BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0109

BETWEEN:

TELIASONERA FINLAND OYJ

Claimant/Applicant

and

ALFA TELECOM TURKEY LIMITED

Defendant/Respondent

Appearances:

Bankim Thanki QC with Michael Fay and Ben Valentin of Ogier for Teliasonera Finland OYJ

Stephen Smith Q.C. with Oliver Clifton of Walkers for Alfa Telecom Turkey Limited

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2008: March 12th, 13th, 14th
April 4thth, 10th and May 9th

JUDGMENT

(Commercial Law – Claim for inducing breach of contract – application for interim injunction – whether claimant has established arguable case for tort – elements of tort of inducing breach of contract
Delay- whether claimant's delay in seeking relief so lengthy that would be inequitable to grant relief if claimant otherwise entitled to relief
Fortification of cross-undertaking as to damages – whether court should order fortification – principles to be considered)

[1] **JOSEPH-OLIVETTI, J:** The almost Nordic saga of the struggle for the Turkcell shares continues in these Virgin Islands but this time the Alfa group faces off against the Teliasonera group. The parties cross sabres in an application by Teliasonera ("Telia") for an interim injunction against Alfa Telecom Turkey Limited ("Alfa"). The court heard the application over a period of 3 days and reserved its ruling pending receipt of post-hearing submissions which were filed on 4th and 10th April respectively plus it received a final missile from Alfa by way of Walkers letter of 17th April.

Brief History and Allegations

[2] As Telia stated in its written submissions at p. 13 - "Although the factual background to this application is somewhat complex, the purpose of TeliaSonera's application is comparatively simple; … it is to restrain Alfa from registering or attempting to register the transfer of any shares of Cukurova Telecom of which it is not already the legal and registered owner (or taking any further or other steps to effect or complete such a transfer), on the basis that, as TeliaSonera submits, to do so would constitute a breach by Cukurova Telecom, deliberately procured by Alfa, of Cukurova Telecom's obligations under the THSA.." The THSA is the cornerstone of Telia's application and I will return to it shortly.

[3] This application arises out of a dispute concerning the ownership of Cukurova Telecom a company incorporated here. Cukurova Telecom holds a significant shareholding in Turkcell Holding AS ("Turkcell Holding"), a Turkish corporation, which in turn holds shares making up a 51% stake in Turkcell Iletisim Hizmetleri ("Turkcell") another Turkish company. Turkcell is a major provider of mobile telephone services to the Turkish market and its shares are of considerable value. On Alfa's evidence the bloc of shares with which we are concerned are estimated to be in the range of $ 1.8 billion to $2.9 billion. as it reflects the value of the Turkcell shares which are quoted on both the Istanbul and New York Stock Exchanges.

[4] There are three relevant groups of companies, namely, the Alfa group, the Cukurova group and the Teliasonera group. The Alfa group is based in Russia and has substantial interests in banking, oil exploration, the retail industry and telecoms across the world but especially in former Eastern bloc states. Alfa Telecom Turkey ltd ("Alfa") is a company incorporated in the British Virgin Islands ("the BVI") and is part of the Alfa group. The Cukurova group is based in Turkey and has interests in the Turkish banking, media, entertainment and telecoms industries.

[5] The Teliasonera group is based in Scandinavia and is substantially owned by the governments of Sweden and Finland. It has extensive interests in telecoms.

[6] In 1999, the Teliasonera group and the Cukurova Group or companies associated with it caused Turkcell Holdings to be incorporated to develop the business of Turkcell and to set forth the terms and conditions of Turkcell Holding and the parties continuing cooperation as shareholders. It, I noted that both groups of companies had a significant holding in

Turkcell immediately prior to the formation of Turkcell Holding which holdings were transferred to Turkcell holding... On incorporation, the Teliasonera group held a 47.09% interest in Turkcell Holdings and the remaining 52.91% was then owned by the Cukurova Group or companies associated with it.

[7] The ownership of shares in Turkcell Holding and the relationship between the shareholders was governed by a shareholders agreement ("the THSA). The THSA was executed in October 1999 by Telia (then named Sonera Corporation), Cukurova Holding A.S. (Cukurova Holding) a Turkish corporation and various other Cukurova-related parties (collectively "Cukurova").

