Neutral Citation Number: [2015] EWHC 3318 (Ch)

Case No: HC 2015 004000

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2015

Before :

NICHOLAS LAVENDER QC

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Between :

(1) LEBARA MOBILE LIMITED
(2) LEBARA LIMITED
(3) LEBARA FRANCE LIMITED
(4) LEBARA MEDIA SERVICES LIMITED
(5) LEBARA GROUP B.V.
(6) YOKARA TRADEMARKS S.AR.L
(7) YOKARA GLOBAL TRADEMARKS S.AR.L

Claimants

- and –

(1) LYCAMOBILE UK LIMITED
(2) LYCAMOBILE GERMANY GMBH
(3) LYCAMOBILE S.AR.L
(4) LYCAMOBILE S.R.L.
(5) LYCAMOBILE DISTRIBUTION LIMITED

Defendants

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Thomas de la Mare QC, **Ben Jaffey** and **James Segan** (instructed by **Ashurst LLP**) for the **Claimants**
Jeffery Onions QC, **Robert O'Donoghue** and **Tom Pascoe** (instructed by **Jones Day**) for the **Defendants**

Hearing dates: 9-11 November 2015

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JUDGMENT

Nicholas Lavender QC, sitting as a High Court Judge :

(1) Introduction

1. This is an application for an interim injunction made by seven Claimant companies who are members of, or associated with, the Lebara group of companies. The five Defendants are members of the Lyca group of companies. I will refer to the Claimants as Lebara and to the Defendants as Lyca. On the whole, it is not necessary for the purposes of this judgment to distinguish the position of individual Claimants or Defendants, and I do not do so save where necessary.

(2) Background

2. Lebara and Lyca are each in the mobile telephone business. Specifically, they are mobile virtual network operators (known as MVNOs). An MVNO leases spare network capacity and frequency allocations from mobile network operators (known as MNOs) in one or more states. Customers buy the MVNOôs SIM cards and are thereby able to access the MVNOôs telephone network, known as Lebara Mobile and Lycamobile.

3. Lyca are what is known as a ñfullò MVNO, whereas Lebara are what is known as a ñlightò MVNO, the principal difference being that Lyca have made substantial investment in hardware, namely a Master Switching Centre and a Gateway GPRS Support Node (known as a ñGGSNò), both of which are located in London.

4. Lyca operate as an MVNO in 19 countries, and Lebara in only 7. Lycaôs turnover is about 2½ times that of Lebara. Lebara and Lyca each target the migrant community and they are fierce competitors.

5. In February 2015 Lebara launched a new product, known as ñLebara Talkò, which is a ñvoice-over-internet protocolò (ñVoIPò) product. Customers download an ñappò (i.e. software) to their smartphone or other mobile device and, if they have internet access, can use the app:

   (1) to make or receive telephone calls to or from other Lebara Talk users free of charge (although this possibility may be of limited use to potential customers, since Lebara have not launched Lebara Talk in those countries in Asia and Africa to which members of the migrant community in Europe might be expected to want to make international calls); and

   (2) to make (but not receive) calls to other telephones for a charge payable to Lebara.

6. Lyca were aware of the launch of Lebara Talk and wanted to stop their customers using Lycaôs SIM cards to access the Lebara Talk service. Accordingly, on 21 February 2015 Lyca introduced into their GGSN in London a mechanism (which was referred to as ñthe Blockò) for blocking any attempt by Lycaôs customers to access Lebaraôs websites or to download or use Lebaraôs apps.

7. The Block operates as follows:

   (1) When a Lyca customer uses a Lyca SIM to access the internet and seeks to access a website, the Lyca GGSN in London scans the data by which the request for access is made.

   (2) If it detects the word ñlebaraò in the URL for that website, then the Lyca GGSN both

blocks the attempted communication and adds the websiteôs IP address to its list of blocked addresses.

(3) The customer is not told that his access to the website has been blocked by Lyca. He receives a message which is generated by Lyca and which states ñThis web page is not availableò.

(4) When a Lyca customer uses a Lyca SIM to activate or operate the Lebara Talk app (or another Lebara app), the app seeks to communicate with one of Lebaraôs websites using an IP address, but is blocked from doing so.

8. The effect of the Block is therefore threefold. Lycaôs customers cannot use Lycaôs SIMs:

(1) to access Lebaraôs websites;

(2) to activate the Lebara Talk app (or other Lebara apps); or

(3) to operate the Lebara Talk app (or other Lebara apps).

9. However, Lycaôs customers can do these things when they are connected to Wi-Fi.

10. The Block thus goes further than simply preventing the use of Lebara Talk by Lycaôs customers using Lycaôs SIMs. It also prevents them using Lycaôs SIMs to access Lebaraôs websites and Lebaraôs other products. These products include Lebara Play, a video streaming product which allows customers to watch TV programmes on demand on their mobile and other devices, and Lebara Community, which is a social networking platform. Lebara Community is accessible from any country where individuals have access to the internet, although its content is primarily targeted at the United Kingdom.

11. There is an issue between the parties as to why Lyca introduced the Block.

(1) Lyca contend that they introduced the Block for 3 reasons. In summary, these were:

(a) to maintain Lycaôs profitability by avoiding two potential consequences of the use to a significant extent by Lycaôs customers of Lebara Talk (and their consequent switch from using phone to data capacity), i.e.:

(i) the loss of revenue from Lycaôs customers; and

(ii) the surcharges which Lyca would incur under their contracts with their MNOs in the event of a substantial and unforeseen increase in customer data usage, so as to exceed certain levels set in those contracts;

(b) to avoid the congestion and capacity constraints which might result from ña potential substantial increase in data use resulting from customers making large volumes of calls on VoIP products or streaming television on products such as Lebara Playò; and

(c) because the use of Lebara Talk by Lycaôs customers in France and Germany would put Lyca in breach of their contracts with their French and German MNOs, which prohibit the use of VoIP.

(2) Lebara contend that Lyca introduced the Block to stifle competition from Lebara, at least to the extent of depriving Lebara of the advantage of being the ñfirst-moverò in marketing VoIP and video streaming services targeted at the migrant market. Since introducing the Block, Lyca have launched their own products, namely:

(a) Lycachat, which is a VoIP service like Lebara Talk, but which also offers video calls; and

(b) LycaTV, which is a video streaming service like Lebara Play.

12. Lebara contend that the introduction of the Block was an actionable wrong, both under English law and under the laws of the 18 other states where it has taken effect. After Lebara had spent some time investigating the Block and potential means of overcoming it, Lebaraôs solicitors wrote a letter before action on 3 September 2015, Lebara issued a Claim Form on 15 September 2015 and subsequently Lebara served Particulars of Claim which run to 47 pages, plus Annexes.

13. Also on 15 September 2015 Lebara issued this application for an interim injunction. That led to a hearing before Nugee J. on 21 September 2015, when directions were given for the hearing of the application. Lyca have served a Defence and the parties have each served a substantial quantity of evidence.

14. In addition, on 29 October 2015 Lycaôs solicitors wrote to Lebaraôs solicitors to say that Lyca would be amending their standard terms in all relevant countries to provide as follows;

> ñ[Lycamobile] reserves the right, in its absolute discretion (and without prior notice), to restrict or prevent access to certain websites and services over its Network, including Voice over Internet protocol (ñVoIPò) services. When we decide to restrict or prevent access under this paragraph, you may receive a message stating that the website or service is ñnot availableò.ò

15. This letter was written only days before the hearing of Lebaraôs application on 3 to 5 November 2015. Lyca contended, and Lebara denied, that this amendment would dispose of Lebaraôs claim that Lyca were not entitled to introduce the Block.

(3) The Orders Sought by Lebara

16. On this application, Lebara sought an order requiring Lyca to cease the Block in all EU Member States and not to implement the Block at any time hereafter in any EU Member State.

17. In the alternative, Lebara sought an order in the following terms:

> ñThe Defendant shall publish on the homepage of each of their websites a notice which informs each visitor to those websites of: (i) the fact of the Block; (ii) the Blockôs period of operation; and (iii) the effects upon customers trying to access or use Lebara apps or Lebara websites.ò

18. Lebara do not seek an order in respect of the 5 non-EU states where the Block has been implemented, i.e. Australia, Hong Kong, Norway, Switzerland and the United States of America.

