonera agrees to cause Sonera Holding BV to

[1] Transcript of Chamber proceedings, for September 19th 2007, at pages 28, lines 19-25, 29, lines 1-19

transfer to the company[1]…'. 3. In the claim form there is a company by the name of TeliaSonera Finland OIG. Learned Queen's Counsel continues in this fashion[2]:

> "Now, we therefore have these company names. We do not have company numbers. It is not immediately apparent that we are talking about the same companies or which companies we're talking about. In the Amended Statement of Claim in the first paragraph, it is pleaded that TeliaSonera the Claimant, was formerly Sonera Corporation. We can see that in Bundle1 Tab3 on page7. That is something which in paragraph 3 of our defence we did not admit.
>
> Now in his evidence, Mr. Hardiman assuming, against the earlier argument, that it would be admissible, not of course, without conceding that point and without preference to it, Mr. Hardiman at page 42 says in paragraph 3 that 'TeliaSonera Finland OIG was formerly Sonera Corportaion.' In paragraph 8, however, he says something slightly different 'TeliaSonera Finland under its predecessor name Sonera Corporation.' And then in my learned friend's skeleton argument at paragraph 3, subparagraph 1, one sees…: 'In October 1993, TeliaSonera, a Finnish company, and Cukurova Holding executed a shareholders agreement.'

[46] Mr. Smith goes on to say that having regard to the merger between Telia, a Swedish company and Sonera, a Finnish company, it is usual for companies to appear or disappear and rights get transferred. He says that in this case the result is unclear. Learned Queen's Counsel ends his submission on the point thus[3]:

> "The suggestion from the skeleton argument is that there was a predecessor company which was a party to the Agreement. That would mean that the Claimant does not have the standing to bring the claim unless there was some form of assignment which, of course hasn't been produced, and we carefully…on at least two occasions yesterday, my learned friend in argument referred to Sonera, the party to the Agreement, being a predecessor company of the Claimant i.e. So…great doubt about the proper identity of the Claimant and the Claimant not having established that it has title to bring these proceedings….".

[47] Mr. Stadlen in rebuttal[4] dealt with the issue by saying that it was only raised in the skeleton arguments on behalf of the Defendant's and also that Mr. Hardiman did not take the point in his affidavit. In any event Mr. Stalden informed the Court that Mr. Hardiman in his third

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[1] 'Turkcell Holdings" as stated in preamble to the Agreement.
[2] Transcript of Chamber proceedings for September 19th, 2007 at page 29, lines 20-25 and page 30, lines 1-25
[3] Transcript of Chamber Proceedings for September 19th 2007 at page 31, lines 16-25 and page 32, lines 1-3
[4] Transcript of Trial Proceedings, for September 21st, 2007 at page 53, lines 15-25, page 54, lines 1-24

has exhibited the relevant document that shows that indeed TeliaSonera is the successor to Sonera.

[48] Mr. Stalden ended his rebuttal on the point in this way:

> "In any event even without that further affidavit, paragraph 1 of the Amended Statement of Claim which says that Sonera, Telia is successor of Sonera is supported by a statement of truth sworn on the instructions of the Claimant. And in the absence of any serious evidence that the proposition is incorrect, that suggests that it is fanciful. And in any event as your Lordship knows, the Vienna arbitration is brought by TeliaSonera on the basis of an arbitration agreement in the Turkcell shareholders agreement, and Cukurova has taken no objection that the arbitrators have no jurisdiction because it's the wrong party."

CONCLUSION

[49] Paragraph 1 of the statement of claim does not advance the matter of standing any further as the Defendant has not accepted the averment. This was re-stated by Mr. Smith.

[50] The greater point is that it cannot be seriously doubted that the legal status of the Claimant is stated in a number of ways which gives rise to some uncertainty. And the fact that Cukurova did not take objection with respect to the jurisdiction of the arbitrators does not alter the legal reality. In truth the mere fact that an attempt was made to file "the relevant document" makes the point on standing and, in any event, it is also academic. This is because the ruling of the Court on the first affidavit of Mr. John Louis Hardiman effectively undermines the Claimant's case in these proceedings.

[51] The matter of the Claimant's standing is well illustrated by paragraph 1 of its Amended statement of claim which reads thus:

> "1. The Claimant TeliaSonera Finland oyj ("the Claimant") (formerly Sonera Corporation) is a private company organized under the laws of Finland. TeliaSonera Finland is a wholly-owned subsidiary of TeliaSonera AB ("TeliaSonera") a Swedish corporation that is a leading telecommunications company in the Nordic and Baltic region."

[52] To say that a company was formerly Sonera Corporation, implies at minimum that there was at least a change of name under the laws of Finland, but, there is no evidence in this regard. 'Predecessor name' again implies some other legal circumstance. Again there is no evidence that is properly before the Court.

[53] The Court therefore agrees with the Defendant that the Claimant has not established its standing to institute these proceedings.

ORDER

[54] IT IS HEREBY ORDERED AND DECLARED as follows:

1. The first affidavit of Mr. John Louis Hardiman filed on May 17th 2007 is in conflict with Rule 30.5 (3) of CPR 2000 and is inadmissible.

2. The re-sworn first affidavit filed on September 14th 2007 is also in conflict with Rule 30.5 (3) of CPR 2000 and was filed without leave of the Court and as such is equally inadmissible.

3. The Claimant has not established its standing to initiate these proceedings.

4. The Claimant's application filed on May 17th, 2007 is accordingly dismissed.

5. The Claimant must pay costs to the Defendant to be assessed under Part 65.12 of CPR 2000.

POSTSCRIPT

[55] This judgment has taken some time to deliver; but the reason for the delay was alluded to by learned Queen's Counsel on both sides at page 82 of the Transcript of Trial Proceedings for September 21st, 2007.

The Court must again place on record its deep appreciation for the advocacy and scholarship on all sides in these proceedings.

Errol L. Thomas
High Court Judge (Ag.)