[8] In this action, Telia's substantive claim is founded on the common law tort of inducing breach of contract. Telia's primary submission is that Alfa should be restrained by injunction because by its conduct in instituting Claim No.72 and 73 against the Cukurova group here it is knowingly and unlawfully threatening to induce/procure Cukurova Telecom to breach the terms of the THSA by which Cukurova Telecom has agreed to be bound.

[9] Telia considers that the THSA gives it pre-emption rights over the Cukurova group's shareholding in Turkcell Holdings and this is the underlying reason behind this action.

[10] To put it simply, if that can really be done within the confines of this judgment, the main events leading up to this action are alleged to be as follows. In late 2004, the Cukurova group ran into serious financial difficulties. In early 2005 it approached Telia about Telia purchasing its Turkcell Holding shares for cash. Telia was receptive and Cukurova Holding agreed to sell its Turkcell Holding shares to Telia. However, instead of closing the transaction, Cukurova Holding advised Telia in May 2005 that it intended to look for possible alternatives.

[11] Telia regarded this as a breach of the agreement for sale and embarked on an ICC arbitration in Geneva in 2005. The Geneva tribunal in a partial award dated 15th January 2007 held that Cukurova Holding had agreed on 9th May 2005 to sell its Turkcell Holding shares to Sonera Holding BV (a Dutch company which is a wholly-owned subsidiary of Telia) and that the parties are obligated to use good faith efforts to close the transaction.

[12] In the meantime, unknown to Telia, the Cukurova group began negotiations with the Alfa group and in late 2005 executed a series of transactions which closed on 25 November 2005 ("the Alfa/Cukurova transactions"). The net effect of the Alfa/Cukurova transactions

is that the Cukurova group formed, inter alia, Cukurova Telecom and transferred its Turkcell Holdings shares in steps to it. On receiving these Turkcell Holding shares and as required by the THSA, **Cukurova Telecom agreed in writing to be bound by the provisions of the THSA**. And, for approx. US$1.5 billion Alfa acquired bonds convertible into a 49% stake in Cukurova Telecom (this Alfa converted on 25th November 2005) and thereby an indirect 25.93% interest in Turkcell Holding and an indirect 13.22% interest in Turkcell). In addition, Alfa loaned US$1.352 billion to the Cukurova group. This loan was secured by the Cukurova group's 52.91% of shares in Cukurova Telecom over which the Alfa group took four share charges, two governed by English law and the other two by BVI law. The loan was drawn down and the charges completed on 25th October 2005. In addition Alfa granted an unsecured facility to the Cukurova group of US$355million.

[13] In connection with the Alfa/Cukurova transactions, neither Alfa nor Cukurova provided Telia with a Transfer Notice as Telia submits is required by Clause 3.02 of the THSA ,on the theory that Cukurova Telecom remained Cukurova's affiliate because Cukurova retained majority (51%) ownership of Cukurova Telecom (and therefore control of the Turkcell Holding shares held by Cukurova Telecom).

[14] The Alfa group's negotiations with Cukurova and consummation of the Alfa/Cukurova transactions in 2005 were carried out, as Alfa acknowledges, in full knowledge of both the THSA and Telia's contractual rights under it.

[15] On 16th August 2005, before the consummation of the Alfa/Cukurova transactions, Telia commenced ICC arbitration against companies in the Cukurova group in Vienna, Austria on the ground that the Alfa/Cukurova transactions violated Telia's rights under the THSA.

[16] On the day of the hearing before this court, Mr. Thanki informed us that the Vienna arbitrators had very recently delivered their award in favour of Telia. Both parties were given leave to file supplemental written submissions after the close of the case to address what weight if any the court should give to the Vienna award, hence the post trial submissions.

[17] It is the Alfa/Cukurova transactions which were implemented and which culminated in Alfa's efforts via legal action against the Cukurova group in the BVI to exercise its rights to appropriate the shares under the English share charges relying on alleged defaults of the loan agreement by the Cukurova group that has resulted in this action.

[18] The main events were as follows. In April 2007, Alfa first threatened to take majority ownership of Cukurova Telecom (and with it, control of a majority interest in Turkcell Holding). In early 2007, Alfa declared that Cukurova Finance had defaulted on its loan obligations and purported to call in its secured loan.

[19] On 16 April 2007, Alfa gave notice to Cukurova Finance and Cukurova Holding accelerating the loan and demanding full and immediate repayment of it.

