TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/012

BETWEEN:

ALFA TELECOM TURKEY LIMITED.

Appellant

and

TELIASONERA FINLAND OYJ

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Janice George-Creque — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Smith QC, Mr. Robert Levy and Mr. Oliver Clifton for the Appellant
Mr. Bankim Thanki QC, Mr. Michael Fay and Mr. Ben Valentin for the Respondent

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2009: January 14;
September 28.

Civil Appeal – Civil Procedure – Interim injunction – standing to seek injunctive relief - whether there is a serious issue to be tried – party already enjoined - whether there was imminent risk of harm – whether there was acquiescence or waiver so as to bar injunctive relief – whether there was delay so as to defeat claim for injunctive relief

Economic tort – tort of knowing interference – tort of inducing a breach of contract / whether cause of action sufficiently identified

Tort of conspiracy – whether sufficiently particularised

Fortification - quantum

The appellant ("Alfa"), a Russian-based conglomerate which controls a diversified range of businesses (including telecommunications companies), is the registered shareholder of 49% of the issued shares in Cukurova Telecoms Holdings Ltd. ("CTH"). CTH is part of a group of companies which may together be called "Cukurova". Cukurova holds some 33%

of the shares in Turkcell Holdings AS which is part of a group of companies that operate the largest mobile telecommunications business in Turkey. The respondent ("Telia") held some 47% of the shares in Turkcell Holdings.

Cukurova and Telia executed the Turkcell Holdings Shareholders Agreement ("THSA") in October 1999, which, among other things, restricted the free transfer of Telia's or Cukurova's shares in Turkcell Holdings to a third party. The THSA provided that if such a transfer of shares were contemplated, a transfer notice was required to be sent to the other existing shareholders who could exercise the "right of first refusal" or the "come along right". A transfer notice was not however required if the shares were being transferred to an "affiliate".

A Telia buy out of the Turkcell Shares ("the Shares") was discussed when Cukurova ran into financial difficulties in 2004. When Cukurova resolved to pursue other options, Telia commenced arbitration proceedings in Geneva and obtained interim measures against Cukurova which prevented Cukurova from disposing of the Shares. In November 2005, Telia withdrew the interim measures.

Cukurova then entered into an agreement with Alfa by which Alfa granted a secured dollar term loan facility in favour of Cukurova ("the Facility Agreement"). This included the grant of equitable mortgages to Alfa over the shares held in Cukurova. A number of share transfers ("the Alfa Transactions") were effected primarily between subsidiaries of Cukurova by virtue of which each subsidiary became bound by the THSA. No transfer notices were presented to Telia in respect of the Alfa Transactions.

Alfa alleged defaults under the Facility Agreement and appropriated the shares in Cukurova. Alfa commenced claims 72 and 73 in the BVI seeking repayment of the balance of the loan facility and perfection of its security as holder of the charged shares. Cukurova however obtained injunctive relief against Alfa in claim 72 ("the Cukurova injunction") which restrained Alfa from registering itself as owner of the charged shares and from taking any steps to enforce the share charges granted to Alfa pursuant to the Alfa Transactions.

Telia commenced the instant proceedings against Alfa claiming that by instituting claims 72 and 73 Alfa was threatening to induce or procure Cukurova to breach the THSA or that Alfa had previously induced a breach of contract by entering into the Alfa Transactions. Telia also sought injunctive relief to restrain Alfa from taking any steps to effect or complete a transfer of ownership of Cukurova to Alfa. In light of Telia's application for injunctive relief, Alfa proffered a number of undertakings which provided, among other things, that it would give notice to Telia of any application to discharge the Cukurova Injunction. Telia considered them inadequate. The injunctive relief sought by Telia was granted; against which decision Alfa appeals.

Held: allowing the appeal, setting aside the grant of the injunction in the court below and awarding costs in the appeal to the appellant to be assessed unless agreed within 21 days:

1. Injunctive relief should only be granted in cases of real urgency, that is, where there is an imminent risk of harm. In the circumstances of the case, it was necessary for the learned judge to explain why the undertakings offered by Alfa did not afford adequate protection. As it stands, it has not been made clear as to why lack of imminent risk of harm was not a bar to Telia's claim for urgent relief. Whilst it is not necessary for a trial judge to consider every point raised in a party's argument, nonetheless it is necessary to give reasons in respect of those matters which are vital to arriving at a final decision. This enables an appellate court to appreciate why a particular decision was arrived at. It is reasonable to conclude, given the lack of reasoning thereon, that no proper consideration of this aspect was undertaken.

   English v Emery Reimbold & Strick Ltd. [2002] 1 WLR 2409 applied.

2. The question as to whether there is imminent risk of harm must be assessed in the circumstances as they exist at the time of seeking such interim relief. It must be established that were it not granted at the time then consequential irreparable harm would result which cannot be adequately compensated in damages. The fact that there was no guarantee that the Cukurova injunction would not be discharged does not amount to imminent risk of harm to Telia.

3. Alfa became an equitable mortgagee of the charged shares on the closing of the Alfa Transactions in 2005, and would have been entitled as from then to be entered on the register of CTH and CFI. Telia ought to have brought proceedings prior to the closing of the Alfa Transactions in 2005, in effect enjoining Cukurova and thus preventing Alfa from acquiring or being granted such rights. Telia, not having done so, or having taken proceedings against Cukurova enjoining them and later surrendering the injunction which allowed the Alfa Transactions to close cannot now seek to undo the Alfa Transactions by raising the issue as to whether Alfa is an equitable mortgagee or now, as Alfa contends, an equitable owner. This was a factor which ought to have been taken into account in deciding whether, Telia, at this stage, was entitled to injunctive relief. The failure to appreciate Telia's legal standing vis à vis Alfa's status as an equitable mortgagee, amounted to an error of principle which inevitably lead to arriving at a wrong conclusion.

4. The tort of inducing a breach of contract is a tort of secondary liability in that the breach of contract (primary liability) must first be established. [OBG which applied Lumley] In the tort of interference or prevention a defendant's liability stands alone; there is no accessory liability. In prevention cases, independent unlawful means must be pleaded and shown to exist. Intention is relevant to both torts. In an inducement case, there must be an intention to procure a breach of contract whereas in interference case, there must be intention to cause loss. Actual

knowledge is required to establish the torts. Constructive notice is not sufficient. [Swiss Bank]

OBG Ltd. v Allan [2007] 2 WLR 920, Meretz Investments NV v ACP [2008] CH 244 and Swiss Bank Corporation v Lloyds Bank Ltd. [1979] 1 Ch 548 applied.

5. There was a failure by the learned judge to give reasons for concluding that the action of Alfa amounted to "a threatened breach of Cukurova's obligations under the THSA." This amounted to an error in principle.

English v Emery Reimbold & Strick Ltd. [2002] 1 WLR 2409 applied.

6. Issues of knowledge and intention are matters requiring factual determination which cannot be made at this early stage of the proceedings. It was necessary that the learned judge correctly identify the cause of action supported by the averments as pleaded and to say whether as a matter of law such cause of action had been made out giving rise to a serious issue to be tried. It is fundamental to establishing the cause of action that the primary party's breach of contract be set out in the party's case, with some cogent evidence of this sufficient to warrant the grant of injunctive relief.