19. Of the 28 EU Member States, Lyca have implemented the Block in 14, those being the only EU Member States where Lyca operate as an MVNO. These 14 states can be broken down as follows:

(1) 5 states where Lebara have launched Lebara Talk: Austria, Belgium, Italy, Portugal and Sweden. Lebara do not operate as an MVNO in any of these states. Lebara launched Lebara Talk in these states in February 2015. Lebara contended in the Particulars of Claim, dated 21 September 2015, that they would be launching Lebara Talk in France and the United Kingdom ñsoonò, but they have not done so yet and their evidence did not give any more detail of their plans.

(2) 6 states where Lebara operate as an MVNO: Denmark, France, Germany, the Netherlands, Spain and the United Kingdom.

(3) 3 states where Lebara have not launched Lebara Talk and do not operate as an MVNO: Ireland, Poland and Romania.

20. Lebara have launched Lebara Play in 6 of these states (France, Germany, Italy, the Netherlands, Sweden and the United Kingdom). Lebara Play can also be accessed from any other EU Member State.

(4) An Agreed Change to the Block

21. At the hearing, Mr. de la Mare stated that Lebara were prepared to give an undertaking to the Court to keep their VoIP traffic on defined IP addresses and to give three working daysô notice of any intention to launch a VoIP service in any new jurisdiction. In a letter written after the hearing, Lyca indicated that, on the basis of that undertaking, they would be prepared to limit the Block to the IP addresses necessary to support Lebara Talk in the jurisdictions in which it has been launched.

22. The net effect is that, if I were not to make the order sought by Lebara, the Block would henceforth by agreement be more limited in effect. In particular:

(1) The Block would only affect Lycaôs customers in those states where Lebara Talk has been launched (which are currently Austria, Belgium, Italy, Portugal and Sweden).

(2) In those states:

(a) The Block would not prevent Lycaôs customers from accessing all of Lebaraôs websites. The Block would only prevent access (by the Lebara Talk app, when Lycaôs customers sought to activate or operate it) to those websites or IP addresses which support Lebara Talk.

(b) The Block would not prevent Lycaôs customers from operating Lebara Play or other Lebara products or accessing Lebara Community.

(c) Equally, the Block would not prevent Lycaôs customers from accessing websites which publicised Lebara Talk.

(d) As I understand it, since the Modified Block would only affect the Lebara Talk app, Lycaôs customers would no longer receive the message that ñThis web page is not available.ò

23. I will refer to the Block as so limited as ñthe Modified Blockò.

24. As a result of these post-hearing developments, the issue for me to decide is, in effect, whether I should grant an injunction to restrain the Modified Block. It follows that a number of the arguments which were addressed to me fall away, as the Modified Block:

    (1) will not affect Lebara Play, Lebara Community or access to Lebaraôs general websites; and

    (2) will, in the first instance at least, apply in only 5 states.

(5) The Impending Change in the Law

25. A new EU Regulation ñlaying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and usersô rights relating to electronic communications networks and services and regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Unionò (ñthe Draft Regulationò) is at an advanced stage of the EU legislative process. The parties were agreed that it will come into effect at the end of April 2016.

26. Lebara contended that, whatever the position may be at present, the Block (including the Modified Block) will be unlawful under the Draft Regulation. Mr. Onions stated that Lyca accepted that they would not be able to maintain the Block in its present form when the Draft Regulation came into effect. He left open the possibility that Lyca might seek to impose some other measure which was consistent with the Draft Regulation.

27. The net effect, therefore, is that it was common ground that, whatever the outcome of this application, the Block (including the Modified Block) will come to an end at the end of April 2016.

28. For this reason, the parties were agreed that it would be unnecessary for me to direct a speedy trial, although I had indicated that I would be willing to do so and that the Court could accommodate a trial in January 2016.

(6) The Court's Approach to this Application

29. There were issues before me as to all four stages of the approach outlined in *American Cyanamid v. Ethicon* [1975] AC 396, i.e.:

    (1) whether there is a serious issue to be tried;

    (2) whether damages would be an adequate remedy for Lebara;

    (3) whether damages would be an adequate remedy for Lyca; and

    (4) where the balance of convenience lies.

30. I will address each of these issues in turn. First, however, it is appropriate to identify the causes of action pleaded by Lebara.

(7) The Causes of Action Pleaded by Lebara

31. On the one hand, the Block was decided on and implemented in London, but, on the other

hand, its effects were felt by Lycaôs customers in the United Kingdom and 13 other EU states. This may give rise to some issues as to choice of law in due course. For the purposes of this application, however, there was a large measure of agreement as to the effect of the relevant choice of law rules, i.e. those contained in Articles 4 and 6 of the Rome II Regulation (Regulation (EC) No 864/2007).

32. In their Particulars of Claim, Lebara allege 11 causes of action against Lyca. These 11 causes of action arise under the laws of 5 jurisdictions: 5 causes of action are asserted under English law (including UK statute), and 6 causes of action are asserted under the laws of 4 other jurisdictions: France, Germany, Italy and the Netherlands. So far as those latter 6 causes of action are concerned, it was agreed that, if established, they would only give Lebara a right to a remedy, whether damages and/or an injunction, in respect of the effect of the Block in the relevant jurisdiction.

33. The five English law causes of action asserted by Lebara are as follows:

(1) conspiracy to injure;

(2) interference with Lebaraôs business by unlawful means;

(3) unlawful means conspiracy;

(4) breach of the E-Privacy Regulations; and

(5) public nuisance.

34. Mr. de la Mare helpfully indicated that he did not rely for the purposes of this application on the alleged cause of action in public nuisance, and I will say no more about it.

(7)(a) Conspiracy to Injure

35. As for the alleged conspiracy to injure, it was not disputed that, if established, this would entitle Lebara to a remedy in respect of all of the effects of the Block, wherever they were felt.

(7)(b) The Unlawful Means Torts

36. I will refer to the two alleged causes of action for: (a) interference with Lebaraôs business by unlawful means; and (b) unlawful means conspiracy as ñthe unlawful means tortsò. The unlawful means alleged for the purpose of the unlawful means torts occupy 16 pages of the Particulars of Claim. Lebara make specific allegations of unlawfulness under UK, Dutch, German, French and Italian law, as well as general allegations of ñunlawfulness under the laws of other EU jurisdictions.ò

37. With a few exceptions, it was agreed that the matters alleged were, if established, capable of constituting unlawful means for the purposes of the unlawful means torts. I will refer later to the issue whether Lebara have adequately pleaded and evidenced all of their allegations of foreign law.

38. On the whole, it was agreed that the unlawful means torts, if and insofar as established, would only give Lebara a right to a remedy, whether damages and/or an injunction, in respect of the effect of the Block in any jurisdiction in which Lebara had established that

Lyca used unlawful means.

39. The possible exceptions concerned three of the unlawful means alleged by Lebara and pleaded as arising under English law, i.e. breach of regulation 7 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426: ñthe E-Privacy Regulationsò), breach of confidence and deceit. Mr. de la Mare contended that, if Lebara established one of the unlawful means torts on this basis, then that would entitle Lebara to a remedy in respect of all of the effects of the Block, wherever they were felt. Mr. Onions disputed this. The issue arose late in the hearing as a result of a query which I raised and was not as fully explored in argument as it might otherwise have been.

40. The unlawful means alleged by Lebara are as follows:

(1) Lebara allege that the Block constituted a breach of Lycaôs contracts with their customers in each of the 14 EU Member States in question.

(2) Lebara also allege that the Block constituted a breach by Lyca in each of those 14 states of the provisions implementing in that state Articles 5 and 6 of the E-Privacy Directive (2002/58/EC). In particular:

(a) In the United Kingdom, Lebara allege a breach of regulation 7 of the E-Privacy Regulations.

(b) Lebara have pleaded breaches of specific provisions of Dutch, French, German and Italian law.

(c) Lebara also allege that, since each EU Member State has a duty to implement the E-Privacy Directive, it is to be inferred in the case of each EU Member State that its law does implement the E-Privacy Directive.

(3) Lebara allege that the Block involved a breach of confidence under English law.

(4) Lebara allege that Lycamobile UK Limited committed the English law tort of deceit by reason of:

(a) an implied misrepresentation alleged to have been made whenever Lycamobile UK Limited entered into a contract with one of its customers; and

(b) the message that ñThis web page is not availableò, whenever this was sent to one of Lycamobile UK Limitedôs customers as a result of the Block.