[20] On the same date, Alfa issued two sets of proceedings in this Court against Cukurova group companies (1) seeking declaratory relief in relation to Cukurova Finance's alleged default on its loan obligations (Claim No. 72 of 2007 the secured facility claim) and (2) seeking declaratory relief in respect of its rights and rectification of the share registers of Cukurova Finance and Cukurova Telecom so as to record Alfa's name as shareholder of the entire share capital of both Cukurova Finance and Cukurova Telecom (Claim No. 73 of 2007- the rectification claim).

[21] Suit 72 was consolidated with a suit brought by Cukurova and a preliminary issue on whether Alfa had appropriated the Cukurova Telecom shares in accordance with that right as granted by the English share charges was determined by me in favour of Cukurova. An interim injunction which was granted by me at Cukurova's behest on 27th April 207 restraining Alfa in substance from dealing with those shares or obtaining a change of registration in their name remained in place pending appeal.

[22] Telia commenced this suit on 17th May 2007. The main relief sought is an injunction. It filed its application for an interim relief on the same day but when the application came on for hearing Telia and Alfa agreed to adjourn the application to a date to be fixed by the court after 6th July, 2007 on Alfa undertaking in essence not to itself make or consent to Cukurova making any application to discharge/discontinue the injunction in the Cukurova proceedings prior to the effective hearing date of Telia's application and to give Telia notice of any independent action by Cukurova to discontinue the injunction.

[23] This application has been called 'a renewed application' as it first came on for substantive hearing before Thomas, J. in September 2007. Thomas, J dismissed the application I am told, on purely technical grounds. Telia then embarked on a procedural appeal. The appeal was successful. Following the appeal the parties by consent order of 7th February 2008 agreed directions for the filing of revised Notice of Application, revised statements of

case and further evidence in preparation for this hearing.[1]

[24] The principal evidence on this application is contained in the following affidavits: filed on behalf of Telia:- the First, Second, Fourth and Fifth Affidavits of Mr. John Hardiman, the First Affidavit of Mr. Esko Rytkönen and the First Affidavit of Professor Barlas. And Professor Haluk Kabaalioglu, for Alfa, the First and Second Affidavits of Mr. Christopher Hardman and that of Professor Okutan. In addition the court of course has had regard to the pleadings.

The Law on the Grant of Interim Injunctions

[25] The law on interim injunctions is well established. The remedy is a discretionary one and the court's jurisdiction to grant such relief stems from s. 24 of the West Indies Associated States Supreme Court (Virgin Islands Order) Cap. 80 which empowers the court to grant such interlocutory relief if it is just and equitable to do so and on such terms as the courts sees fit. In exercising this power our courts have adopted the familiar test laid down by the House of Lords in **American Cyanamid v. Ethicon[2].** In substance, Telia must satisfy the court that it has a serious issue to be tried, that is, one that is not frivolous or vexatious and with a real as distinct from a fanciful prospect of success and that the balance of convenience favours the grant of an injunction. As this is an application for a quia timet injunction Telia must also show that it faces the risk of imminent harm.

Issues Arising

[26] The main issues arising are:-

(1) Whether Telia's claim raises a serious issue to be tried.

(2) Whether this being a quia timet injunction Telia currently faces any risk of imminent harm in light of the injunctive relief granted against Alfa in Suit 72 and Alfa's offer to undertake to give full notice to Telia of any discharge application.

(3) Whether the balance of convenience lies in favour of granting the injunction

[1] Pursuant to that order, Telia filed a revised Notice of Application, a revised draft order, a Re-Amended Statement of Claim and various further affidavits. Alfa filed an Amended Defence and one further affidavit.

[2] (1975) A.C. 396.

(4) Whether Telia has waived its right to complain of, or alternatively to seek injunctive relief in respect of, the events identified in its Re-Amended Statement of Claim.

(5) Whether Telia's failure to progress these proceedings and its delay in bringing this application is so inordinate as to deny it any entitlement it may have to injunctive relief.

(6) Whether the court should order fortification of the undertaking if it is minded to grant the injunction.