7. It is a long established maxim that delay defeats equity. Delay in seeking interim relief is all the more critical as the grant of such relief is predicated on a state of urgency. In addressing the question of delay the learned judge referenced 2005, which can only be reasonably taken as the time she considered as being the relevant time. Having regard to Telia's pleadings in the court below and the findings of the learned judge, Alfa's seizure of control of CTH in 2007, is not relevant to this determination.

8. The learned judge's finding that Telia could have only brought proceedings against Alfa in Turkey in 2005, is not relevant to the question of delay. The point is not *where* but when Telia pursued its remedies against Alfa for breach of its rights.

9. In all the circumstances, Telia has failed to explain its two year delay in seeking relief for breach of the rights complained of as early as 2005. The learned judge accordingly fell into error in holding that the delay was not of such a nature as to weigh against Telia.

10. Having regard to the total lack of particularisation in respect of Telia's claim that Alfa's conduct or threatened conduct amounted to the tort of conspiracy, this ground is dismissed as being unworthy of further consideration for the purpose of continuing the injunction.

11. Obiter: The ordering of fortification and the level thereof, in respect of a cross-undertaking to pay damages on the grant of an interim injunction is discretionary. If fortification is ordered then the yardstick as to quantum would invariably be the amount of loss the party enjoined is likely to suffer in the event it turns out that the

injunction was wrongly granted. This in turn would call for a preliminary assessment of the value of the stake based on the material before the judge and not on some extraneous consideration relative to the country in which the matter is being litigated. A judgment once delivered is not subject to being reopened by the judge save in exceptional circumstances.

JUDGMENT

[1] GEORGE-CREQUE, J.A.: This appeal by Alfa Telecom Turkey Limited ("Alfa") is against the judgment and order of the trial judge made on 9th May 2008, granting the respondent, Teliasonera Finland OYJ ("Telia") being the claimant in the court below, an interim injunction. The injunction restrains Alfa from seeking to register themselves as holder of a 51% shareholding in a Virgin Islands ("BVI") company, Cukurova Telecoms Holdings Limited ("CTH"). CTH is or was part of a group of Turkish companies which may together be called "Cukurova". Cukurova holds a very valuable stake in the Turkish mobile telecommunications industry. Telia has contended in the proceedings below that Alfa is threatening to induce and or procure CTH to breach a shareholder's agreement entered into in 1999, between Telia and Cukurova. A short history of the matter and relationship between the parties is necessary in order to gain an appreciation of the current proceedings being just one set in a number of related proceedings and applications amongst the various parties.

The Background

[2] (a) The Cukurova group of companies is a very substantial Turkish group of companies with interests in the banking, media and telecoms industry. Telia forms part of a Scandinavian group of companies and is part owned by the Swedish and Finnish Governments and also has extensive telecoms interests. Alfa is part of a Russian group of companies with substantial diversified interests ranging from banking and oil exploration to telecoms.

(b) Within the Cukurova Group is a company called Turkcell Holdings AS ("Turkcell Holdings"). Turkcell Holdings in turn owned a majority interest in Turkcell Iletisim Hizmetleri AS ("Turkcell") which is the largest mobile telecoms company in Turkey.

(c) In October 1999, Telia and Cukurova executed an Agreement called the Turkcell Holdings Shareholders Agreement ("THSA") in respect of their shareholding in Turkcell Holdings. On the creation of Turkcell Holding, Telia held 47.09% of its shares and the remainder were held in large part by Cukurova.[1]

(d) The THSA governed the relationship between Telia and Cukurova and contained provisions in essence restricting the free transfer of Telia's or Cukurova's shares in Turkcell Holdings to a third party. In brief, if a shareholder wished to transfer its Turkcell Holdings shares to a third party, that shareholder was required to send a transfer notice to the other existing shareholder offering the shares firstly to the other existing shareholder (the so called 'right of first refusal') or afforded that other shareholder the opportunity to sell its own shares along with the existing shareholder's ("the come along right"). The THSA also contained a provision entitling a shareholder to transfer its shares to an affiliate without sending a transfer notice to the other existing shareholder. But if such an affiliate whilst holding the Turkcell Holdings shares ceased being an affiliate then the affiliate was required to re transfer those shares back to the transferor or an affiliate of the Transferor before the affiliate ceased being an affiliate. These provisions are contained in clause 3.02 of the THSA. Indeed, these are the provisions which are at the heart of the dispute and which Telia alleges that Alfa has either threatened to induce or procured Cukurova to breach or has breached. The THSA is governed

[1] Cukurova Holding held 32.9 %, an entity called YKB (not affiliated to Cukurova or Telia) held 20% and smaller amounts were held by other entities, some being within the Cukurova Group.

by and to be construed in accordance with the laws of the Republic of Turkey.

(e) In late 2004, Cukurova ran into financial difficulties. Cukurova approached Telia in early 2005, with a view to Telia buying out Cukurova's Turkcell Holding shares ("the Shares") for cash. Telia was receptive and discussions regarding the sale were undertaken. However, in May 2005, Cukurova announced that it intended to start working on possible alternatives to the Telia buy out. This decision by Cukurova became the subject of an ICC arbitration in Geneva ("The Geneva Arbitration"). The Geneva Arbitration proceedings are only relevant in the context of this appeal to the extent that Telia, in those proceedings obtained interim measures against Cukurova on 24th October 2005, which in effect prevented Cukurova from disposing of the Shares.

(f) Eventually Telia withdrew the interim measures obtained against Cukurova. This became effective as of 22nd November 2005, by order of the arbitration tribunal.

(g) Cukurova and Alfa thereupon entered into a series of transactions completed on 25th November 2005, ("the Alfa Transactions") in which the Shares moved to CTH[2] in this way:

(i) An entity, Yapi Kredi Bankasi ("YKB" not affiliated to Cukurova or Telia) transferred its "Shares"[3] to a company called Intercon.[4]

(ii) Cukurova Holding transferred its Shares to Intercon which had become a wholly owned subsidiary of CTH.

[2] It is common ground that CTH prior to the Alfa Transactions was an Affiliate of Cukurova group of companies as that term is defined in the THSA.
[3] "Shares" in this sense means shares in Turkcell Holdings.
[4] Intercon was a subsidiary of a company called Buselten Finance a company in the Cukurova group.

Intercon, (now holding 52% plus) of the Shares became bound by the terms of the THSA.

(iii) CTI was incorporated and became a wholly owned subsidiary of CTH.

(iv) Intercon in turn transferred the Shares so acquired to CTI. CTI thus became bound by the THSA.

(v) CTI in turn transferred the Shares (52% plus) so acquired to CTH. On receipt of the Shares, CTH became bound by the THSA.

(vi) Alfa, in consideration of a payment of $1.593 billion by it to Cukurova, acquired shares convertible into a 49% stake in CTH (and thereby an indirect 5.93% interest in Turkcell Holdings and an indirect 13.22% interest in Turkcell.

(vii) Alfa also loaned to Cukurova Finance International Limited[5] ("CFI"- a BVI company, holding a 51% interest in CTH) $1.352 billion. This sum was secured to Alfa on both CFI's 51% interest in CTH and on Cukurova Holdings' entire shareholding in CFI ("the charged shares"). The charged shares were the subject of two sets of share charges. One set being English Share charges which provided for the novel remedy of 'appropriation'[6] and the other set being BVI share charges. It is now settled that the share charges made Alfa an equitable mortgagee of the charged shares[7].