(5) Lebara allege that the Block was contrary to the Consumer Protection from Unfair Trading Regulations 2008, the instrument which implements in the United Kingdom the Unfair Commercial Practices Directive (2005/29/EC). Lebara also allege that the Block was contrary to a corresponding provision of the Italian Consumer Code, but Mr. de la Mare did not seek to rely for the purposes of this application on the more general plea that it is to be inferred that the Block was unlawful and actionable in every EU Member State which has implemented the Unfair Commercial Practices Directive.

(6) Lebara have pleaded that the Block was contrary to English law in two other

respects, namely public nuisance and an alleged breach of Lycamobile UK Limitedôs contract with its MNO, O2. However, Mr. de la Mare did not place any reliance on these allegations for the purposes of this application.

(7) Lebara allege that the Block was contrary to specific provisions of Dutch, French, German and Italian competition law.

(8) Lebara allege that the Block was contrary to provisions of Dutch and Italian law concerning electronic communications.

(7)(c) Breach of the E-Privacy Regulations

41. I have already stated that Lebara allege that Lyca was in breach of regulation 7 of the E-Privacy Regulations. It was common ground that any such breach would be actionable by Lycaôs customers in the United Kingdom and was therefore capable of constituting an unlawful means for the purposes of the unlawful means torts. But Lebara also alleged that in the United Kingdom such a breach would give Lebara a direct cause of action against Lyca, by virtue of regulation 30 of the E-Privacy Regulations.

(8) Whether there is a Serious Issue to be Tried

42. As Lord Diplock said in *American Cyanamid* at 407H:

> ñThe court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.ò

43. The test of whether there is a serious issue to be tried is thus a low one. In their written submissions, Lyca contended that where the claimant is seeking a mandatory injunction, the Court must apply a higher test. However, this allegation was not pursued at the hearing. (I will deal later with the submissions which were made by reference to the authorities concerning applications for mandatory interim injunctions.)

44. I bear in mind that it would be wrong for me to engage in an attempt either to resolve disputed issues of fact or to decide difficult questions of law. In addition, for the purpose of deciding whether there is a serious issue to be tried, it is not necessary for me to address in detail all of the causes of action pleaded. I concentrate on those which Mr. de la Mare submitted were the most compelling, i.e. breach of contract, breach of the E-Privacy Regulations and breach of confidence.

45. I do not propose to rehearse all of the arguments advanced by parties, each of which I have carefully considered. It is sufficient to say that there are at least some causes of action which I cannot dismiss at this stage as frivolous, vexatious or unarguable and which, if established, would entitle Lebara to relief in respect of the effects of the Block throughout Europe.

(8)(a) Dutch, French, German and Italian Competition Law Claims

46. Lyca conceded that there is a serious issue to be tried in respect of each of the causes of action alleged by Lebara for breach of the competition laws of France, Germany, Italy and the Netherlands.

47. At present, Italy is the only one of these states where the Modified Block will apply. It may also apply in France as and when Lebara Talk is launched there.

(8)(b) Conspiracy to Injure

48. Lebaraôs cause of action in conspiracy to injure depends upon proving that two or more of the Defendants agreed to implement the Block and that their predominant purpose in introducing the Block was to injure Lebara. Lebara will bear a high burden when making an allegation of this nature, which, as Mr. Onions submitted, amounts to an allegation that Lyca acted maliciously. However, I cannot accept that it is unarguable, especially having regard to the following factors:

(1) Lyca allow their customers to use other VoIP products, such as Skype, WhatsApp and Viber. Lebara Talk is the only VoIP product which Lyca block. Lyca also allow their customers to use other video streaming products, such as Netflix and Spotify. Lebara Play is the only video streaming product which Lyca block. Indeed, far from discouraging their customers from using products such as Skype and Netflix, Lyca describe them on their website as *"must-have apps"* for 4G phones. Lebara will contend that the real reason why they have been singled out is a desire by Lyca to impede the development of Lebaraôs new products.

(2) The Block was applied in states where Lebara had not launched Lebara Talk (or Lebara Play). Lebara will contend that, in the words of Viscount Simonds L.C. in *Crofter Hand Woven Harris Tweed Co., Ltd. v Veitch* [1942] A.C. 435, 447, ñthis may throw doubts on the bona fides of the avowed purposeò of the Block.

(3) Lebara will argue that the reasons put forward by Lyca for the Block are mere pretexts, or at least are only part of the picture. I do not propose to rehearse all of the arguments by which Mr. de la Mare sought to cast doubt on the credibility, or at least sufficiency, of the reasons given by Lyca. By way of example, however, he drew attention to the contrast between, on the one hand, Lycaôs professed concern that Lebara Talk and Lebara Play might cause such an increase in data use as to result in capacity constraints on Lycaôs network and, on the other hand, the fact that Lebara have now launched similar products and, according to Mr. Cotterôs third statement (which was served on the first day of the hearing), Lyca have decided that it is not necessary for this purpose to increase the capacity of Lycaôs network (by renegotiating its data limits with MNOs).

(4) Lyca have not disclosed any documents evidencing the decision to implement the Block. Lyca were not obliged to disclose these documents in response to this application, but they had the option of doing so and the fact that they have not done so means that I cannot rule out the possibility that they will, when disclosed, prove to contain material which supports Lebaraôs case.

(5) Indeed, Lyca have neither identified nor served evidence from the individuals who took the decision to implement the Block. The factual evidence relied on by Lyca

consisted primarily of statements made by Nicholas Paul Cotter, who is a partner in Jones Day, Lycaôs solicitors. He stated that (unnamed) ñLondon-based managers decided in February 2015 to take steps to deal with the threat to their MVNO services presented by the VoIP services and app.ò Lycaôs Chief Technical Director, Mr. Radhakrishnan Kadamban, was involved in giving effect to this decision. He has made a statement in which he says that the (unnamed) ñHeads of Lycaôs product and commercial teamsò took the decision to explore ways to block access over Lycaôs network to Lebara Talk.

(8)(c) The Unlawful Means Torts

49. Given what I have said about conspiracy to injure, it follows that there is also a serious question to be tried whether Lyca had the necessary intention for the torts of interference with Lebaraôs business by unlawful means and/or unlawful means conspiracy.

50. In relation to these torts, Lyca deny that implementing the Block involved the use of unlawful means, but I cannot say that there is not a serious issue to be tried in this respect. I will deal with each of the alleged unlawful means, but I do not propose to review them all in detail.

51. There is a question of law whether it is a defence to these torts that the alleged tortfeasor honestly believed that the means employed were lawful. This question was considered in the context of unlawful means conspiracy by Morgan J. in *Digicel (St. Lucia) Ltd. v. Cable & Wireless Plc* [2010] EWHC 774 (Ch) (at paragraphs 86-118 of Annex H) and briefly by David Richards J. in *HMRC v. Begum* [2010] EWHC 1799 (Ch), at paras. 49-52. Both the question whether there is such a defence and, if so, whether Lyca held such a belief give rise to serious issues to be tried.

(8)(c)(i) Breach of Contract

52. For the following reasons, I consider that there is a serious issue to be tried as to whether the Modified Block will constitute a breach of Lycaôs contracts with their customers in each of the EU Member States in which it applies.

(8)(c)(i)(1) Breach of Contract: the United Kingdom

53. Lyca have a different standard form of terms and conditions for each state in which they operate as an MVNO. Copies of each of them were put in evidence. However, they follow broadly the same form.

54. The Terms and Conditions used by Lyca in the United Kingdom (ñthe UK Termsò) are governed by English law. They include, at clause 2.1, the following:

> ñOBLIGATION TO PROVIDE THE SERVICES
>
> 2.1 Lycamobile will provide the Services to you using its own Network and the Networks of one or more telecommunications operators. Occasionally any of these Networks may be unavailable for maintenance, modifications, upgrades, emergencies or to protect the security of the Network. At these times the Services may be temporarily unavailable.ò

55. The first sentence of this clause imposes an obligation on Lyca to provide the Services.

That expression is defined in clause 1.13 as meaning:

> ñThe mobile telephone services that Lycamobile provides to you, including voice calling, messaging and data services, voicemail, é ò

56. As I pointed out in argument, a literal reading of these two clauses might deprive Lycaôs obligation under clause 2.1 of any content at all, if one combined them so as to read, ñLycamobile will provide the mobile telephone services that Lycamobile provides to youò. Mr. Onions agreed that this would not be the correct construction.