[27] First, I bear in mind the proper and reassuring admonitions of both counsel, that, having regard to the nature of this application I am not called upon to decide whether Telia will succeed on its substantive claim but only to decide whether Telia has a good arguable case, namely, one with a realistic as opposed to a fanciful chance of success. (I cannot help observing at the risk of being deemed facetious that I have heard arguments from Her Majesty's Counsel "learned in the law" for 3 days and that this in itself begs the question whether Telia has not shown that it has a good arguable case. Would that my task could be resolved so lightly!) I now turn to issue 1.

Issue I

[28] Does Telia's claim raise a serious issue to be tried or in other words, does Telia have a good arguable case for a claim for the tort of inducing breach of contract and does Telia have standing?

[29] The arguments of Mr. Smith Q.C. appearing on behalf of Alfa on this head can be summarized thus. Telia's claim assumes that if a wrong has been committed (or threatened) the wrong has been committed or threatened in the BVI as it is only if a tort has been committed here that the court can apply BVI tort law. No wrong or threatened wrong is taking place in the BVI as Alfa is only seeking certain declaratory relief in the Cukurova proceedings. If Alfa infringed any of Telia's rights, which is denied, such infringement took place in Turkey in 2005 when the Alfa/Cukurova transactions were being negotiated.. Further the THSA which is alleged to have been breached or in danger of being breached is governed by Turkish law. Therefore, this is a Turkish law claim and the preponderance of evidence from the Turkish law experts is that Turkish law does not

recognize a claim for inducing breach of contract. Alfa also relies on the rule in **Boys v. Chaplin**, the double actionability rule, and says that even if that rule is applicable Telia cannot satisfy it as it is unable to show that the actions complained of here would amount to a tort in both the BVI and Turkey.

[30] Further, even if one applied BVI law Telia's claim is bound to fail as Telia cannot establish that the entry into the Alfa/Cukurova transaction or any later action by Alfa was or would be a breach of the THSA. In addition, Telia has not shown that Alfa had the necessary intention to procure a breach of he THSA and the actual knowledge that a breach would result from is actions.

[31] In response, Mr. Thanki in short submitted that Telia in reliance on the evidence of Prof. Barlas has made out a good arguable case that Alfa's conduct complained of here would constitute an actionable wrong in Turkey both under the Turkey Code of Obligations TCO41/1 and TCO 41/11. That BVI tort law applies as the primary breaches complained of, the Cukurova proceedings, will take place in the BVI and if successful will result in the Cukurova group being in breach of their obligations under the THSA. That in any event even if there is a foreign element the substantive actions took place or will take place in the BVI and therefore BVI tort law will apply and that the double actionability rule is not relevant. He relied on **Metall & Rohstoff v. Donaldson Inc**[3]**.**

[32] Further, that there is evidence before this court to establish a good arguable case that Alfa had both the knowledge that a breach of the THSA would result from its actions and the requisite intent. That on the evidence Telia has made out a good arguable case that the Alfa/Cukurova transactions together with the Cukurova proceedings if successful would result in the Cukurova group handing over its shares in Turkcell Holding through the medium of Cukurova Telecom shares without the Cukurova group honoring their obligations under the THSA and that that would amounts to a breach or threatened breach of the THSA.

The law on the tort of inducing breach of contract

[33] It is common ground that the law on this subject has undergone considerable development

[3] [1990] 1 Q.B. 391

since May 2007 having regard to the tripartite decision of the House of Lords[4] in what I will loosely call the economic tort cases as that august body finally put paid to the idea of a unified theory of economic torts. Mr. Smith places particular reliance on **Mainstream Properties** as it dealt specifically with the tort under consideration and therefore I will refer to the salient facts of that case.

[34] In **Mainstream Properties** the claimant was a property development company which employed the first and second defendants to find suitable properties for development by the claimant. In breach of their contracts with the claimant, the two defendants diverted the purchase of development land to a joint venture consisting of themselves and the sixth defendant, who financed the project. The claimant brought proceedings against the first and second defendants for damages for loss of the opportunity to develop the site, **and against the sixth defendant for damages for inducing a breach of the first and second defendants' contracts of employment with the claimant**. The judge at first instance upheld the claim against the first and second defendants but dismissed the claim against the sixth defendant on the ground that although the sixth defendant knew of the first and second defendants' duties towards the claimant he had sought and been given assurances by them that there was no conflict of interest with the claimant and therefore he did not intend to procure a breach of the first and second defendants' contracts of employment or otherwise interfere with their performance. The trial judge's ruling in favour of the sixth defendant was upheld by the House of Lords.