[5] A wholly owned subsidiary of Cukurova Holdings
[6] Pursuant to the Financial Collateral Arrangements (No.2) Regulations 2003 of the European Directive
[7] See: the judgment of the Privy Council Appeal No 60 of 2008. ---- CFI, CH v Alfa Telecom Turkey

(viii) The diagrams marked "A" and "B" attached to Telia's skeleton arguments provide a ready and easy illustration of the corporate groups and their interrelationships "before" and "after" the Alfa Transactions. The diagrams numbered 1 to 7 attached to Alfa's reply skeleton arguments shows the more intricate movement of the Shares up to the point of Alfa's subscription for the 49% stake in CTH.

(h) The potential net effect of the Alfa Transactions is that were the Alfa securities to be realized, Alfa would indirectly, through ownership of CFI and CTH, own the Shares. It is useful to note however, that after the Alfa Transactions it cannot be said that Alfa owned as of right any controlling interest with its 49% stake in CTH since CFI still held 51% (though now subject to the share charges in favour of Alfa) and thus the controlling interest in CTH. The power to exercise control by virtue of its status as equitable mortgagee of the charged shares is quite another matter and it is this state of affairs which is at the very heart of the matter in terms of whether the Transfer Notice provisions of the THSA were triggered.

(i) No Transfer Notice was given to Telia in respect of the Alfa Transactions as based on the corporate structure presented after the Alfa Transactions, Cukurova considered that CTH remained Cukurova's affiliate because CFI (owned by Cukurova Holding) retained the majority 51% ownership of CTH. Further, CTI from whom CTH acquired the Shares, remained a subsidiary of CTH.

(j) The issue as to whether Telia was entitled to a Transfer Notice is also the subject of an arbitration commenced in Vienna, Austria by Telia against Cukurova Holding ("(the Vienna Arbitration") on 16th August 2005. One of Telia's contentions is that the transfer of the Shares violated the THSA.

(k) Alfa accepts that it was aware of the THSA at the time of the Alfa Transactions. In fact Alfa's position is that it and Cukurova intended to effect the Alfa Transactions in a manner that would not engage the provisions of the THSA[8].

(l) At the time that Telia withdrew the interim measures it had obtained against Cukurova in the Geneva Arbitration, it was aware of the likelihood of the Alfa Transactions proceeding. As stated earlier, the Alfa Transactions were completed within a matter of a few days following the formal release of the interim measures by the Geneva Arbitration Tribunal.

(m) Whilst the Vienna and Geneva arbitration proceedings were ongoing as between Telia and Cukurova, apart from correspondence passing between Telia and Alfa from as early as June 2005, (Alfa complaining of breach or threatened breach of the THSA) no proceedings were commenced or became joined as between them.

(n) It appears that the tone and colour of all understandings changed when Alfa wrote to Cukurova alleging that Cukurova was in default under the Facility Agreement comprised in the Alfa Transactions and demanding repayment of the loans made by Alfa.

(o) The upshot is that on 16th April 2007, Alfa, commenced 2 sets of proceedings ("the Cukurova Proceedings") against Cukurova:

(i) Claim 72 alleged events of default under the Facility Agreement comprised in the Alfa Transaction and demanded repayment of the balance of the loan under the Facility;

(ii) Claim 73 sought to have Alfa registered by way of perfection of its security as holder of the charged shares.

[8] See: Hardiman's Affidavit 1 and 2 - paras. 38-43 and 21 – 30 respectively.

(p) Cukurova obtained injunctive relief against Alfa in claim 72 on 11th May 2007, which in effect restrained Alfa from registering itself as owner of the charged shares and also from taking any steps to enforce the share charges granted to Alfa pursuant to the Alfa Transactions. This injunction is still in place ("the Cukurova Injunction").

(q) These events including Alfa's stated 'appropriation' of the charged shares, spurred Telia into action[9]. On 17th May 2007, Telia commenced the instant proceedings against Alfa in which Telia alleges as its primary case that Alfa in bringing the claims 72 and 73 is threatening to induce or procure CTH to breach the THSA and alternatively, that Alfa had previously induced a breach of the THSA by entering into the Alfa Transactions. Telia, on the same date, also applied for injunctive relief to restrain Alfa, in effect and inter alia, from pursuing or taking any steps in its claims 72 and 73 of 2007 unless or until CTH transferred the Shares to Cukurova Holding AS, and from taking any further steps to effect or complete a transfer of ownership of CTH to Alfa.

(r) Telia's application for interim injunctive relief came on for hearing on 12th March 2008. On 9th May 2008, the learned judge, after hearing considerable argument and reviewing much evidence on affidavit for both sides, in a written judgment, granted to Telia injunctive relief. I set out the relevant portions of the order for the purposes of this appeal:

> "The Injunction"
>
> 1. "[Alfa] be restrained …. from ….:
>
> (a) Registering ….. the transfer of any shares of Cukurova Telecom of which it is not already the legal and registered owner, to any person or entity;
>
> (b) Taking any further or other steps to effect or complete a transfer of any shares of Cukurova Telecom of which it is not already the legal and registered owner, to any person or entity.

[9] See: Telia's skeleton arguments para. 28

Fortification

2. [Telia] will pay into court as fortification for its cross undertaking in damages the sum of US$29,000,000 within 21 days…. Pending trial of this action or such further order……...

On 30th May 2008, the learned Judge further ordered as follows:

"The relevant provision in the order of 9th May 2008, is varied to permit [Telia] to provide the fortification ordered either by way of payment into court or by way of bank guarantee from a reputable commercial bank … in the Territory. Such guarantee shall be in the form used in the English courts with consequential amendments to reflect that it is given by a bank in the Territory..."

(s) Alfa, being dissatisfied with the decision of the learned judge has appealed this decision.

The grounds of appeal

[3] Alfa contends that this court should set aside the decision of the learned trial judge because she exercised her discretion wrongly in that she: (a) committed an error of principle; (b) took into account matters she ought not to have taken into account; (c) failed to take into account matters which she ought to have taken into account; and (d) reached a conclusion which was plainly wrong.

Despite the lengthy submissions and voluminous documents comprising of affidavits, pleadings, correspondence between the parties and the like, the issues raised in some respects, are not overly complex.

The Law

[4] The law as to the ability of the appellate court to set aside a decision of the trial judge on the exercise of a discretion may be taken as well settled in establishing that an appellate court cannot interfere with the exercise of the judge's discretion simply because were they themselves sitting at first instance they would have reached a different conclusion. A decision based on the exercise of discretion

may only be set aside applying the principles as set out in the well known decisions of Hadmor Productions v Hamilton[10] and The Abidin Daver[11] which are cited with approval and adopted in many decisions of this court. I do not consider that any further exposition of the principles is necessary here.

Alfa already enjoined

[5] Counsel for Alfa contends that it is wrong in principle to restrain a person from doing that which the person has already been restrained from doing. He termed it 'highly unusual' to have in place what he called a 'duplicating injunction'. He further argued that the learned judge failed to give sufficient consideration to the offer of undertakings to Telia which included a requirement to give notice to Telia if Alfa intended to apply for a discharge of the Cukurova Injunction. The learned judge in paragraph 56 of her judgment erroneously concluded that the Court of Appeal had, on 22nd April 2007, discharged the Cukurova Injunction.[12] Her decision however, as counsel for Telia points out, did not rest on this basis. She was of the view that Telia could not be forced to rely on an injunction to which it was not a party and, was accordingly entitled, in essence, to seek an injunction to protect its own rights irrespective of the state of affairs in the Cukurova Proceedings. She also found that Telia did not act unreasonably in refusing Alfa's undertakings.

Imminent risk of harm

[6] Counsel for Alfa further contended that the fact that an injunction against Alfa in almost similar terms was already in place then there was no imminent risk of harm to Telia as the court must assume that its order will be obeyed. Mr. Hardiman, in his first affidavit[13] on behalf of Telia stated as its reason for seeking urgent interim relief that Telia was *"concerned to ensure that its rights are fully protected in the event that the court lifts the interim injunctive relief…… granted to Cukurova…. ."*

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[10] [1983] AC 191
[11] [1984] AC 398
[12] The injunction was not in issue before the Court of Appeal which dealt with the question of whether there had been an "appropriation" of the charged shares.
[13] Volume 2, Tab 1, para. 47 of the Record

Based on this statement, counsel argues that Telia was therefore fully aware that, so long as the Cukurova Injunction remained in place, Telia was also protected thereby. Counsel relied on the principle set out in Snells Equity[14] which states:

> "This class of action, known as the quia timet, has long been established, but the Claimant must establish a strong case; "No one can obtain a quia timet order by merely saying "Timeo". He must prove that there is an imminent danger of very substantial damage, or further damage, eg by showing that the threatened act "is attended with extreme probability of irreparable injury to the property of the Claimants, including also danger to their existence."

[7] Mr. Hardman's first affidavit on behalf of Alfa sets out the undertakings given by Alfa to Telia in light of Telia's application for injunctive relief.[15] These included inter alia that:

(i) Alfa would not apply for the injunction in claim 72 to be set aside prior to a hearing of Telia's application for injunctive relief;

(ii) Alfa would give notice to Telia of any application by Cukurova to discontinue the injunction in claim 72.

These were being offered notwithstanding Alfa's view that Telia was not entitled to injunctive relief. Telia has not said why these undertakings would not afford adequate protection. The learned judge having found that Telia did not act unreasonably in refusing Alfa's undertakings did not say why she so found or why the lack of imminent risk of harm was not a good answer to Telia's claim for relief. She did say in effect however, that the court of appeal having discharged the Cukurova injunction that issue fell away although there was the possibility of a further appeal. [16] This was obviously based on an erroneous understanding. In my view, given the nature of the relief sought which should only be granted in cases of real urgency, the imminent risk of harm being an integral consideration in assessing whether such relief should be granted on an urgent basis it was necessary to explain why the undertakings did not afford adequate protection in

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[14] 31st Ed. (2005) para. 16-13

[15] Volume 2, Tab 2, paras. 62-63 of the Record. See: also Hardman 2nd Affidavit, Vol.2, Tab 7, paras.18-20

[16] See: judgment: Volume 1, Tab 8, para. 56

making a finding that Telia had not acted unreasonably in refusing them. As it stands, it has not been made clear as to why lack of imminent risk of harm was not a bar to Telia's claim for urgent relief. Whilst it is not necessary for a trial judge to consider every point raised in a party's argument, nonetheless it is necessary to give reasons in respect of those matters which are vital to arriving at a final decision. This enables an appellate court to appreciate why a particular decision was arrived at. More will be said on the duty to give reasons later. It is reasonable to conclude, given the lack of reasoning thereon, that no proper consideration of this aspect was undertaken.

[8] Telia's response to this contention is that the judge having found that Telia should not be forced to rely on the Cukurova injunction was therefore of the view that there was imminent risk of harm to Telia - in essence there was no guarantee that the Cukurova Injunction would not be discharged and this finding was well within the judge's discretion to so find. But does the fact of no such guarantee equate, without more, to imminent risk of harm to Telia? I think not. As to whether risk of harm is imminent, this must be assessed in the circumstances as they exist at the time of seeking such interim relief. It must be established that were it not granted at the time then consequential irreparable harm would result which cannot be adequately compensated in damages.

Telia's standing to seek injunctive relief:

[9] Alfa contends that the learned judge erred in failing to address their principal argument namely:

(i) that Telia had no arguable claim to restrain registration because Alfa had, prior to the issuance of proceedings by Telia become the equitable owner of the charged shares (as the judge herself recognized in her judgment in the Cukurova Proceedings[17] and the Court of Appeal in its judgment[18]); and

[17] Alfa Telecom v Cukurova Holding A.S. et al Claim Nos. 72 and 119 of 2007 (delivered 16 November 2007)
[18] Alfa Telecom Turkey Ltd. v Cukurova Finance International Ltd. et al HCVAP 2007/027 (delivered 22 April 2008)

(ii) that Telia had no arguable proprietary claim to the charged shares.

[10] Alfa says that it acquired the equitable ownership of the charged shares as a security interest in November 2005, subject only to Cukurova's equity of redemption. This was common ground in the Cukurova Proceedings. Counsel for Alfa further argues that upon the exercise of Alfa's contractual right of appropriation under the share charges, on 27th April 2007, Alfa became the indefeasible equitable owner of the Shares - in essence, that the act of appropriation[19] destroyed Cukurova's equity of redemption. Accordingly, Alfa says, Telia was too late when it brought its proceedings as Alfa had already become the owner of the charged shares with Cukurova being its bare trustee in respect of the shares and that Telia could not seek to undo what had already occurred firstly, as equitable mortgagee under the share charges, and thereafter as absolute beneficial owner upon 'appropriation' on 27th April 2007. Alfa says that if indeed there was a time for Telia to bring such proceedings it was in 2005, prior to the closing of the Alfa Transactions. On this basis Alfa says that Telia has no right to prevent it acquiring legal title (whether as equitable mortgagee or as beneficial owner) from the party who holds the legal title on a bare trust for it. Accordingly Telia was not entitled to an injunction but if entitled to any remedy at all, on the assumption that Alfa had committed an economic tort,(which Alfa disputes) then Telia's remedy lie in damages only.

[11] Interestingly, whilst Telia accepts that it was common ground in the Cukurova Proceedings that Alfa was an equitable mortgagee of the charged shares, Telia disputes this and says that this raises a serious triable issue in the proceedings below.[20] The reasons they give may be summarized as follows:

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[19] The issue as to what constitutes an 'appropriation' was the subject of appeal to the Privy Council which concluded that Alfa was an equitable mortgagee of the legal interest in the shares and that commercial practicalities require that there should be an overt act evincing the intention to exercise a power of appropriation, communicated to the collateral-provider. In this case ATT's (Alfa) letter of 27 April 2007 was an effective exercise of ATT's power of appropriation (subject always to the dispute about an event of default (proceeding before the court below - which is not part of the preliminary issues).

[20] See also: Telia's Counter-Notice para. 4(2)

(a) That the establishment of an equitable right relies on equity's aid and the maxim that equity looks on that as done which ought to be done;

(b) If Alfa knowingly acquired its equitable mortgage by engineering a breach of the THSA then equity should not treat Alfa's equitable mortgage as a matter which ought in equity to be done;

(c) There is a serious issue as to whether Alfa has clean hands so as to invoke the aid of equity;

(d) Any views expressed by the experts in the Cukurova Proceedings are irrelevant as Telia's contention of tortious breach of the THSA by Alfa or Cukurova are not being considered in those proceedings.[21]

[12] Given that Cukurova does not assert that its dealings with Alfa and the entering into of the Alfa Transactions were in breach of Telia's rights under the THSA, or that the share charges are tainted with invalidity it is difficult, in my view, for Telia to make the case that Alfa's rights acquired under the Alfa Transactions by which Alfa became an equitable mortgagee of the charged shares is not to be given effect because Cukurova in giving those rights to Alfa was acting in breach of the THSA. Surprisingly, Telia has not sought in this jurisdiction to sue or join Cukurova, its contracting party who it says is being induced or being made to breach the THSA. I agree with counsel for Alfa, that if this is the case which Telia seeks to make then Telia ought to have brought proceedings prior to the closing of the Alfa Transactions in 2005, in effect enjoining Cukurova and thus preventing Alfa from acquiring or being granted such rights. Telia, not having done so, or having taken proceedings[22] against Cukurova enjoining them and later surrendering the injunction which allowed the Alfa Transactions to close cannot now seek to undo the Alfa Transactions by raising the issue as to whether Alfa is

[21] There is no assertion by Alfa or Cukurova that either is in breach of the THSA.
[22] Referring to the Geneva Arbitration

an equitable mortgagee or now, as Alfa contends, an equitable owner. In my view, this was a factor which ought to have been taken into account in deciding whether, Telia, at this stage, was entitled to injunctive relief.

[13] I also agree with counsel for Alfa that to the extent that Alfa must rely on equity for the establishment of its rights as an equitable mortgagee this would be as against Cukurova only and not Telia since Telia does not have any proprietary right (which it accepts) to the charged shares but relies only on its contractual rights under the THSA. Alfa's position however is that as an equitable mortgagee it has the right, in essence at its sole option, to convert or merge its equitable holding into a legal holding of the charged shares subject only to Cukurova's right of redemption which Alfa says has been destroyed by Alfa's 'appropriation' of the charged shares.

[14] Consequently, it would be difficult to rationalize the basis on which Telia can claim to be entitled to injunctive relief restraining Alfa from registering itself as owner of the charged shares. The fact is that Alfa became an equitable mortgagee of the charged shares on the closing of the Alfa Transactions in 2005, and would have been entitled as from then to be entered on the register of CTH and CFI. Alfa could have perfected its equitable proprietary interest by calling for the legal estate thereby converting the equitable mortgage into a legal mortgage subject only to Cukurova's equity of redemption. In my view the failure to appreciate Telia's legal standing vis à vis Alfa's status as an equitable mortgagee, amounted to an error of principle which inevitably lead to arriving at a wrong conclusion. Having so stated for the avoidance of doubt, I express no view as to whether Alfa was entitled to exercise its power of appropriation. That issue is very much joined in the proceedings below. This no doubt suffices to dispose of this appeal.

[15] Telia further contends however, that its undisputed contractual rights under the THSA in respect of which it says Alfa had knowledge at the time of entering into the Alfa Transactions, gives it standing to seek injunctive relief to protect those rights. Telia relies on the case of Swiss Bank Corporation v Lloyds Bank Ltd.[23]

[23] [1979] 1 Ch. 548

in which Browne-Wilkinson J in reference to the tort of knowing interference with contractual rights had this to say at page 575C-E of his judgment:

> "… 2. A person proposing to deal with property in such a way as to cause a breach of contract affecting that property will be restrained by injunction from so doing if when he acquired that property he had actual knowledge of that contract. 3. A plaintiff is entitled to such an injunction even if he has no proprietary interest in the property: his right to have his contract performed is a sufficient interest. 4. There is no case in which such an injunction has been granted against a defendant who acquired the property with only constructive notice, as opposed to actual notice of the contract. In my judgment constructive notice is not sufficient, since actual knowledge of the contract is a requisite element of the tort."

[16] In support of this Telia places reliance on the learned judge's findings [para. 48] that "..*on the pleadings and on the evidence Telia has made out a strong case that Alfa was aware of the THSA prior to beginning of negotiations with the Cukurova Group…"*. However, does evidence of being aware of the THSA equate to actual knowledge? More will be said about this in dealing with the question as to whether Telia has been able to show a good arguable case thereby satisfying the first limb of the American Cyanamid test for the grant of an injunction.

[17] Telia also contends that the learned judge ought to have found that certain intermediate share transfers (all part of the Alfa Transactions) were 'sham' transactions and should be disregarded for the purpose of considering whether Alfa threatens to induce or has induced breach of the THSA.[24] Telia says that they carried no commercial value and that no rational purpose for them has even been suggested other than an attempt to deny Telia's rights under the THSA. In Stone v Hitch[25] it was stated by Lady Justice Arden, that the test for ascertaining whether acts or documents are a 'sham' is that laid down in the Snook v London & West Riding Investments Ltd [26] in which Lord Diplock stated at page 802 as follows:

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[24] See: Telia's Counter-Notice para.4(7)
[25] [2001]EWCA Civ 63
[26] [1967] 2 QB 786

> "For acts or documents to be a "sham", … all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

Alfa points to the fact that numerous lawyers and law firms were involved for the different parties involved in the transactions and they are legitimate transactions and in any event does not meet the test of a "sham" as laid down in Snook. Adopting that test it becomes readily apparent that Telia (a non party to the Alfa Transactions) apart from assertions and relying on unsustained inferences, would be hard put to establish such a claim in the absence of the contracting parties (Cukurova/ Alfa) making such an allegation. There is no evidence suggesting that any of the intermediate share transfers were fictitious. The fact that Telia finds no commercial purpose to those intermediate transactions does not bring those transactions within the definition of a "sham" applying the Snook test.

The economic torts

[18] Much argument has been advanced on the question as to the type of economic tort Alfa is said to have committed: in essence, whether Telia's claim against Alfa is substantively one of inducement or one of interference or prevention. Telia's primary claim is based on future threatened breaches of the THSA[27]. It is common ground that Telia has certain contractual rights under the THSA. The issue however is not the existence of those rights, but rather, whether those rights have been breached or are about to be breached. Telia asserts that the execution of the Alfa Transactions amounted to a breach of the THSA (by Cukurova) induced by Alfa, and says further that Alfa, by bringing proceedings against Cukurova, in claims 72 and 73, threatens to induce and or procure Cukurova to breach the THSA or, as in essence put by Telia in its skeleton arguments,[28] Alfa having induced the breach of the THSA in 2005, threatened by its actions in 2007, to aggravate the damage flowing to Telia from the breach. Alfa's case is that there has been no breach of the THSA.

[27] See para.93 of Telia's skeleton arguments.
[28] See paras. 64, 83, 94, 108, Telia's skeleton arguments.

[19] The tort of inducing a breach a contract is different from the tort of interference with business by unlawful means although they are both recognised as economic torts. These torts were carefully analyzed in the cases of OBG Ltd. v Allan[29] and Meretz Investments NV v ACP[30]. The ingredients required for establishing a case in each are different. First of all, the tort of inducing breach of contract is a tort of secondary liability. Therefore a breach of contract is an essential element. "*One cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability"*[31] In the tort of interference or prevention cases no question of accessory liability arises. A defendant's liability stands alone. The distinguishing features of the two torts were succinctly explained by Lord Nicholls of Birkenhead in OBG. At paragraph 178 he stated:

> "There is a crucial difference between cases where the defendant induces a contracting party not to perform his contractual obligations and cases where the defendant prevents a contracting party from carrying out his contractual obligations. In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the defendant acts independently of the contracting party. The defendant's liability is a 'stand – alone' liability. Consistently with this, tortious liability does not arise in prevention cases unless …. the preventative means used were independently unlawful."

[20] The question of intention is relevant to both torts. In an inducement case there must be an intention to procure a breach of contract whereas in an unlawful means case, there must be an intention to cause loss. As Lord Hoffman said in OBG at paragraph 52 of his judgment:

> "The ends which must have been intended are different. South Wales Miners Federation v Glamorgan Coal Co. Ltd [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same"

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[29] [2007] 2 WLR 920, para. 178
[30] [2008] Ch 244
[31] Per Lord Hoffman in OBG Limited v Allan para. 44

To establish intent, a certain degree or quality of knowledge is required. The alleged tortfeasor must know that he is inducing a breach of contract. Actual knowledge is required. Constructive notice is not sufficient.[32] Lord Hoffman in the OBG case, at para. 39 of his opinion, stated:[33]

> "To be liable for inducing breach of contract you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so."

At para. 43 he went on further to say:

> ".. if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended"

[21] Alfa, boldly says that the Alfa Transactions were structured in such a way so as not to infringe the Turkcell Holdings' Articles of Association which they understood to be in similar terms as the THSA. Having stated in paragraph 48 of her judgment that Telia had made out a strong case showing that Alfa was aware of the THSA prior to beginning negotiations with Cukurova, and aware of the Geneva Arbitration proceedings brought by Telia against Cukurova to enforce its contract, it is easy to appreciate the judge's conclusion thus: **"It appears that Alfa was alive to the possibility that it could not acquire those shares without circumventing the THSA."** As Alfa rightly contends, circumventing a contract in a way which does not involve or avoids its breach does not ground a cause of action – at least not in inducement.

[22] As it relates to actual knowledge (the burden of proof of which is on Telia), Alfa says in essence that Telia has failed to produce any evidence to show that:

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[32] See: Swiss Bank Corporation v Lloyd's Bank Ltd. [1979] 1 Ch 548

[33] See also Mainstream Properties v Young [2007] 2 WLR 920 per Lord Hoffman at para. 70 where the principle is similarly stated.

(i) Alfa had the requisite knowledge and intention to bring about a breach of the THSA in the OBG/Mainstream Properties[34] sense; or

(ii) that Alfa had breached a contractual obligation which it had assumed in relation to the Shares in the Strathcona sense. The Strathcona principle is, in essence, this: Where party C (third party) accepts property from one of the original contracting parties being A and B, subject to an obligation to perform certain contractual obligations to A or B those obligations being fully disclosed to C, then C may not renege on the performance of those obligations.

[23] Further, Alfa says that to the contrary, it adduced evidence showing that it had no such intention and pointed to the evidence regarding the assurances and the warranty obtained from Cukurova (Telia's THSA contracting party) to the effect that the Alfa Transactions did not involve any breaches of contract or the Articles of Turkcell Holdings.

[24] It is not disputed that the lawyer, Mr. Derman, who had previously acted for Telia in the negotiation and consummation of the THSA, acted for Cukurova in the negotiation and consummation of the Alfa Transactions. It appears to be common ground that he did not act for Alfa. The judge however found, contrary to the evidence produced, that Alfa had sought out Mr. Derman's services and had relied on advice from him in respect of the Alfa Transactions, and went on to conclude that this casts doubts on Alfa's bona fides.[35] This was a misunderstanding of the facts leading to the unwarranted drawing of an adverse inference as to the bona fides of Alfa's stated lack of knowledge and intention to induce or procure the breach of the THSA.

[34] [2007] 2 WLR 920
[35] Para. 49- Judgment –core bundle tab 8

[25] Telia in its Counter-Notice says that the judge ought to have found as an additional ground for concluding there was a serious issue to be tried as to whether Alfa intends or intended procuring a breach of the THSA, the lack of any explanation whatsoever on the part of Alfa as to the necessity for the complexity of the structure for achieving the holding of the Shares by CTH. However, it would appear that this was taken into account where in para 48, she referred to the intricate network of companies brought about *"some for merely a nanosecond"* for the purpose" of the Alfa Transactions and concluded that Alfa was alive to the possibility of their being unable to acquire the Shares without circumventing the THSA.

[26] Alfa contends that the allegations of wrongdoing levelled by Telia against Alfa are principally allegations that Alfa is attempting or threatening to prevent Cukurova from performing its obligations under the THSA by the institution of the Cukurova Proceedings and accordingly is not an inducement case at all on the basis that inducement presupposes some element of consensual behaviour in achieving a desired result. Alfa accepts that the negotiation and consummation of the Alfa Transactions were consensual. It denies however any unlawfulness in respect of those actions. The actions in respect of the Cukurova Proceedings, Alfa says, is anything but consensual as the parties (Cukurova and Alfa) are locked in a bitter and hard fought battle. Cukurova enjoined Alfa from getting itself registered as legal owner of the charged shares. Accordingly, there could be no question of Cukurova being induced by Alfa in 2007, to do anything. On this basis, Alfa says that on Telia's pleaded case in respect of Alfa's actions in 2007, the wrong alleged can only be in substance a prevention case for which independent unlawful means must be pleaded and shown to exist. No such unlawful means has been pleaded or alleged by Telia. I agree that the bringing of the Cukurova Proceedings cannot be considered as unlawful means for the purpose of grounding such a cause of action.

The establishment of an inducement case.

[27] As is clear from the OBG case and long established in Lumley v Gye[36], a breach of contract is critical to establishing the tort of inducement or procurement. This would require some consideration of the act of alleged breach itself.

[28] The learned judge in paragraph 45 of her judgment, whilst referring to Clause 3.02(b) and 3.02(c) of the THSA and noting Telia's pre-emption and come–along rights and the exception or reservation on those rights as it related to "Affiliates" of the contracting parties, concluded in essence that if Alfa succeeds on its rectification claim (claim 73) and having no intention of allowing CTH to return the charged shares to the 'original Cukurova transferor', that this amounted to '*a threatened breach'* of CTH's obligations under the THSA. She failed however to set out her reasons for so finding. Key to this finding would be a consideration of the term "affiliate" defined by the THSA and whether there was evidence tending to show that CTH was an affiliate, or that the transferor to CTH was an affiliate or had ceased being an affiliate.

[29] Moreover, it is not clear whether the learned judge was satisfied that there was 'a breach' of the THSA or 'a threatened breach'. At paragraph 43 the judge expressly found as follows:

> "… 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…. the principal acts which would result in breach are taking place in the BVI."

A reference to the acts taking place in BVI could only be, in the context of the case, a reference to the Cukurova Proceedings.

[30] At paragraph 44 the learned judge went on to say as follows.

> "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"

[36] [1853] 2E&B 216

As I stated earlier, the learned judge went on to find at paragraph 45 of her judgment a threatened breach of the THSA in the course of her treatment of the tort of inducement. At paragraph 48 she spoke of Alfa being alive to the possibility of their inability to acquire the Shares without circumventing the THSA and then at paragraph 50, she stated as follows:

> "In my view, Telia has made out a good case that this tort (inducing breach of contract) the actions leading to breach of contract are not required to be unlawful in themselves…."

Finally, on this issue the learned judge summed up at para. 51 as follows:

> "On the question whether Telia has a good arguable case I find for the reasons advanced that Telia has crossed that initial hurdle."

[31] If it is that Telia was found to have made out a case of 'threatened breach' then, to my mind what is missing in the learned judge's treatment of this issue is a consideration of the acts which are said to amount to breach or threatened breach of the THSA on the part of Cukurova and the manner in which Alfa is said to have induced or threatens to procure such breach by Cukurova. As Telia has rightly pointed out, a judge is not required to give reasons in respect of every issue raised by a party in the proceedings and has quite helpfully distilled the following principles from the judgment of Lord Phillips MR in English v Emery Reimbold & Strick Ltd,[37] which also finds support in this court:

> "(i) There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what is said shows the parties and, if need be the appellate court the basis on which he acted.
>
> (ii) "… The judgment must enable the appellate court to understand why the judge reached his decision.
>
> "This does not mean that every factor which weighed with the judge in his appraisal of the vidence has to be identified and explained. But the issues the resolution of which was vital to the judge's conclusion should be identified and the manner in which he resolved them explained."[38] (my emphasis)

[37] [2002] 1WLR 2409
[38] Per Lord Phillips para. 19

[32] The establishment of the underlying cause of action in this case the tort of inducing breach of contract is in my view at the heart of the matter. As Telia has rightly stated in reliance upon Siskina[39], an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant upon there being a pre-existing cause of action against the Defendant. As has already been established the tort of inducing breach of contract is one of secondary liability. Accordingly, for the purpose of deciding whether a good arguable case had been made out in respect of the tort of inducing breach of contract or in this case a threatened breach of contract, for the purpose of satisfying the American Cyanamid test, the learned judge, in my view, was required to say what were the acts of Cukurova which could or would result in breach of the THSA and to identify those provisions of the THSA and explain (whether on an application of Turkish law or BVI law), how those acts are said to be in breach or threatens to breach the THSA and go further to explain the actions by which Alfa is said to have induced Cukurova to breach or threatens to procure a breach of those provisions. A cause of action is not made out by merely being stated. The acts averred must be capable of giving rise to the cause of action as stated. In essence, it was necessary to explain the basis for concluding that the action of Alfa amounted to, as she termed it [para. 45] *"a threatened breach of Cukurova's obligations under the THSA".* There was a failure to provide this analysis which in my view amounts to an error in principle.

[33] Alfa accordingly contends that Telia has failed to make out an arguable case in respect of either the tort of inducing breach of contract or the tort of interference or prevention of performance and that the trial judge was in essence wrong in concluding, that the first limb of the test laid down in American Cyanamid had been satisfied by Telia. Alfa says that this is because the trial judge misunderstood the effects of the rulings in the OBG and Meretz cases and applied the wrong test;[40] that had she asked herself whether Telia's principal claims concerning Alfa's actions in 2007, were in substance an inducement case or an interference case she would have reached the conclusion that it was the latter and

[39] Siskina (Cargo Owners) v Distros SA [1979] AC 210 (para 32 of Telia's skeleton arguments).
[40] See judgment para. 50

that the claim was accordingly bound to fail because unlawful means were not pleaded and could not be proved.

[34] In respect of the tort of inducement I agree with the learned judge that issues of knowledge and intention are matters requiring factual determination which cannot be made at this early stage of the proceedings.[41] All the evidence is not yet in and engaging in a mini trial is an undesirable course. I refrain from making any such finding the issue being one for trial. Nevertheless, bearing in mind that this tort is one of secondary liability, in my view, it was necessary that the judge correctly identify the cause of action supported by the averments as pleaded and to say whether as a matter of law such cause of action had been made out giving rise to a serious issue to be tried. I agree with counsel for Alfa that where a claimant alleges that the tort of inducing a breach of contract has been committed, it behoves the claimant to identify the contractual provision(s) it is alleged have been breached by the contracting party (here Cukurova) and to explain the way in which that contracting party's actions may be said to amount to a breach of those provisions; and to identify the manner in which it is alleged that 'the inducer' [Alfa] induced the contracting party to breach those provisions. It cannot be left to be presumed generally, that a contract has been breached based upon the end result. It must be shown that the actions leading to that result were acts involving or which would involve a breach. In this regard the words of Lord Hoffman in OBG warrant repetition: "*One cannot be liable for inducing a breach unless there has been a breach".* Accordingly, it is fundamental to establishing the cause of action that the primary party's breach of contract be set out in the party's case, with some cogent evidence of this sufficient to warrant the grant of interim injunctive relief.

[35] Telia says that the judge could have taken into account as being relevant to the grant of injunctive relief the fact that the Vienna Arbitration had concluded that Cukurova had breached the THSA in 2005. This is raised in Telia's Counter-Notice. The judge expressly refused to take account of the findings of the Vienna

[41] See judgment para. 49

Arbitration.[42] Whilst this may be a relevant factor to consider in deciding whether or not to grant interim injunctive relief, this does not obviate the need for making out a case on the tort of inducement as between the parties to this substantive action applying the American Cyanamid principles. Breach by the primary party is but one element. Knowledge and intention on the part of the accessory or secondary party must also be shown.

[36] On the basis that Telia has made out an arguable case in respect of Alfa inducing Cukurova to breach (assuming there was a breach for present purposes and having due regard to the fact that Telia's primary case relates to Alfa's actions in 2007, as establishing a case of procuring or threatening to procure breach of the THSA), such action on the part of Alfa as may amount to inducement, on the pleadings and evidence adduced, in my view, are Alfa's actions in 2005, in the negotiation and consummation of the Alfa Transactions. Do those actions occurring in 2005, afford good ground for injunctive relief in 2007?

[37] Telia says in paragraph 83 of its skeleton arguments that Alfa induced certain breaches of the THSA by Cukurova in 2005, and that Alfa's conduct in 2007, threatens to cause or aggravate damage to Telia resulting from those past breaches. In my view, whether the breach may be said to have been aggravated by the commencement of the Cukurova Proceedings in 2007, the acts which may be said to give rise to the alleged breach would have none the less occurred in 2005. The cause of action does not lie in the aggravation of the breach but in the breach itself. This brings me to the question of delay in seeking urgent injunctive relief in April 2007, for an alleged breach in 2005, and whether there was acquiescence or waiver by Telia of its right to seek such relief.

Acquiescence / waiver

[38] The parties agree that acquiescence may be a bar to relief and that the test for acquiescence is whether it would be unconscionable on the part of an owner of a

[42] See judgment paras. 62 - 63

right to press or seek to enforce that right.[43] It is common ground that Telia had obtained protection of its rights asserted against Cukurova by virtue of the 'interim measures' granted in its favour in the Geneva Arbitration. It is also common ground that interim measures in effect blocked the consummation of the Alfa Transactions. Alfa contends that Telia, being aware that without an injection of funds Cukurova was facing bankruptcy, voluntarily agreed to surrender the interim measures in the knowledge that the Alfa Transactions would proceed thus providing the funds needed by Cukurova to stay afloat. The Alfa Transactions were accordingly consummated resulting in the sizeable funding of Cukurova by Alfa and the taking of appropriate security by Alfa which would ultimately give to Alfa, an interest in the Shares. In so doing Alfa says, Telia acquiesced in the consummation of the Alfa Transactions or in any event waived its right to seek protection of its alleged rights and accordingly cannot be allowed to assert those rights. Alfa also points to Telia's letter of 27.09.05 to Cukurova and Alfa which it says clearly demonstrates Telia's understanding of the nature of the Alfa Transactions. Alfa further contends that Telia, whilst stating that the interim measures were released, has failed to explain why they were released in the face of Alfa's stated assertion to Telia that this conduct amounted to a waiver of such rights.

[39] The judge at paragraph 53 stated:

> "It is well established that waiver cannot apply unless one has full knowledge of what is being waived."

With regard to Telia's conduct in 2005, the judge had this to say at paragraph 55:

> "… 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

[43] Snell's Equity 21st Ed. Para.16-16

> not maintaining the injunction and in any event it cannot be taken to have known of the full implications of the Alfa/ Cukurova transactions to raise any question of waiver against it."

[40] Alfa contends that the judge applied too stringent a test as to knowledge such as to amount to waiver. I do not consider for one moment that counsel is seeking to suggest that knowledge is not a salient factor in determining waiver. One certainly cannot be said to have waived that of which one has no knowledge. Telia, on the other hand, contends that the judge properly exercised her discretion for the reasons given in her judgment. Having examined those documents which were before the judge, I am satisfied that this is a conclusion reasonably open to her to find. This accordingly, would not afford a basis for interference by this court.

Delay

[41] The maxim of equity that 'delay defeats equities' is well known and is sometimes stated in the expression – 'a person who sleeps on his rights losses them'. Delay in seeking interim relief is that much more critical. This is because the grant of interim relief is predicated on a state of urgency. Snell at 16-25 states it thus:

> "…a lesser degree of acquiescence or laches suffices to debar a claimant from interlocutory relief than from obtaining a perpetual injunction, the refusal of an interlocutory injunction is only a temporary rebuff, whereas the refusal of a perpetual injunction… 'amounts to a decision that a right which has once existed is absolutely and forever lost'. Moreover, interim relief is granted only in matters of urgency, so that a claimant who delays thereby demonstrates the absence of any urgency requiring prompt relief. Even a month's delay between the assertion of a right and the commencement of proceedings may debar the claimant if in the meantime the Defendant has contracted to let the subject property matter to third parties."

[42] Alfa asserts that Telia's delay in seeking interim relief against it is extensive – since 2005, when Telia was aware of Alfa's agreement to finance Cukurova to the tune of $3.3 billion, and that Telia had written to Alfa, in June 2005,[44] asserting its rights of first refusal in respect of the Shares in reliance on the THSA and requesting that Alfa refrain from any action in breach of the THSA, which Telia

[44] This correspondence appears at Volume 3, Tab 1, pp. 234 – 238 of the Record

asserted would cause substantial harm to it. In correspondence passing between Telia, and Alfa, Telia on 16th November 2005, warned that it intended to pursue all it remedies for breach of its rights[45]. Telia however, took no steps as against Alfa until commencing these proceedings in May 2007.

[43] The judge at paragraph 57 of her judgment stated thus:

> "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 and not the 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….."

[44] Alfa complains that this was a plainly wrong exercise of discretion in that the learned judge:

(i) took into account the irrelevant consideration of Alfa being aware of the Vienna and the Geneva arbitrations which in any event were confidential and to which Alfa was not a party;

(ii) concluded that Telia could only have brought proceedings in Turkey at the time and not BVI, thereby overlooking the fact that Alfa is a BVI company and thus was liable to suit in BVI as of right;

(iii) failed to say why the bringing of proceedings in Turkey would not have sufficed;

(iv) failed to explain why she did not accept that Telia ought to have brought proceedings against Telia in 2005, having regard to Telia's correspondence of 16.11. 05 complaining that a breach of its rights had occurred and that Sonera would pursue available remedies;

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[45] This correspondence appears at Volume 3, Tab 1, pp. 264 – 265 of the Record

(v) applied the wrong test on delay having said *"It cannot be said that Telia slept on its rights such as to disarm Alfa." [para. 57],* The question being whether Telia had delayed and if so whether such delay amounted to a bar to interim relief.

[45] Telia, in defending the judge's exercise of discretion on this aspect referred to the test to be applied as being whether there has been a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim[46]. Telia asserts that:

(i) the action which gives rise to Telia's primary case was the seizing of control of CTH in April 2007, and its application was issued one month later in May 2007;

(ii) even if the judge was incorrect in holding that in 2005, Telia could only have brought proceedings against Alfa in Turkey such a finding made no difference to her overall conclusion that Telia had not delayed in such a way that it could be said it had sat on its rights. Telia goes on to say that 'the finding is probably correct in that any action in 2005, would have had as its primary focus the conduct of Cukurova Holding which was a Turkish company; and

(iii) there is no suggestion in the judgment that the judge took into account Alfa's awareness of the Vienna and Geneva arbitrations as a material factor (or a factor at all) in concluding on delay.

[46] In my view, Telia's arguments fail to meet the challenges mounted by Alfa on this point. To rely on Alfa 's seizing of control of CTH Telecom in April 2007, adds nothing to the point as the judge's reasoning failed to address any action occurring in 2007, as the basis for her conclusion on delay. Rather, she referenced 2005, which can only be reasonably taken as the time she considered as being the relevant time. In that regard Telia's correspondence in 2005, threatening pursuit

[46] See: Snell's Equity (21st Ed) para. 5-19

of its remedies for breach was in my view highly relevant. I agree with Alfa that the point is not where Telia pursued its remedies against Alfa but rather the fact as to whether Telia did or did not pursue remedies against Alfa wherever, having complained of breach of the very rights complained of now, as early as 2005. For the reasons as clearly advanced by Alfa, and summarised at paragraph 44 above this amounted, in my view, to a wrongful exercise of the judge's discretion. The delay has simply not been satisfactorily explained by Telia. The learned judge fell into error in addressing this issue.

The conspiracy claim – Telia's Counter-Notice

[47] In this judgment I have made reference to Telia's Counter-Notice where relevant in respect of matters which it felt ought to have been relied on or taken into account by the learned judge in arriving at her decision. Telia further urges as an additional point, that in the event the court concludes that there is no serious issue to be tried in respect of its claim founded on the tort of inducing breach of contract, then it ought to consider continuing the injunction based on Telia's claim as set out in its Re-Re-amended Statement of Claim that Alfa's conduct/ threatened conduct amounts to the tort of conspiracy.[47] Alfa in answer points, in my view quite rightly, to the total lack of particularisation in respect of this newly pleaded claim to the point that nothing further requires being said by way of dismissing this ground as being unworthy of further consideration for the purpose of continuing the injunction.

[48] For the reasons advanced I would allow this appeal and set aside the order made by the judge. Having arrived at this conclusion it is not necessary to consider the question of the level of fortification save to make these comments:

(i) The ordering of fortification and the level thereof, in respect of a cross-undertaking to pay damages on the grant of an interim injunction is discretionary. If fortification is ordered then the yardstick as to quantum would invariably be the amount of loss

[47] See: paras. 23-25 of Re-Re-Amended Statement of Claim; Counter-Notice para. 7: See Volume 1, Tab 13 of the Record

the party enjoined is likely to suffer in the event it turns out that the injunction was wrongly granted. This in turn would call for a preliminary assessment of the value of the stake based on the material before the judge and not on some extraneous consideration relative to the country in which the matter is being litigated.

(ii) A judgment once delivered is not subject to being reopened by the judge save in exceptional circumstances.

Conclusion

[49] The appeal is allowed and the order of the trial judge is set aside. The respondent shall bear the costs of this appeal to be assessed unless agreed within 21 days. Finally, I am grateful to counsel on both sides for their well presented submissions which made this task easier.

Janice George-Creque
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]