57. Instead, Mr. Onions submitted that the UK Terms obliged Lyca to provide ñdata servicesò to their customers and he submitted that there has been no breach of the UK Terms because Lyca are providing data services, even after the implementation of the Block. It seems to me that it is arguable that this is not the right construction either. It could lead to the seemingly surprising result that Lyca would be at liberty to place any limit of any kind at any time for any purpose on the data services which they provide, so long as what they provided on any particular day could legitimately be described as ñdata servicesò.

58. It seems to me at least arguable that the correct construction is that the data services which Lyca are obliged by clause 2.1 to continue to provide are those which Lyca were already providing. In January, Lyca were providing data services of such a nature that their customers could use them to access Lebaraôs websites, with data passing from customer to website and vice versa through Lycaôs GGSN. In February, however, Lyca implemented a change at their GGSN which was intended to have, and has had, the effect of restricting the use which customers can make of Lycaôs data services. Thus, in the absence of a provision in the UK Terms entitling Lyca to do this, it seems to me arguable that the implementation of the Block was a breach of the UK Terms.

59. Lyca have pleaded that the implementation of the Block was justified by clause 5.2 of the UK Terms. However, Mr. Onions accepted there was a serious issue to be tried in this respect. (I will deal later with the proposed amendment to Lycaôs terms and conditions.)

60. So far, I have simply addressed the wording of the UK Terms. However, as a matter of English law, it is arguable that a construction of Lycaôs UK Terms which requires Lyca to continue to provide data services which enable Lycaôs customers to access Lebaraôs websites is bolstered by one or more of the following factors:

    (1) Consumer contracts are subject to the ñcontra proferentemò rule which is now contained in section 69(1) of the Consumer Rights Act 2015. Mr Onions pointed out that this provision can only be invoked where there is an ambiguity in a written term: see *The County Homesearch Co (Thames & Chilterns) Ltd. v. Cowham* [2008] 1 WLR 909, CA, at [21]; and *Du Plessis v. Fontgary Leisure Parks Ltd.* [2012] EWCA Civ 409, at [40]. But it seems to me at least arguable that there is an ambiguity in Lycaôs UK Terms.

    (2) An unfair term in a consumer contract is not binding on the consumer, as is now provided by section 62(1) of the Consumer Rights Act 2015. It is arguable that any provision of Lycaôs UK Contract which permitted Lyca to introduce the Block would be a term of the kind described in paragraph 13 (or perhaps paragraph 3 or 12) of Part 1 of Schedule 2 to that Act, which sets out the ñindicative listò of potentially unfair terms: see section 63(1) of the Consumer Rights Act 2015.

(3) Mr. de la Mare relied on articles 20 to 22 of the Universal Services Directive (2002/22/EC) and regulatory material relating thereto, i.e. the Body of European Regulators for Electronic Communicationsô ñGuidelines on transparency in the scope of Net Neutrality: Best practices and recommended approachesò and ñOfcomôs approach to net neutralityò. The admissibility of this material as an aid to contractual construction was disputed by Mr. Onions, but that is another issue to be tried in due course. (I note that Lebara did not rely on the Universal Services Directive or the domestic measures implementing it either as giving Lebara a cause of action or as constituting ñunlawful meansò, but rather as informing the approach which Lebara contended should be taken to issues such as the construction of Lycaôs contracts with their customers.)

61. For these reasons, I conclude that there is a serious issue to be tried whether the Block was a breach of Lycaôs contracts with their UK customers. However, I note that the Modified Block will not affect Lycaôs UK customers unless and until Lebara launch Lebara Talk in the United Kingdom.

(8)(c)(i)(2) Breach of Contract: Other States

62. As I have already said, the standard terms and conditions used by Lyca in each EU Member State follow the same form. In particular, the terms and conditions used in states other than the United Kingdom (ñthe Non-UK Termsò) include the same clause 2.1 and the same definition of ñServicesò as Lycaôs UK Terms.

63. The only allegedly material differences between the UK and Non-UK Terms referred to by Mr. Onions at the hearing concerned certain clauses in Lycaôs Austrian, Belgian and Irish terms and conditions. However, these clauses did not strike me as likely to make Lebaraôs allegations of breach of contract unarguable in those states.

64. The Non-UK Terms each provide that they are governed by the law of the state in which they apply. Mr. Onions alleged that Lebara could not rely for the purposes of this application on any of the Non-UK Terms without pleading and providing evidence of the law of the relevant jurisdiction as to the construction of contracts. He relied for this purpose on the following passage from the judgment of Roskill L.J. in *Alfred Dunhill Ltd v. Sunoptic S.A* [1979] F.S.R. 337 (*"Dunhill v Sunoptic"*), at 368-369:

> ñThat leaves the other part of the injunction. Clearly ñworld-wideò is much too wide. There is no evidence that Dunhill's trade elsewhere than in those countries whose names appear in the last document in the green bundle, to which I referred earlier. There is no evidence as to the local law in relation to those countries, other than Switzerland. Mr. Alexander bravely tried to argue that he did not need any evidence as to that local law but he could rely upon the presumption that foreign law was the same as English law. Asked to produce authority for that proposition in a case of this kind, not surprisingly perhaps he found himself unable to do so. I think Mr. Dillon was right when he said that the effect of Mr. Alexander's argument on this branch of the case was to cast a negative burden on a defendant when in truth the whole of the burden of proof rests on the plaintiff. On the present evidence, therefore, I cannot see my way to grant a wider injunction than in relation to the United Kingdom and Switzerland.ò

65. Mr. Onions contended that this case was binding authority for the proposition that, where a

party is seeking an interim injunction in respect of a foreign jurisdiction, the applicant bears the burden of proving an arguable breach of law in that jurisdiction and cannot rely on the presumption that foreign law is the same as English law.

66. The scope for the application of the so-called ñpresumptionò that foreign law is the same as English law can be a matter for debate, as appears from *Dicey, Morris & Collins on The Conflict of Laws* (2012) 15th Edn, paras. 9-025 to 9-030. Indeed, the editors of *Dicey, Morris & Collins* suggest that (para. 9-025):

> ñé it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law.ò

67. I note that there are cases referred to in *Dicey, Morris & Collins* which concern the application of the ñpresumptionò in contract cases, but none of these were cited to me. *Dicey, Morris & Collins* contains the following general observations:

> ñThe recent practice of the English courts also suggests that the default application of English law where foreign law is not proved, is not unqualified, and is more likely to be challenged where the rule of English law is statutory rather than being a rule of the common law.ò (para. 9-07)

> ñThe conclusion is that there are cases in which the default application of a rule of English law is simply too problematic to be appropriate, but that apart from the fact that a court should not ñinventò a rule of English law to be applied in default of proof of foreign law, no sharp line exists to define the limits of the principle that in default of sufficient proof, foreign law will be taken to be the same as English law.ò

68. I pointed out during the hearing that *Dunhill v. Sunoptic* is not cited in the paragraphs of *Dicey, Morris & Collins* to which I have referred. Nor was it cited in the two recent Court of Appeal decisions referred to by Mr. de la Mare concerning the application of the ñpresumptionò in the case of applications for interim injunctions: *OPO v MLA* [2015] E.M.L.R. 4; and *Brownlie v Four Seasons Holdings Inc.* [2015] EWCA Civ 665. This would perhaps be surprising if it lays down the general rule for which Mr. Onions contended. However, I am not persuaded that it does.

69. I note that in *Dunhill v. Sunoptic* Roskill L.J. referred to ña case of this kindò, and one gets some flavour of the kind of case to which Roskill L.J was referring from what he said immediately after the passage in *Dunhill v. Sunoptic* cited by Mr. Onions:

> ñBut having said that, let me add this. If at some later stage acts are done or attempted to be done in other countries, similar to those acts which I would restrain in relation to this country and Switzerland and Dunhill's were to return under a liberty to apply with a fresh application for an injunction in relation to any of those other countries, supported by proper evidence of attempted passing off in those other countries, of confusion, and all the rest, whatever the local law is, then, if the evidence were satisfactory, a judge of the Chancery Division might, in the light of this judgment, see fit to grant a wider injunction. But at this stage I think that it would be wrong to grant a wider injunction than that I have already indicated.ò

70. Consequently, I read Roskill L.J.ôs words in *Dunhill v. Sunoptic* as relating to applications for injunctions in passing-off cases, and not as directly governing cases concerning foreign contract law.