[35] Lord Hoffman who rendered the majority decision in **Mainstream Properties** had this to say:-

> **"Liability for inducing breach of contract** was established by the famous case of **Lumley v. Gye [1853] 2 e & B 216**. The court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. As Erle J put it, at p. 232:
>
> > "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in

[4] **Mainstream Properties v. Young**, **Douglas and others v. Hello! Ltd. and others** and **O.B.G. Ltd. v. Allan [2007] 2 W.L.R. 920** hereinafter referred to as "OBG"

violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."

The forms of action no longer trouble us. But the important point to bear in mind about **Lumley v. Gye** is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. **Liability depended upon the contracting party having committed an actionable wrong**..." (Emphasis added.)

[36] Lord Hoffman looked at the historical development of the tort and explained the muddle that had arisen by treating the **Lumley v. Gye** tort of inducing breach of contract as one of a species of a more general tort of actionable interference with contractual rights under a unified theory of economic tort.

[37] The ratio of **Mainstream Properties** is summed up in the headnote at p. 922 para. 2:-

"That inducing a breach of contract was a tort of accessory liability, and an intention to cause a breach of contract was a necessary and sufficient requirement for liability; that in order to be liable a person had to know that he was inducing a breach of contract and to intend to do so with knowledge of the consequences; that a conscious decision not to inquire into the existence of a fact could be treated as knowledge for the purposes of the tort; that a person who knowingly induced a breach of contract as a means to an end had the necessary intent even if he was not motivated by malice but had acted with the motive of securing an economic advantage for himself; that, however, a breach of contract which was neither an end in itself nor a means to an end but was merely a foreseeable consequence of a person's acts did not give rise to liability; and that there could be no secondary liability without primary liability, and therefore a person could not be liable for inducing a breach of contract unless there had in fact been a breach by the contracting party."

Discussion

[38] Telia's primary case is that Alfa **threatens** to procure a breach by Cukurova Telecom of Clause 3.02(b) and/or Clause 3.02(c) of the THSA. The primary acts relied on (see para. 17 – 19A of the Re-Amended Statement of Claim) are the institution by Alfa of the Cukurova proceedings which on Telia's case if successful would result in Cukurova Telecom having to deliver its Turkcell Holdings shares to Alfa as owner without having to comply with Clause 3.02 of the THSA.

[39] The THSA is governed by Turkish law and so we must look to the Turkish law experts to determine whether Telia has made out a good arguable case that the breaches complained of or threatened will amount to a breach of the THSA by the Cukurova group.

[40] First, I remark that Mr. Smith contends that the court should disregard Professor Kabaalioğlu's affidavit and that of Mr. Rytkonen filed 18 February on the basis that foreign law must be pleaded and Telia has not pleaded the foreign law points raised by Prof. Kabaalioğlu. He relied on **Ascherberg, Hopwood & Crew Ltd. v. Casa Musicake Sonzopro [1971] 1 WLR 173. Ascherberg** undoubtedly reflects established law that foreign law is a matter of fact and must be pleaded if it is to be relied on. However, having regard to the state at which this action is at - no case management conference has yet been held or pleadings closed - it would be open to Telia to amend its pleadings and therefore to my mind it would not further the overriding objective to exclude this evidence. In so holding I am conscious of the fact that Alfa is not prejudiced by this ruling as it has had an opportunity to itself give evidence of foreign law and itself relies on foreign law to construe the THSA which both parties agree form the bedrock of this action. Further, if the court were to disregard Turkish law it would still have to consider the relevant provisions of the contract as if same were governed by English law, an artificial exercise which ought to be avoided if possible in the interest of upholding the contracting parties' bargain as no doubt they went to great pains to choose their governing law and we ought not lightly to ignore that.

[41] I have considered the contending submissions and the expert evidence on whether the actions complained of are actionable here.

[42] Having regard to the authorities and in particular to **Metall & Rohstoff** it is clear that where a tort involves a foreign element the court must apply the "substance" test in determining

where the tort was committed. If the tort was committed substantially in the BVI then BVI law would apply to determine whether or not an action exists and the double actionability rule does not apply.

[43] Without making any definitive finding on the substantive case, having regard to the evidence, I am of the view that Telia has established a good arguable case that the acts done by Alfa in the BVI threaten to procure a breach of the THSA by Cukurova and that BVI law governs this tort as although a foreign element is involved, the principal acts which would result in breach are taking place in the BVI.

[44] Thus, Telia must then go on to show that it has a good arguable case that the acts of which it complains amount to the tort of inducing breach of contract. In accordance with the principles laid down in **Mainstream Properties.**

[45] I have had regard to the respective experts evidence on the effect of the THSA and in particular to Clause 3.02(b) and/or Clause 3.02(c) and to the submissions. To my mind Telia has put forward a good arguable case that Telia has a right of pre-emption over the Cukurova group's Turkcell Holding shares and what has been called a 'come-along right' if the Cukurova group wish to transfer their Turkcell Holding shares to a party other than one of the original parties to the THSA or their affiliates. That, the THSA provides further that if Turkcell Holding shares are transferred to an affiliate then the affiliate prior to ceasing to be an affiliate must return the shares to the transferor and that Cukurova Telecom is bound by the THSA and in particular that clause and that Alfa if it obtains the relief it seeks in the rectification claim has no intention of allowing Cukurova Telecom to return the Turkcell Holding shares to the original Cukurova transferor and that this is a threatened breach of Cukurova Telecom's obligations under the THSA.

[46] Now I turn to the issue of intention and knowledge. Telia has to establish as part of its burden to establish a good arguable claim here that Alfa intended to procure a breach of contract on the execution and implementation of the Alfa-Cukurova transaction and knew that its actions including the Cukurova proceedings would result in a breach of the THSA.

[47] Alfa says that it genuinely believed that the implementation and execution of the Alfa/Cukurova transaction would not give rise to a breach of the THSA and referred to legal advice to that effect which it obtained in 2005 prior to consummating the Alfa-Cukurova transaction. Alfa did not waive privilege and therefore we do not know the

precise contents of this advice.

[48] On the pleadings and on the undisputed evidence Telia has made out a strong case that Alfa was aware of the THSA prior to beginning negotiations with the Cukurova group and that it was also aware of the Geneva arbitration proceedings by Telia to enforce its alleged contract yet it was not deterred. That Its aim/goal was to obtain Turkcell shares and that it seized the opportunity to do so by obtaining shares in Turkcell Holding from the Cukurova group via Cukurova Telecom and the intricate network of companies which were brought into being specifically for that purpose, some for merely a 'nanosecond' as was so colourfully termed by Mr. Thanki. It also appears that Alfa was alive to the possibility that it could not acquire those shares without circumventing the THSA.

[49] Further, the legal advice relied on comes from the lawyer who acted for Telia on the THSA, a fact Alfa knew and this further bolsters Telia's argument that the lawyer was in a potential conflict situation and casts doubts on Alfa's bona fides in seeking out his services. In addition, the court is cognizant of the fact that issues of knowledge and of intention cannot be decided on the mere say so of witnesses on paper and that these are eminently matters for cross-examination at trial.

[50] Alfa says also that Telia has not shown that the acts relied on are independently unlawful as instituting legal actions here, the primary acts relied on by Telia, are not unlawful in themselves. **Meretz Investments NV v. ACP Ltd.**[5] is relied on. However, I am not persuaded that it is an element in the tort of inducing breach of contract that the means used must be unlawful in themselves and that **Meretz** supports this proposition. I have had regard to the authorities cited and in particular to **Mainstream Properties and Total Network SL v Revenue and Customs Commissioners**[6], a case concerned with unlawful means conspiracy and whether criminal conduct could constitute unlawful means for the purposes of that tort. In my view Telia has made out a good case that in this tort (inducing breach of contract) the actions leading to breach of contract are not required to be unlawful in themselves or independently unlawful. In my preliminary view, in the tort of causing loss by unlawful means, the actions which give rise to breach must in themselves be unlawful but not so for the tort with which we are concerned. See Lord Hoffman at p. 950 para. 86:-

[5] [2007] EWCA 1303
[6] [2008] All ER (D) 160 (Mar)