71. In the present case, I have found that the wording of the UK Terms in itself discloses a serious issue to be tried under English law as to whether Lyca are in breach of those terms. Lebara have pleaded that Lyca are in breach of the Non-UK Terms, which are in material respects the same as the UK Terms. I am not persuaded that in those circumstances it is necessary for Lebara, on an application for an interim injunction to take effect in another EU Member State, to produce evidence of the law of that state as to the construction of contracts.

72. I note also that, although the Consumer Rights Act 2015 is a United Kingdom statute, the provisions of that Act to which I have referred are amongst those which implement an EU Directive, i.e. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

(8)(c)(i)(3) Breach of contract: Lyca's proposed amendment to their Terms

73. Lyca cannot complain that Lebara have not pleaded a case or served evidence of foreign law in relation to Lycaôs proposed amendment to their Terms, since Lyca only notified Lebara of that proposed amendment on 29 October 2015.

74. On the one hand, the proposed amendment presents another obstacle for Lebara to overcome if they are to succeed in this action. On the other hand, Mr. de la Mare outlined a number of grounds on which Lebara will contend that Lyca cannot rely on the proposed amendment as either an effective defence to the claim that the Block is a breach of Lycaôs contract with their customers or as constituting consent by those customers to the Block. In particular, Mr. de la Mare alleged, inter alia, that:

    (1) The proposed new term would be ineffective (under 62(1) of the Consumer Rights Act 2015), because it would be an unfair term. It is a term of the kind described in paragraph 13 (or perhaps paragraph 3 or 12) of the indicative list of potentially unfair terms in Part 1 of Schedule 2 to the Consumer Rights Act 2015.

    (2) The introduction of the proposed new term would be an unfair commercial practice, contrary to EU Member State laws implementing articles 5 to 7 of the Unfair Commercial Practices Directive. These include, in the United Kingdom, articles 3, 5 and 6 of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

    (3) Even if effective, the proposed new term would not constitute adequate consent to the Block by Lycaôs customers for the purposes of, inter alia, the E-Privacy Directive.

    (4) Moreover, the power conferred on Lyca by the proposed new term would be subject in English law to the limits acknowledged by the Supreme Court in *Braganza v. BP Shipping Ltd.* [2015] 1 WLR 1661, at paras. 17-37 (per Baroness Hale), 52-55 (per Lord Hodge) and 102-3 (per Lord Neuberger).

75. I do not propose to delve further into these arguments. It is sufficient to say that I am not persuaded that the proposed amendment to Lycaôs Terms will have the effect of making Lebaraôs allegations of breach of contract unarguable. There remain serious issues to be tried.

(8)(c)(ii) The E-Privacy Directive

76. Articles 5 and 6 of the E-Privacy Directive require the EU member states to implement measures which prohibit the ñinterception or surveillance of communications and related traffic dataò (Article 5) or the processing of ñtraffic data relating to subscribers and usersò (Article 6) save for certain specified purposes or with the consent of the customer.

77. Lebara allege that the Block is contrary to the requirements of Articles 5 and/or 6 because it involves:

(1) monitoring traffic data relating to communications and then processing that data;

(2) without the customerôs consent; and

(3) for a purpose (i.e. denying the customer access to Lebaraôs websites) which is not one of the purposes specified in Articles 5 or 6.

78. In fact, as the argument developed, it appeared that Lebaraôs real allegation is that the Block is contrary to Article 5, rather than Article 6. Lebaraôs claim is fiercely disputed by Lyca, but I cannot say that it is unarguable. Since it would be wrong for me to attempt to resolve difficult issues of law, I do not propose to rehearse the detail of the argument on either side on this issue.

79. It is appropriate, however, to say more about the position in relation to the laws implementing Articles 5 and 6 in the various EU Member States.

(8)(c)(ii)(1) The E-Privacy Directive: The United Kingdom

80. Lebara allege that, by implementing the Block, Lyca were in breach of regulation 7(1) of the E-Privacy Regulations, which implements Article 6 of the E-Privacy Directive, and which provides as follows:

> ñ(1) Subject to paragraphs (2) and (3), traffic data relating to subscribers or users which are processed and stored by a public communications provider shall, when no longer required for the purpose of the transmission of a communication, beï
>
> (a) erased;
>
> (b) in the case of an individual, modified so that they cease to constitute personal data of that subscriber or user; or
>
> (c) in the case of a corporate subscriber, modified so that they cease to be data that would be personal data if that subscriber was an individual.ò

81. Lebaraôs argument is that:

(1) The URL or IP address contained in a request for access to one of Lebaraôs websites is traffic data.

(2) Lyca use that data, not for the purpose of transmitting a communication, but for the purpose of blocking a communication.

(3) That is not a use which is permitted by regulation 7(1), (2) or (3).

82. Lycaôs answer to this is that regulation 7(1) (like Article 6) only applies to traffic data

ñrelating to subscribers or usersò, and that the URL or IP address for the website which a subscriber or user wishes to access is not data ñrelating to the subscriber or userò, since it does not identify the subscriber or user.

83. Lebara accept that that is the literal effect of the words of regulation 7(1), but contend that the Court should apply a purposive construction to regulation 7(1), to prevent what they allege would otherwise be a failure by the United Kingdom to implement Article 5 of the E-Privacy Directive insofar as it relates to traffic data. (This is why it seems to me that Lebaraôs real complaint concerns Article 5 and not Article 6.) Mr. de la Mare relied on the well-known case of *Marleasing SA v. La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, ECJ and what Arden LJ said about that case in *The Commissioners for Her Majesty's Revenue and Customs v. IDT Card Services Ireland Ltd.* [2006] EWCA Civ 29 at [73] to [92].

84. Alternatively, Mr. de la Mare suggested that the alleged failure to implement Article 5 could be addressed by one of two other alternative techniques:

    (1) by adopting a purposive construction of the provisions of the Regulation of Investigatory Powers Act 2000 which were intended to implement Article 5 of the E-Privacy Directive; or

    (2) by interpreting the English law of confidence in such a way as to give effect to Article 5 of the E-Privacy Directive.

85. This brief summary demonstrates some of the issues which Lebaraôs claim will face, but I am not persuaded that it is unarguable or, to use Lord Diplockôs words, frivolous or vexatious.

(8)(c)(ii)(2) The E-Privacy Directive: Dutch, French, German and Italian law

86. Lebara allege that the Block was unlawful under:

    (1) Article 11.2a of the Dutch Telecommunications Act;

    (2) Article D.98-5 of the French Post and Electronic Communication Code;

    (3) Section 88 of the German Telecommunications Law; and

    (4) the Italian Privacy Code (Legislative Decree No. 206/05),

    each of which was introduced to implement Articles 5 and 6 of the E-Privacy Directive.

87. Lebara have served statements from Dutch, German, French and Italian lawyers supporting their pleaded case. However, their French lawyer, M. Pierre-Emmanuel Fender, stated that France has not complied with its obligation to implement domestic remedies for breach of the E-Privacy Directive. Consequently, Lebara acknowledge that they cannot rely on breach of the E-Privacy Directive as an unlawful means under French law.

88. It is not disputed that the E-Privacy Directive has been implemented under Dutch, German and Italian law, although Lycaôs evidence on those laws raises a number of issues under the relevant provisions of domestic law. However, foreign law is a question of fact and it would be wrong for me to engage in an attempt to resolve disputed issues of fact. I proceed on the

basis, therefore, that there is a serious issue to be tried whether the Block was unlawful under these laws.

89. However, as I have already noted, at present, Italy is the only one of these states where the Modified Block will apply. It may also apply in France as and when Lebara Talk is launched there. In relation to both France and Italy, there is an issue whether a breach of the relevant French or Italian law would be actionable by Lycaôs customers or would be a purely regulatory matter, and therefore not capable of constituting ñunlawful meansò for the purposes of the unlawful means torts.

(8)(c)(ii)(3) The E-Privacy Directive: Other EU Member States

90. It is the duty of all EU Member States to implement the E-Privacy Directive. This duty includes, pursuant to article 15(2) of the E-Privacy Directive, a duty to provide a remedy in damages for breach of the E-Privacy Directive. (The nature of this duty was considered by the Court of Appeal in *Vidal-Hall v. Google Inc.* [2015] 3 WLR 409.)

91. Lebara allege that the Court can infer, by reason of this duty, that the Block is unlawful and actionable in every other EU Member State in which the Block was applied. The Court is invited to draw this inference in relation, in particular, to the laws of Austria, Belgium, Portugal and Sweden, those being the only states (other than Italy) in which the Modified Block will apply in the first instance.

92. Mr. Onions again relied on *Dunhill v. Sunoptic* and asserted that Lebara could not invite the Court to grant an interlocutory injunction without pleading and providing evidence of the applicable law in each jurisdiction in respect of which an injunction was sought.

93. I have already said that I do not regard *Dunhill v. Sunoptic* as laying down a rule of general application to all cases of applications for interim injunctions. Moreover, the Court of Appeal did not in that case address the particular issue which arises when one is considering an area of law which is the subject of an EU Directive.

94. This is not a case of applying the so-called ñpresumptionò that foreign law is the same as English law. Lebara are relying on a provision of EU law, which is part of English law. EU law obliges the Member States to implement the E-Privacy Directive. They may fail to do so, and indeed it is Lebaraôs own case that the relevant United Kingdom legislation is not well-drafted for implementing the E-Privacy Directive and that the Directive has not been fully implemented in France. However, Mr. de la Mare submitted that it would be wrong for this Court to assume that other states have failed to comply with their obligations under EU law. He referred in this context to the case of *R. v Ministry of Agriculture, Fisheries and Food Ex p. Hedley Lomas (Ireland) Ltd* (C-5/94) [1997] Q.B. 139.

95. In these circumstances, and having regard to the issue of proportionality in circumstances where Lebara have produced evidence as to the applicable law in 4 Member States, it seems to me that the appropriate course is to assume, for the purposes of deciding whether there is a serious issue to be tried, that the other relevant EU Member States have implemented the E-Privacy Directive, but to bear in mind when considering the later stages in the analysis that there is no evidence to confirm this.

(8)(c)(iii) Breach of confidence

96. The allegation of breach of confidence is closely related to the allegations of breach of

contract and breach of the E-Privacy Directive, since all concern what Lebara contend is the unauthorised misuse of confidential data. Accordingly, it gives rise to a serious issue to be tried as to whether there has been a breach of confidence under English law. For example, Lyca deny that the domain names which customers enter when they seek to access Lebaraôs websites, or the IP addresses of those websites, constitute confidential information.

97. As I have said, it was not agreed and I did not have the benefit of full argument as to whether any breach of confidence, if established as part of one of the unlawful means torts, would entitle Lebara to a remedy in respect of the Blockôs effects outside the United Kingdom. Given my other findings, I do not need to resolve this issue.

(8)(c)(iv) Deceit

98. I doubt whether the tort of deceit has any continuing relevance in circumstances where Lyca will not be sending to their customers the message that ñThis web page is not available.ò

(8)(c)(v) The Unfair Commercial Practices Directive

99. Lebara have pleaded breaches of domestic provisions implementing the Unfair Commercial Practices Directive in only two states:

(1) the Consumer Protection from Unfair Trading Regulations 2008 in the United Kingdom; and

(2) article 5 of the Italian Consumer Code (Legislative Decree No. 206/05).

100. I accept that both give rise to serious issues to be tried, but I note that Lebaraôs pleaded case relies to a considerable extent on the message that ñThis web page is not availableò, which will no longer be sent to Lycaôs customers.

(8)(c)(vi) Dutch, French, German and Italian competition law

101. Lebara allege that the Block was unlawful under:

(1) Dutch tort law;

(2) the French tort of unfair competition;

(3) section 3(1) of the German Act Against Unfair Competition; and

(4) article 2598 of the Italian Civil Code.

102. It would not be appropriate for me to seek to resolve the disputes as to the content of foreign law, and so I proceed on the basis that there are serious issues to be tried in this respect. I note, however, that, at present, Italy is the only one of these states where the Modified Block will apply.

(8)(c)(vii) The provisions of Dutch and Italian telecommunications law.

103. The same applies to Lebaraôs allegations that the Block was in breach of:

(1) Article 7.4a of the Dutch Telecommunications Act; and

(2) Article 3 of the Italian Electronic Communications Code (Legislative Decree No. 259/2003).

(8)(d) The E-Privacy Regulations: Lebara's alleged direct cause of action

104. Lebara contend that they are persons who have suffered damage by reason of a contravention of the E-Privacy Regulations, and therefore have a direct cause of action against Lyca pursuant to regulation 30 of the E-Privacy Regulations, which provides as follows:

> ñ(1) A person who suffers damage by reason of any contravention of any of the requirements of these Regulations by any other person shall be entitled to bring proceedings for compensation from that other person for that damage.ò

105. Mr. de la Mare relied on the judgment of Lewison J. in *Microsoft Corpn v McDonald (trading as Bizads)* [2007] Bus. L.R. 548, a case concerning the restrictions in regulation 22 of the E-Privacy Directive on ñthe transmission of unsolicited communications by means of electronic mail to individual subscribersò, i.e. spam emails.

106. In paragraphs 9 and 10 of his judgment in *Microsoft Corpn v McDonald (trading as Bizads)* [2007] Bus. L.R. 548, Lewison J. said as follows:

> ñ9 The threshold question, as it seems to me, is whether Microsoft Corporation has a cause of action under these Regulations at all. That is to be determined according to the normal principles applicable to deciding whether a private person (whether a natural person or a corporation) has a cause of action for breach of a statutory requirement. The court must first be satisfied that the person who claims the cause of action was within the class of persons for whose protection the relevant statutory requirement was imposed. Second, the court must be satisfied that the terms in which the statutory requirement was imposed enables a claim for relief to be brought.
>
> 10 As I have said the domestic regulations were made in order to conform with the provisions of the Directive and part of the policy of the Directive was, in my judgment, to protect the providers of electronic communications' systems. Consequently, I am satisfied that Microsoft is within the class of persons for whose benefit the statutory requirement was imposed.ò

107. However, Mr. Onions submitted that that case was distinguishable because the statutory requirement referred to by Lewison J. was not regulation 7, but regulation 22 of the E-Privacy Regulations. There is support in the recitals to the E-Privacy Directive (specifically, in recital (28)) for Lewison J.ôs conclusion that it was part of the policy of the E-Privacy Directive to protect the providers of electronic communications systems from the effects of spam emails, but Mr. Onions submitted that there was no support in the recitals to the E-Privacy Directive or in the wording of Article 5 or 6 for an argument that it was part of the policy of the E-Privacy Directive to protect the providers of electronic communications systems from breaches of Article 5 or 6.

108. Mr. de la Mare did not identify any specific basis for contending that Lebara were within the class of persons for whose protection the requirements of regulation 7 of the E-Privacy Regulations were imposed. Having regard to the terms of Article 5 and 6 of the E-Privacy Directive, I doubt whether there is a serious issue to be tried in this respect, but in the light of my other findings I do not have to decide this point.

(9) Whether damages would be an adequate remedy for Lebara

109. Lord Diplock said as follows in *American Cyanamid*:

> ñé the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.ò

110. No question was raised as to the ability of either party to pay damages if ordered to do so. Since the Claimants and the Defendants are all trading companies, the losses which they might suffer are financial in nature and capable in principle of being compensated by an award of damages. However, both parties contended that the difficulties in assessing their loss were such that there was a real risk that damages would not be an adequate remedy.

111. I approach the question whether damages would be an adequate remedy for either party on the basis that the Modified Block:

(1) would only apply in those states where Lebara Talk has been or will be launched;

(2) would only prevent Lycaôs customers from using Lebara Talk on their Lyca SIMs; and

(3) would come to an end in any event at the end of April 2016, i.e. in about 5½ monthsô time, the Block having already been in place for about 9 months.

112. I was referred to the judgment of Ramsey J. in *NATS (Services) Ltd v Gatwick Airport Ltd* [2014] B.L.R. 697, although in truth that case was merely one example, in the context of a public procurement dispute, of the application of the principles stated in *Evans Marshall & Co. v Bertola SA* [1973] 1 W.L.R. 349 by Sachs LJ at 379H and 380C-D:

> ñThe standard question in relation to the grant of an injunction, ñAre damages an adequate remedy?ò, might perhaps, in the light of the authorities of recent years, be rewritten: ñIs it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?òò
>
> ñThe courts have repeatedly recognised that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examplesé ò

113. Lebara contended that its losses would be both substantial and difficult to quantify. The alleged difficulties of quantification identified in paragraphs 63 to 66 of Lebaraôs Skeleton Argument were as follows:

(1) estimating the number of Lycaôs customers who would have signed up for Lebaraôs products if the Block had not been in place, but did not do so;

(2) quantifying the harm done to Lebaraôs brand by the false impression allegedly created among those of Lycaôs customers who were potential Lebara customers by the message that Lebaraôs website was ñnot availableò or by the failure of the Lebara Talk app to activate or operate; and

(3) risking the success of the new Lebara products by impeding their development at a critical stage, i.e. during the launch phase when they enjoyed a ñfirst moverò advantage over Lyca.

114. I do not consider that the second and third of these factors are significant. Lyca will no longer be sending the message that ñThis web page is unavailableò, and Lebara will also have the opportunity on their websites to explain that Lyca have introduced the Modified Block. The Modified Block will only affect Lebara Talk, and far from its development being impeded, the evidence is that it is growing rapidly:

(1) Although the Block was introduced in February 2015, the same month in which Lebara launched Lebara Talk in Austria, Belgium, Italy and Portugal, Lebara asserted in paragraph 25 of the Particulars of Claim dated 21 September 2015 that ñSince its launch Lebara Talk has grown rapidly in the relevant territories.ò

(2) As one would expect, Lebara made projections before launching Lebara Talk of the revenue which they expected to receive from it. Lebara have not provided those projections to the Court (although a confidentiality ring arrangement is in place), and Mr. de la Mare confirmed that there is no statement in Lebaraôs evidence to the effect that Lebara Talk has failed to achieve its projected growth.

115. These factors also lend force to the submissions made by Mr. Onions to the effect that Lebara have not substantiated their claim that they are likely to suffer significant loss. Moreover:

(1) Lyca have 14 million customers in the EU, but only a fraction (estimated by Lyca at about 10% in the United Kingdom) of Lycaôs customers are potential customers for Lebara Talk, given that:

(a) many of Lycaôs customers are either not connected to, or do not make use of, data services; and

(b) many of Lycaôs customers do not have mobile phones which are compatible with Lebara Talk (which requires an Android or Apple phone).

(2) The evidence was that the Lyca customers who are potential customers for Lebara Talk are ñtech-savvyò. Moreover, the Modified Block will only affect those of Lycaôs customers who have already found out about Lebara Talk and downloaded the app (which the Modified Block will then prevent them from activating, unless they do so via Wi-Fi).

(3) Lycaôs customers will have unrestricted access to Lebaraôs websites, on which Lebara will be able to advertise Lebara Talk and provide information about the Modified Block. Lebaraôs customers will therefore be able to find out about Lebara

Talk through this means, as well as others.

(4) Lebara will also be able to market Lebara Talk by other means, and the evidence was that within the migrant community word of mouth was one of the most effective marketing techniques.

116. On the other hand, Mr. de la Mare pointed out that the number of Lycaôs customers who are potential customers for Lebara Talk is still considerable, that the market moves rapidly and that any attempt to assess the effect of the Modified Block on the revenue which Lebara might have earned from those customers would necessarily involve consideration of a number of hypothetical issues (e.g. as to the number of customers, the extent of their use of Lebara Talk and the consequent profit to Lebara), each of which would be likely to be disputed and subject to contested expert evidence. He also argued that Lyca would not have imposed and maintained the Block if they did not think it was going to have a significant effect.

117. I accept that any assessment of damages if Lebara were successful at trial would involve some approximation, and consequently a risk that Lebara would be under-compensated. But the Courts can and do carry out such assessments and do what they can to guard against the risks of under- (or over-)compensation. There is a spectrum of cases in which there is a greater or lesser risk of significant under-compensation. The exercise of assessing damages in this case would not be a particularly unusual one, nor such as to place it towards the far end of that spectrum.

118. I pointed out to Mr. de la Mare that, if this action were to proceed to trial, then the issues relating to the assessment of damages would have to be gone into anyway in respect of Lebaraôs claim for damages in respect of the period of operation of the Block from February to November. His response was that, if I were to grant the injunction sought, and if Lebara were to succeed on liability and obtain a final injunction, then Lebara might decide not to pursue their claim for damages in respect of that period. The fact that the losses allegedly suffered in the last 9 months are such that Lebara might decide not to pursue them tends, if anything, to support Mr. Onionsô submissions.

119. On the whole, while I do not consider that it would be right for me to dismiss this application simply on the basis that damages would be an adequate remedy for Lebara, since I cannot conclude that it is certain the Modified Block will not cause Lebara significant loss, and there would be some difficulties in assessing the amount of such loss, I have real doubts whether the Modified Block is likely to cause Lebara significant uncompensated loss, and this is a factor to be considered when it comes to considering the balance of convenience.

(10) Whether damages would be an adequate remedy for Lyca

120. Lord Diplock said as follows in *American Cyanamid*:

> ñIf, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a

financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.ò

121. In his submissions, Mr. Onions focused on the potential loss of income from customers which Lyca would suffer if an injunction were to be granted but Lyca were to succeed at trial. This is very much the obverse of the loss which Lebara claim that they will suffer if I do not grant an injunction. In both cases, there is reason to doubt whether the alleged loss will be substantial, but I cannot rule that out, and there would be difficulties in quantifying any loss. Accordingly, my conclusion in relation to this issue is the same as in relation to the issue whether damages would be an adequate remedy for Lebara.

122. I should add that Mr. Onions appeared to suggest that, in the case of an application for a mandatory interim injunction, the Court should omit this step in the *American Cyanamid* analysis. I do not accept this. (I will deal later with the authorities concerning applications for mandatory interim injunctions.)

(11) The Balance of Convenience

123. Lord Diplock said as follows in *American Cyanamid*:

> ñIt is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.
>
> Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength

of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.ò

124. This passage has been considered and explained in many cases since 1976. In particular, I was referred to the following observations of Lord Hoffmann in the Privy Council case of *National Commercial Bank of Jamaica v. Olint Corpn* [2009] 1 WLR 1405 (ñ*Olint*ò), at paras. 16-18:

ñ16 é It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17 In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

> ñIt would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.ò

18 Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

(11)(a) The factors listed by Lord Hoffmann

125. For the reasons which I have already given, the position in relation to the first three factors listed by Lord Hoffmann is as follows:

(1) Either party is capable of suffering financial loss if the injunction is granted (in the case of Lyca) or withheld (in the case of Lebara). Henceforth, those losses will concern lost revenue from Lebara Talk (in the case of Lebara) or revenue lost to Lebara Talk (in the case of Lyca). In either case, the nature of the exercise of assessing damage would involve some risk of under-compensation. To that extent, either party is capable of suffering irremediable prejudice.

(2) However, it may well be that the loss (and, a fortiori, the uncompensated element of any loss) would not be substantial in the context of the partiesô respective businesses. I repeat that it is Lebaraôs own case that Lebara Talk has grown rapidly despite the Block and that Lebara have not adduced evidence that the Block has caused Lebara Talk to fall short of its projections.

(3) As I have said, no issue arises as to the ability of either party to satisfy an award of damages.

126. As for the relative strength of the partiesô cases, I have already pointed out that it would be wrong for me to engage in an attempt either to resolve disputed issues of fact or to decide difficult questions of law.

127. In the course of argument, I referred to the sort of case, say an application for a freezing order, where it is pretty obvious that the Defendant has done wrong and the Court would be surprised, even after a short hearing, if the outcome of the trial was any different. Mr. de la Mare frankly accepted that this did not look like one of those cases. He submitted, however, that this was a case where I could have, in the words of Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, ña high degree of assurance that at the trial it will appear that the injunction was rightly grantedò.

128. I have considered the facts and the law to the extent which is appropriate on an application for an interim injunction, but this exercise has not revealed the case to be one of those in which, to use Lord Diplockôs words, ñit is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.ò (See also *Series 5 Software Ltd. v. Clarke* [1996] 1 All ER 853, 865c-g, per Laddie J.)

(11)(b) Delay

129. The Block has been place since February 2015. Lyca relied on this fact as relevant to the exercise of my discretion in two respects. First, Lyca alleged that Lebara had delayed in bringing this application. Secondly, Lyca contended that the status quo now is that the Block is in place. I deal first with the issue of delay.

130. Lebaraôs evidence, contained in the statements of its Deputy CEO, Jean-Pascal van Overbeke, was as follows. Lebara first became aware of the Block on 1 March 2015 in relation to Lebara Talk in Austria. Lebara carried out tests in April and May and had discovered by the end of May that the Block extended to Austria, Belgium, France and the United Kingdom. Testing continued thereafter, with Lebaraôs expert witness, Dr. Richard Clayton, carrying out tests on 28 June 2015 (and some further testing on 19 and 26 July 2015) and Kroll Associates UK Limited carrying out tests in 6 states in the week beginning

29 June 2015.

131. Lebara instructed solicitors on 29 May 2015. However, Lebara did not want to pursue legal remedies unless satisfied that self-help was not an option. Accordingly, Lebaraôs technical team spent time ñthroughout June and Julyò (according to paragraph 73 of Mr. van Overbekeôs first statement) seeking to develop a technical solution to circumvent the Block. This proved not to be possible. This appears to be the stage, although Lebara have not specified the date, when Lebara decided to make this application. Time was then needed to gather the evidence and for counsel to prepare the Particulars of Claim.

132. I accept that it would have taken time for Lebara to investigate the Block and for their lawyers to formulate their case. However, it would no doubt have been possible for Lebara to engage in correspondence with Lyca and to issue this application sooner than they did. I note that Lyca never denied the existence of the Block, and acknowledged it in a letter dated 16 September 2015, less than 2 weeks after the letter before action and the day after the Claim Form was issued.

133. However, Lebara decided that, before writing to Lyca or issuing this application, they wanted to try to find ways of working round the Block. Lebara could have done this at the same time as pursuing the present application, but chose instead to do one before the other. If Lebara had not taken this approach, then this application could have been made at least a month and probably two months earlier than it was.

134. To that extent, Lebara bear some responsibility for the fact that this application was brought so long after the Block was implemented, and that is a factor which counts to some extent against the grant of an injunction, especially as the Modified Block will come to an end in any event in April 2016.

(11)(c) Status Quo

135. I have already quoted Lord Diplockôs statement in *American Cyanamid* (at 408G) that:

> ñWhere other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.ò

136. Preserving the status quo could perhaps be described as a ñtie-breakerò. Mr. Onions also referred to the explanation which Lord Diplock gave in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130, at 140C-D:

> ñThe status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo.ò

137. These statements by Lord Diplock suggest that, were I to find that all other factors were evenly balanced, I should incline towards refusing the injunction sought and thereby

preserving what has become the status quo.

(11)(d) Mandatory interim injunction

138. In addition to the factors mentioned by Lord Diplock and listed by Lord Hoffmann, the parties relied on two other factors as relevant to the balance of convenience in the context of the present case, namely: (a) the fact that the injunction sought is mandatory in nature; and (b) the public interest. I deal first with the mandatory nature of the injunction.

139. In *Olint*, Lord Hoffmann disapproved of what he described (in paragraph 21) as the ñbox-tickingò approach to an interim injunction application which had been adopted by the judge at first instance and the Court of Appeal of Jamaica, i.e. ñapplying a rule that if it was mandatory, a ñhigh degree of assuranceò was required, while if it was prohibitory, all that was needed was a ñserious issue to be triedò.ò

140. Lord Hoffmann described the correct approach as follows:

> ñ19 There is however no reason to suppose that, in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89)* [1991] 1 AC 603, 682ï 683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, ña high degree of assurance that at the trial it will appear that the injunction was rightly grantedò.
>
> 20 For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see *Films Rover* [1987] 1 WLR 670, 680. What matters is what the practical consequences of the actual injunction are likely to be. é ò

141. In paragraph 49 of his judgment in *Dahabshiil Transfer Services Ltd v Barclays Bank Plc* [2013] EWHC 3379 Ch., Henderson J, after quoting this passage, referred to what he called ñthe requirement for ña high degree of assuranceòò, but neither party contended before me that Lord Hoffmannôs judgment should be read as imposing a requirement, as opposed to identifying factors which are relevant to the consideration of the balance of convenience. (I was also referred to the judgment of Phillips LJ in *Zockoll Group Ltd v. Mercury Communications Ltd.* [1998] F.S.R. 354, which helpfully reviews a number of the authorities which pre-date *Olint*.)

142. It is clear from Lord Hoffmannôs judgment that what matters is not whether the proposed

injunction would properly be described as mandatory, but rather whether it would be likely to cause irremediable prejudice to Lyca. For reasons which I have already given, I doubt whether the grant or the refusal of the injunction would be likely to cause substantial irremediable prejudice to either party.

(11)(f) The Public Interest

143. The public interest is a factor which is relevant to the balance of convenience and which ought to be taken into account. This was stated, albeit in a different context, in the judgment of the Court of Appeal (which was reversed, but not on this point) in *Associated British Ports v TGWU* [1989] 1 WLR 939, at 957C-D (per Neill L.J.), 962E (per Butler-Sloss L.J.) and 968H-969C (per Stuart-Smith L.J.).

144. Mr. de la Mare referred in this context to; (a) consumer protection; (b) free competition; and (c) Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union. To a considerable extent, Lebaraôs case on the public interest involved looking at the allegedly unlawful means from the customerôs point of view. There was consequently a considerable overlap with the merits of Lebaraôs case, which I have already considered, although I accept that the case for an injunction gains some extra weight when looked at from this perspective.

145. On the other hand, however, the public interest is of less significance in relation to the Modified Block than the original Block. Lyca will no longer be blocking access to Lebaraôs general websites, and Lebara will be able to use those websites to publicise its products, including Lebara Talk, to Lycaôs customers and to provide information about the Modified Block.

(11)(e) Balance of Convenience: Conclusion

146. Taking all of these factors into account, in my judgment the balance of convenience is against granting the injunction sought.

(12) The Alternative Order Sought

147. I do not consider that it would be appropriate to make the alternative order sought by Lebara, i.e. an order requiring Lyca to make statements about the Block on its website.

148. There was only limited argument before me about the circumstances in which it would be appropriate to make an interim order of this nature. Mr. de la Mare referred to *Samsung Electronics (UK) Limited v. Apple Inc* [2012] EWCA Civ 1339, but that was a case concerning a final injunction rather than an interim injunction. Sir Robin Jacob held (at [75]) that there was power to make a ñpublicity orderò as an adjunct to a declaration. He said that it was a discretionary, equitable, remedy and the test he applied was whether there was a real need to dispel commercial uncertainty. He found that that test was satisfied on the facts of that case, in which ñmassive publicityò by Apple had caused sales of Samsungôs products to plummet. Apple were ordered to publicise the judgment which had held that, contrary to Appleôs well-publicised claims, their registered design had not been infringed by Samsung.

149. In the present case, I have regard in particular to:

(1) the absence of evidence that sales of Lebara Talk have failed to meet expectations;

(2) the more limited scope of the Modified Block;

(3) the fact that Lyca will not be sending to their customers the message that ñthis web page in unavailableò; and

(4) the opportunities which Lebara themselves will have to inform Lycaôs customers of the Modified Block.

150. Consequently, I am not persuaded either that there is a serious issue to be tried in respect of a final ñpublicity orderò or that the failure to make such an order on an interim basis would risk causing irremediable prejudice to Lebara. I also regard an order of this nature as one which I would not consider it appropriate to make unless I had ña high degree of assurance that at the trial it will appear that the injunction was rightly grantedò.

(13) Conclusion

151. For these reasons, Lebaraôs application is dismissed.

152. I stress that I have not dealt in this Judgment with what my decision might have been if Lyca had not agreed to modify the Block.

153. Leading counsel covered a huge amount of material in the 3 day hearing and presented their cases clearly and persuasively. I am grateful to them and to all counsel and solicitors involved for the hard work and efficiency which made this possible.