> "The present case amply illustrates the dangers of a broad reading of Lord Macnaghten's reference to "interference" in **Lumley v. Gye (1853) 2 E & B 216** and the promiscuous application of cases on accessory liability (such as **Greig v Insole [1978] 1 WLR 302**) to a case which, on any view, can only be a case of primary liability. **There are only two possible causes of action: procuring a breach of contract in a way which creates accessory liability under Lumley v. Gye or causing loss by unlawful means.** It is, I think, plain and obvious that the requirements for liability under neither of these torts were satisfied. **There was no breach or non-performance of any contract and therefore no wrong to which accessory liability could attach. And the receivers neither employed unlawful means nor intended to cause OBG any loss.**"

[51] To sum up on the question of whether Telia has a good answerable case I find for the reasons advanced that Telia has crossed that initial hurdle. The next substantive argument advanced by Alfa is that Telia waived any breach which occurred by Cukurova entering into the Cukurova/Alfa transactions as it was aware since 2004 that Alfa was in negotiations with Cukurova.

[52] From the evidence it appears that although Telia knew of the negotiations it did not know of the precise terms of the Cukurova/Alfa transactions and so could not be taken to have any definitive knowledge that Cukurova/Alfa transactions would lead to a breach or threatened breach of the THSA. As soon as it had knowledge of a likelihood of breach it acted by bringing the Vienna arbitration proceedings against Cukurova and when it learnt of Alfa's actions to call in the security and appropriate the Cukurova Telecom shares under the Alfa-Cukurova transactions and the Cukurova proceedings it acted within the space of a month by bringing this action.

[53] It is well established law that waiver cannot apply unless one has full knowledge of what is being waived and in my view Telia has made out an arguable answer to the waiver issue.

[54] Next, Alfa contends that the balance of convenience favours it and that Telia will suffer no damage as a result of any breach as the shares the subject matter of the action are those of Cukurova Telecom to which Telia has no rights. This to my mind would be taking an overly simplistic view of the matter. According to Telia's case it has rights under the THSA which it says will be infringed and having regard to those rights it is readily apparent that

Telia would suffer damages from a breach of those rights and to my mind in these circumstances damages will not be an adequate remedy as it is well nigh impossible to put any real monetary values on such rights.

[55] Further, and in any event says Alfa, the grant of an injunction is discretionary and Telia had an injunction against Cukurova in October 2005 in the Geneva arbitration and that it did not persist with that remedy thus allowing Cukurova to conclude the valuable Alfa/Cukurova transactions of which it was aware. In my opinion this is a too facile interpretation of the reasons why Telia did not pursue that injunction. The reasons for not doing so can be gleaned from the Geneva partial award and in those circumstances I do not accept that Telia acted unreasonably in not maintaining the injunction and in any event it cannot be taken to have know of the full implications of the Alfa/Cukurova transactions to raise any question of waiver against it.

[56] Alfa also contends that Telia is in no imminent risk of harm because the injunctive relief granted against Alfa in the Cukurova proceedings provides more than sufficient protection against the consequences it complains of here. The court can take judicial notice of the fact that recently (22 April 2007) the Court of Appeal discharged the injunction which this court had granted against Alfa in the Cukurova Proceedings and this issue falls away although there is the possibility of a further appeal. In any event, I had not been persuaded that it was a good answer to Telia's claim for relief that Telia could be forced to rely on an injunction in proceedings to which it was not a party. It was therefore entitled to itself seek an injunction to protect its rights regardless of the state of affairs in the Cukurova proceedings and did not act unreasonably in refusing the offer to notify it of a discharge application.

[57] Alfa complains that Telia has delayed excessively in bringing these proceedings and that is a factor which the court should put in the balance against it. I do not accept that Telia ought to have brought proceedings against Alfa in 2005. In any event Telia could only have done so in turkey not he BVI at that time. Telia in fact instituted the Vienna arbitration against Cukurova in May 2005 for breach of the THSA. Alfa was aware of that and of the Geneva arbitration. It cannot be said that Telia slept on its rights such as to disarm Alfa. In the complicated circumstances of this case I do not accept that there was delay of such a nature that should weigh against Telia. I also do not consider that the

court should in all the circumstances treat the delay in progressing this action as such as to deprive Telia of its right to an interim injunction.

[58] Looking at the matter in the round, I am satisfied that Telia has a good arguable case against Alfa, that serious issues are raised including the development of the tort of inducing breach of contract and complex issues of Turkish law fall to be determined which cannot be answered except after a full investigation at trial. The balance of convenience favours the grant of an interim injunction as Alfa can continue to maintain its position as equitable mortgagee of the Cukurova Telecom shares, a status which is challenged here, until the determination of these proceedings and Alfa has not advanced grounds for saying that this would not be a just and convenient course to adopt. And damages would not be an adequate remedy.

[59] Next, I have considered the issue of fortification of the usual undertaking which is the price Telia is required to pay for the interim injunction. See Lindley L.J. at p. 253 in **Tucker v. New Brunswick Trading Co. [1890] 44 Ch. D. 249**.

[60] The court has discretion as to whether or not to order fortification and in considering the question must have regard to all the circumstances of the case.[7] In particular, I remark that Telia, although beneficially owned by foreign governments has no assets within the jurisdiction thus making it difficult for Alfa if eventually successful to enforce judgment. I note the approximate value of the Turkcell shares as given by Mr. Hardman which would be reflected in the value of the Cukurova Telecom shares. I have had no indication that if asked to provide fortification that Telia would be hampered in any way in pursuing this application, indeed every indication is to the contrary. Fortification is intended to provide a fund for compensation for damages to Alfa if it transpires that the grant of this injunction was wrong and that Alfa has suffered as a result. It is difficult to estimate what damages Alfa would suffer in that case but I accept that it would suffer damage but not the loss of the shares themselves. Therefore, to order fortification in the full value of the Turkcell shares as representing the value of the Cukurova Telecom shares as contended for by Alfa strikes me as inappropriate and wrong. In all the circumstances I am of the view that it is just to order fortification. I will treat the value of the Turkcell Holding shares held by Cukurova Telecom as US$2.9 billion and order fortification in the sum of 10% of that value.

[7] See Gee on Commercial Injunctions, 5th Ed., para. 11.004

This sum is to be paid into court within 21 days from the date hereof.

[61] Accordingly, for the reasons advanced I will grant the interim injunction prayed for until trial or further order. The court invites both parties to assist in settling the order. Costs of the application to be in the cause. The court pays tribute to both counsel for their comprehensive submissions both written and oral which proved of immense help in a case which could hardly be described as the usual run of the mill interim application case.

[62] By way of postscript I add the following. I acknowledge Walkers' letter of 17 April on behalf of Alfa in reply to Telia's post hearing submissions and the reference in particular to **Three Rivers DC v. Bank of England**[8] and **Executor Trustee and Agency Company of South Australia Limited v. The Deputy Federal Commissioner of Taxation**[9]**.** Based on **Three Rivers** Mr. Smith submits that the decision of the arbitrators in the Vienna award is not relevant and or persuasive material in deciding whether Telia's claim is frivolous and vexatious and that the fact that this court (and now the Court of Appeal) has held that Alfa is an equitable mortgagee of the Cukurova Telecom shares cannot be impugned in these proceedings. This case was not cited but I remark **John Forster Emmott v Michael Wilson & Partners Limited**[10] which seems to give rise to further thought on the uses which can be made of awards and documents generated in arbitration proceedings.

[63] I hasten to say that in view of this objection and despite my decision to admit the Vienna award at the hearing on the basis that both parties regarded it as relevant that out of abundance of caution the court has not taken any account of the Vienna as this too to my mind raise another serious triable issue.

[64] With respect to **Executor Trustee** although worthy of consideration it is not binding on this court coming from Australia. Suffice it to say it serves to illustrate that there are issues of moment both of fact and law which call for full investigation at trial. I take heart from the caveat of the House of Lords in **Three Rivers District Council and others v. Bank of England**, which albeit a decision on an interlocutory application to strike out pleadings as disclosing no realistic prospects of success, strikes me as apt, that the court should be astute not to deal peremptorily with emerging and or developing areas of law.

[65] I also bear in mind Lord Diplock's caveat in **American Cyanamid at p. 407 H** that on an

[8] [2003] 2 AC1 [HL]
[9] [1939] 62 CLR 545.
[10] [2008] EWCA Civ 184

application for an interlocutory injunction the court should not attempt to determine "difficult questions of law which call for detailed argument and mature considerations". Would that lawyers could give more consideration to the import of that admonition.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands

POST SCRIPT

On delivery of this ruling and on hearing Mr. Clifton's calculations of the sum ordered for fortification and on further reflection the court has varied the sum to US$29M as being more in keeping with the purposes of fortification and a fairer sum as that was the figure the court had in mind based on the court's own faulty arithmetic.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands