Neutral Citation Number: [2009] EWHC 339 (Ch)

Case No: 7MA91089

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**MANCHESTER DISTRICT REGISTRY**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2009

**Before**:

**THE HONOURABLE MR. JUSTICE LEWISON**

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**Between:**

| | |
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| **EASYAIR LIMITED (Trading As OPENAIR)** | **Claimant** |
| **- and -** | |
| **OPAL TELECOM LIMITED** | **Defendant** |

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**Miss Lesley Anderson QC** (instructed by **Cobbetts LLP**) for the **Claimant.**
**Mr. Michael J. Booth QC** (instructed by **Mason Hayes**) for the **Defendant.**

Hearing dates: 4, 5 February 2009

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# Judgment

**Mr Justice Lewison:**

1. Until the end of April 2004 the Claimant, Easyair Ltd (which traded as "Openair"), operated a business providing SIMs to its business customers under a service provider agreement with O2, the mobile phone network. Openair's customers, in turn, used those SIMs to connect to the O2 network. However, they were not the end users of mobile phones. They connected to the O2 network as GSM gateways. GSM gateways allow a call made from a fixed line telephone to a mobile telephone to be recognized as a mobile to mobile call. The latter may be cheaper for the caller, particularly if he is recognised as being on the same mobile network as the recipient of the call. GSM gateways are often used in conjunction with software which determines whether a particular call will or will not be cheaper if treated as a mobile to mobile call and automatically selects the cheaper alternative.

2. At that time a distinction was drawn by mobile network operators (MNOs) and the regulator (OFCOM) between "private" GSM gateways (used solely by a single end user for its own calls) and "public" GSM gateways (through which intermediaries enabled end users to make calls from fixed lines at potentially lower cost). Subsequently, a three-fold categorisation was adopted, distinguishing self-use gateways, commercial single-user gateways ("COSUGs") and commercial multi-user gateways ("COMUGs"). Openair's pleaded case asserts that its customers inserted the SIMs supplied by Openair into COMUG GSM gateways.

3. At that time there was some doubt about whether an MNO could lawfully permit public gateways to connect to its network, without being in breach of its own licence conditions. O2 published its own policy about gateways. There were at least two versions of the policy. One version, issued in December 2003, stated:

> "The term 'GSM Gateway' is used to describe equipment which enables the routing of voice calls from fixed line equipment to a mobile phone, yet it gives the impression it's a mobile to mobile call.
>
> This type of equipment is being deployed widely across mobile networks without the prior consent of the network operators and is resulting in quality impairments, network congestion and safety/security concerns.
>
> New legislation has been introduced which has allowed us to review our policy on the use of GSM Gateways.
>
> Permitted use
>
> The use of GSM Gateways by private users is permitted providing that the system is operated by or on behalf of the customer for the sole use of that customer
>
> A private GSM Gateway registration process is being introduced in January 2004 which will allow us to strictly control the use of these devices on our network.
>
> Non permitted use
>
> The use of public GSM gateways for the conveyance of third party traffic is not permitted on the O2 UK network and where found we will withdraw the service."

4. Openair ran its business under a service provider agreement with O2. It is not in evidence. It is thus not clear whether, under the terms of its agreement, Openair was bound to comply with O2's statement of policy which does not in terms purport to have contractual force. I will assume that it was not. It is also alleged on behalf of Openair that it had the consent of O2 to facilitate the connection of public (including COMUG) gateways to the O2 network. I will assume this allegation to be true. It is not, however, alleged that any consent given by O2 was irrevocable.

5. As part of its business Openair had a lot of information about its customers. This information was potentially valuable. However, in order to exploit the information itself, Openair need to be able to supply its own customers with O2 airtime. To do this, it needed a contractual relationship with O2. However, for reasons that do not matter O2 refused to renew Openair's service provider agreement, which was due to expire at the end of April 2004.

6. Openair thus looked for another way of making money. It entered into negotiations with Opal Telecom Ltd ("Opal"), which is a subsidiary of The Carphone Warehouse plc. Opal had its own business providing airtime on the O2 network. It is alleged on behalf of Openair that Opal also had consent from O2 to facilitate the connection of public gateways to the O2 network. I will assume this to be true.

7. On 30 April 2004 Openair and Opal entered into two agreements:

i) A sale and purchase agreement ("the SPA") and

ii) A dealer agreement.

8. There was another collateral agreement, to which I will return, and another agreement (referred to as the services agreement) which plays no part in this case.

9. Under the terms of the SPA Openair sold to Opal its rights under existing subscriber contracts, and also its subscriber base. Under the terms of the dealer agreement Opal appointed Openair as its non-exclusive agent for attracting subscribers, and agreed to pay commission on business introduced, as well as on continuing contracts that had passed under the SPA.

10. In June 2004 O2 issued a revised version of its policy about GSM gateways. That said:

> "1. Prohibition on the use of public GSM Gateways
>
> Public GSM Gateways are not permitted to operate using the O2 network. O2 does not agree to provide service to operators of public GSM Gateway operators. Where they are found to operate, O2 will take steps to withdraw service, on the basis that their continued operation effectively puts O2 in breach of its Conditions of Entitlement
>
> 2. Private GSM Gateways should be permitted
>
> The operation of private GSM Gateways does not appear to be inconsistent with legal or regulatory requirements. On that basis, there is no general prohibition. However, Gateway operators should ensure to O2's reasonable satisfaction that they adhere to OFCOM's guidance on the provision of correct CLI information."

11. O2's policy on GSM gateways was enforced by requiring subscribers to sign a form confirming that the SIM cards issued to them would be used exclusively for telecommunications traffic generated by them during the normal course of business and that they accepted the policy.

12. In September 2004 O2 disconnected some 7000 SIMs from its network. Those SIMS had been issued to customers who had formed part of the subscriber base that Openair had sold to Opal. In the run up to the disconnection there had been correspondence between Opal and O2 in which Opal tried to dissuade O2 from disconnecting the SIMs. Opal has said that the reason why the SIMs were disconnected was that they were COMUGs and illegal (in the sense that, as the June 2004 policy statement said, allowing COMUGs to operate would have put O2 in breach of its own licence, which was a standard form licence for operating a mobile telephone network). Openair dispute this. They hint at some sort of hidden agenda, but say that without disclosure they cannot make good or even formulate any real allegation. On the evidence it is clear that the reason why O2 disconnected the Sims was that they were COMUGs and that O2 considered that they were illegal in the sense just mentioned. Openair argued that O2 were wrong to say that COMUGs were illegal, and relied on a decision of the Competition Appeal Tribunal (CAT) in *Floe Telecom Ltd v Office of Communications* [2006] CAT 17. That case concerned (among other things) the interpretation of a licence granted to Vodafone. The CAT decided that, on the true construction of the Vodafone licence, the licence conditions permitted Vodafone to provide a

telecommunications service, including COMUGs, provided that the COMUGs complied with the technical requirements of European legislation. At the hearing before me it was known that judgment on an appeal from the CAT was due to be handed down by the Court of Appeal in the following week; and so I deferred judgment until the result of the appeal was known. Both parties made additional written submissions following the hand down of judgment on the appeal. The Court of Appeal reversed the CAT on the question of construction (*Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47). They held:

i) The Vodafone licence did not, on its true construction, permit the use of GSM gateways, let alone COMUGs;

ii) The construction of the licence was not affected by European legislation. As Mummery LJ put it (§ 102):

> "It is not, however, correct to construe that directive and then to hold that the licence must be construed to be compatible with that directive. It is wrong because the licence is neither domestic law made to implement the EC directive, nor is it any other kind of "law" in the generally understood sense of general rules laid down either in the form of legislation or of case law."

13. In the light of that decision, the legal foundation of Openair's claim that O2 was not entitled to disconnect the SIMs has completely disintegrated. Ms Anderson QC, appearing for Openair, argued that there might still be an issue of European law. However, it is not suggested that O2's standard from of licence differed in any material respect from Vodafone's; and the Court of Appeal has decided that European law is not relevant to interpreting the scope of the licence. There is, in consequence, no live issue of European law.

14. Openair have now brought an action against Opal claiming damages. Although the Particulars of Claim do not identify the nature of the damage which Openair claim to have suffered, it is clear from the evidence that what they claim is the profit that they would have earned under the dealer agreement if the disconnections had not taken place. But the curious thing is that the claim is not based on any alleged breach of the dealer agreement. It is based on a breach of the SPA; and on breach of an alleged fiduciary duty. Openair allege that Opal had an obligation to fight the disconnection; if necessary by taking legal proceedings against O2; and that Opal also had an obligation to procure the registration of its customers under O2's registration scheme for private gateways. Opal say that the claim is not maintainable on the true construction of the SPA or that it has no reasonable prospect of success. They therefore apply to strike out the claim; alternatively for summary judgment. Openair have responded by formulating draft amendments to the Particulars of Claim. In considering Opal's applications I have worked on the basis of the draft amended Particulars of Claim.

15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

16. On the factual assumptions that I have made in Openair's favour, I do not consider that there is any reason to postpone a decision on the construction of the SPA or on the question whether, having regard to the contractual relationship between the parties, the alleged fiduciary duty arose.

17. I turn, then, to the contractual provisions. The SPA recites that Openair "wishes to sell" and Opal "wishes to buy the O2 Subscribers of the Business on the terms of this Agreement." Clause 1.1 contains a number of definitions among which is "Subscriber Contracts" defined as:

> "the contracts between [Openair] and Subscribers for the supply of the Services complete and up-to-date [copies of which] have been supplied to [Opal] at Completion."

18. Clause 2.1 of the SPA provided:

> "At Completion [Openair] shall sell (which expression shall where appropriate include an assignment or novation) and [Opal] shall buy the following assets free from all Encumbrances
>
> **Asset**
>
> All rights under an in connection with the benefit of the Subscriber Contracts
>
> The Subscriber Database"

19. Clause 3.3 required Opal to "assume all obligations under the Subscriber Contracts". Clause 4 specified the purchase price as £1 together with the obligation to enter into the Dealer Agreement. Clause 5 provided for completion to take place immediately after execution of the SPA. Clause 6 required Openair to make available on completion an assignment of its rights under the Subscriber Contracts, and the consent of O2 to the transfer together with details of the Subscriber Base and copies of the Subscriber Contracts. Clause 6 dealt with third party consents required under Subscriber Contracts, and said that if a necessary third party consent could not be obtained within two months of a request for consent, then the Subscriber Contract in question would be deemed to be an Excluded Asset.

20. Clause 7.1 is the contractual provision on which the claim for damages is based. It provides:

> "Subject to the following provisions of this clause 7, [Opal] shall perform all obligations required to be performed after [1 May 2004] under those Subscriber Contracts of which complete and up-to-date copies have been provided to [Opal] at Completion."

21. Clause 7.2 carved out certain obligations from the scope of clause 7.1; and clause 7.3 provided that Openair would discharge them and indemnify Opal against liability for them. Clause 11 contained a number of warranties given by Openair; and contained indemnities by Openair against liabilities incurred by Opal arising from or in connection with any breach of the warranties. The warranties included a warranty by Openair that:

> "O2 has given written approval to all subscriber identity module Gateways (whether public or private) used by or in respect of the Subscribers."

22. Clause 12 contained an acknowledgment by Openair that Opal was "buying the Assets in accordance with the terms of this Agreement and that, therefore, [Opal] is entitled to protect the Assets". It also contained restrictive covenants precluding Openair from engaging in mobile phone businesses for a period of five years, or from soliciting subscribers during that period.

23. Clause 25 contained an entire agreement clause which said that the entire agreement was contained in "this Agreement and the documents referred to in it".

24. As foreshadowed by the SPA the dealer agreement was executed on the same day. Openair was called "the Dealer". Its recitals referred to the SPA. Clause 1 contained a number of definitions, including:

| | |
|---|---|
| "Customer" | means a New Customer and/or an Openair Customer |
| "New Customer" | means a person who enters into an Opal Contract after the date of this Agreement |
| "OPAL Contract" | means a written agreement between OPAL and a customer for the provision of Services where the execution of the agreement has been procured by the Dealer |
| "OPAL Terms" | means the terms and conditions on which OPAL offers to provide Services to customers which terms and conditions OPAL shall determine in its absolute discretion |
| "Openair Customers" | means those customers of the Dealer for mobile telecommunications services transferred to Opal pursuant to the SPA |
| "Openair Customer Contracts" | means the contracts entered into by [Openair] with the Openair Customers in relation to the provision of mobile telecommunications services and sold to Opal pursuant to the Opal SPA |

25. Clause 2.2 required Opal to supply Openair with the Opal Terms (i.e. its terms of business). Clause 3.2 required Openair to provide Customers and prospective Customers with Opal's tariffs and on behalf of Opal to:

> "ensure that the Customer signs the then current OPAL Terms as provided by OPAL to [Openair] under Clause 2.2…."

26. Clause 5.3 said that Opal had no obligation to accept orders for services placed by customers and clause 5.4 said that Opal was entitled at its sole discretion "from time to time to extend the range of Services, or discontinue any of the same".

27. Clause 6.1 obliged Opal to pay Openair commission, calculated in accordance with a formula:

> "in respect of all Openair Customer Contracts that are in force during the Life of this Agreement and all OPAL Contracts entered into during the Life of this Agreement…"

28. Clause 6.2 provided for commission to be payable monthly.

29. Clause 7.1 provided:

> "If [Openair] disputes the amount of any payment (a "Disputed Payment") by OPAL under this Agreement, [Openair] shall as soon as reasonably practicable issue a notice in writing identifying the Disputed Payment and detailing the nature of and reason for the dispute, accompanied by supporting documentation. In the event that [Openair] fails to issue any

such notice within 60 days of the receipt of the Disputed Payment, [Openair] agrees that the payment shall be deemed to have been agreed and that, notwithstanding the issue of any subsequent notice, it shall be deemed to have waived any right or remedy which it might otherwise have enjoyed in respect of any underpayment."

30. Clause 10.3 provided that:

> "Neither Party shall be liable to the other in contract, tort (including negligence and breach of statutory duty) or otherwise howsoever for:
>
> (a) any loss of profit, business, goodwill, contract revenue, anticipated savings or business; or
>
> (b) … or
>
> (c) any special indirect consequential loss or damage of any nature whatsoever, whatever the cause thereof arising out of or in connection with this Agreement."

31. It is this clause that explains why Openair brings its claim under the SPA rather than under the dealer agreement. Clause 20.1 said that nothing in the agreement should be deemed to constitute a partnership between Openair and Opal. Clause 23 contained an entire agreement clause.

32. Although each of the SPA and the dealer agreement contained an entire agreement clause, they were plainly part of one overall package. Indeed apart from the payment of £1, entry into the dealer agreement was the whole purchase price under the SPA. Moreover the entire agreement clause in the SPA said in terms that the entire agreement was contained not only in the SPA but also in the documents referred to in it, which included the dealer agreement. Clearly then, they must be construed together.

33. The important features of the overall deal were in my judgment as follows:

    i) The SPA was just that. It was a sale and purchase. In other words the assets ceased to belong to Openair and became the property of Opal. Openair had no continuing proprietary interest in the sold assets.

    ii) Following the SPA, the only way in which Openair could make money from the assets it had sold was under the dealer agreement.

    iii) Commission was payable under the dealer agreement on two kinds of contract:

        a) Contracts which had been sold by Openair to Opal and which continued in force and

        b) Contracts between subscribers and Opal which Openair had procured.

    iv) Since commission was payable at the same rate for both kinds of contract it was a matter of financial indifference to Openair whether customers in its subscriber base signed up on new Opal terms or remained on Openair contracts;

v) Indeed the dealer agreement positively required Openair to sign up "Customers" (a defined expression which includes Openair's subscribers) on Opal terms;

vi) The parties expressly agreed that neither of them would be liable for loss of profit or revenue under the dealer agreement.

34. It is against that background that clause 7.1 of the SPA must be construed. The essential question is: is it in substance no more than an indemnity; or does it impose a positive obligation on Opal breach of which sounds in substantial damages equivalent to the loss of profit that Openair would have made under the dealer agreement (but which it had agreed would not be recoverable under that agreement)?

35. Valiantly though Ms Anderson argued the latter, I have no doubt that it was only an indemnity. She pointed, naturally enough, to parts of the SPA in which the parties had used the language of indemnity, and contrasted that with clause 7.1 which uses the language of positive obligation. Clause 7.1, she said, imposed a positive obligation on Opal to preserve the subscribers' connection to the O2 network, if necessary by taking proceedings against O2 in the event of disconnection. But that, to my mind, is a detailed linguistic and semantic analysis which makes no business sense.

36. First, clause 7.1 applied only to "Subscriber Contracts" as defined. If a former customer of Openair signed up to a new contract on Opal Terms, its new contract would not qualify as a Subscriber Contract. Since Openair undertook an obligation to bring this about, it would be inconsistent to read clause 7.1 as obliging Opal to preserve Openair contracts. Second, it was common ground that the mechanism for inserting Opal into the shoes of Openair vis-à-vis subscribers was by way of novation, since that is the only way in which contractual burdens can be shifted from one person to another. It was also common ground that a novation took effect as a new contract. So a novated contract would not fall within clause 7.1 if construed as Openair wish to construe it. Third, since Openair was entitled to the same commission whether the subscriber was bound by Openair's terms or by Opal's there was no commercial reason for wishing to preserve the body of Subscriber Contracts, as defined. Fourth, it cannot be supposed that having agreed that neither party would be liable for damages for loss of profit under the dealer agreement, Opal would have undertaken an obligation under clause 7.1 of the SPA which led to the same result.

37. Indemnity clauses cast in the language of positive obligation have a long history in sales and purchases. *In re Poole and Clarke's Contract* [1904] 2 Ch. 173, *Harris v. Boots Cash Chemists (Southern) Ltd* [1904] 2 Ch. 376 and *Reckitt v. Cody* [1920] 2 Ch. 452 are examples. The reason why the court construes such clauses as indemnities is clear. Once a seller has sold the property in question he has no continuing interest in it, and his only commercial interest is to protect himself against being liable for residual obligations. In my judgment that is the position in the present case. Accordingly in my judgment clause 7.1 of the SPA gives no support to the claim now made against Opal. I am satisfied that the claim for breach of contract has no real prospect of success.

38. The allegation of fiduciary duty is pleaded in paragraph 16 of the draft amended Particulars of Claim as follows:

> "Further or alternatively [Opal] owed [Openair] a fiduciary duty to act (in relation to the Subscriber Base) in the interests of [Openair]. It is the case of [Openair] that such a duty arises because of the circumstances pleaded in paragraphs 4-7 above [which set out certain provisions of the SPA and the dealer agreement] and the fact that

> [Opal] was in control of the Subscriber Contracts but [Openair] was dependent on the maintenance of the same for the purpose of generating revenues under the [dealer agreement]."

39. It is, in my judgment, plain that the allegation that Openair was dependent on the maintenance of the Subscriber Contracts to generate revenues under the dealer agreement is wrong. As I have said, Openair was entitled to revenues under the dealer agreement not only in respect of Subscriber Contracts but also in relation to Opal Contracts (i.e. customers who signed up on Opal's terms, where Openair had procured the contracts). Thus the underpinning of the allegation of fiduciary duty is hopeless. The pleaded terms of the SPA and the dealer agreement do not support the allegation either. As developed in oral submission, the allegation of fiduciary duty is dependent on establishing that, in some way, Openair had a continuing proprietary interest in the Subscriber Contracts. But once it had sold its interest to Opal, it ceased to have any such interest, and to describe Opal's purchase as being in some sense a joint venture is, in my judgment, unrealistic. The fact is that the parties chose to regulate their relationships in two contracts: one dealing with the sale and purchase and the other dealing with Openair's appointment as agent. Although it is, of course, possible for fiduciary duties to exist alongside contractual relationships, any fiduciary duties must be moulded by the contractual setting. The pleading asserts that Opal owed a duty to act "in the interests of [Openair]". It does not even admit of the possibility of Opal acting in the *joint* interests of itself and Openair, still less in its own interest. In my judgment this allegation is incompatible with Opal's purchase of the assets transferred by the SPA and inconsistent with the recognition in clause 12 of the SPA that Opal was "entitled" (but not obliged) to protect them. It is also inconsistent with Openair's obligation under the dealer agreement to sign up "Customers" on Opal terms. I am satisfied that the allegations of breach of fiduciary duty have no real prospect of success.

40. Thus far I have not based any part of my reasoning on the particular breach of contract and fiduciary duty alleged. But in the light of the decision of the Court of Appeal in the *Floe* case it is plain that any legal action brought against O2 would have failed. It cannot be either a breach of fiduciary duty or (in the absence of the clearest possible words) a breach of contract not to bring proceedings which are bound to fail. This provides another reason for dismissing the main claim. The claim that there was a breach of contract or duty by failing to register users leads nowhere. It is common ground that all the relevant users were COMUGs. Thus registering those users would have resulted in their disconnection, because the particulars required by O2 would have revealed them as COMUGs. This claim is hopeless.

41. The two remaining pleaded claims relate to the payment of commission. It is now necessary to revert to the collateral agreement that I mentioned earlier. Under the collateral agreement Openair deposited £200,000 with Opal "as a security" for a period of six months. Opal was entitled to have recourse to this deposit in the event that:

> "for each Month (as defined by the Dealer Agreement) falling in a period of six months following [30 April 2004] … (B + D + E) exceeds A where
> B, D and E have the meanings set out in Schedule 2 to the Dealer Agreement; and
> A means the aggregate sums actually paid by customers in respect of the figure represented by "A" in the formula set out in Schedule 2 to the Dealer Agreement.
> Such excess being hereinafter referred to as "the Monthly Excess"."

42. Fleshing this out a little:

i) A is Opal's actual monthly receipt from Customers (less tax, discounts etc);

ii) B is what Opal pays the mobile phone network;

iii) D is 3.25 per cent of A; and

iv) E is £3 per connected SIM of each customer included in the calculation of A.

43. By contrast, in Schedule 2 to the dealer agreement A was not Opal's actual monthly receipt, but its monthly invoice total. At the end of the six month period Opal was required to repay the deposit (or what was left of it) to Openair, although it had 60 days from the end of the period in which to pay.

44. Opal has said that it is entitled to deduct from the deposit the sum of £69,000- odd as representing a debt that it cannot recover from Itelso Ltd, a company which is a subscriber. In the draft amended Particulars of Claim Openair says:

i) It does not accept that Opal cannot recover the debt from Itelso;

ii) The true position is that Itelso has disputed the accuracy of Opal's invoices, and has also claimed a set off;

iii) In any event Opal has not shown that the Itelso debt arose during the period covered by the deposit; and

iv) The formula in the collateral agreement does not entitle Openair simply to deduct a bad debt; but only entitles it to calculate the figure produced by application of the formula, which Opal has not done.

45. Based on these allegations Openair claims an account and inquiry to what amount of the deposit is due to Openair under the collateral agreement; and what (if any) Monthly Excess should be deducted from the deposit.

46. So far as the Itelso debt is concerned, Opal's primary response is that it is too late for Openair to raise this question. Opal says that the position is covered by clause 7.1 of the dealer agreement. That requires Openair to give notice in writing identifying a Disputed Payment, detailing the nature of and reasons for the dispute, accompanied by any supporting documentation. Since Openair did not do that within the 60 days permitted by that clause, it is now deemed to have agreed the payment and to have waived its rights and remedies.

47. I do not consider that clause 7.1 governs the position. Opal's complaint is not that commission has been underpaid under the dealer agreement. Its complaint is that the deposit has not been returned. That is a complaint that arises under the terms of the collateral agreement. Clause 7.1 of the dealer agreement was not incorporated into the collateral agreement. Thus clause 7.1 does not apply. In addition, the deposit was expressly described as a "security". Opal's interest in it was therefore only a security interest. The existence of a security interest is not incompatible with Openair's retention of a beneficial interest in the fund (analogous to an equity of redemption). Where a secure creditor (e.g. a mortgagee) has had possession of the property comprising the security, he is usually under an equitable obligation to account for his dealings with the security. It is, to put it no higher, well arguable that a similar principle applies to a security deposit. And if property is transferred by way of security, contractual time bars (e.g. the standard mortgage covenant to repay the debt

in 30 days) have never been enforceable in equity. The equitable right to redeem is based on that principle. I am also influenced by the fact that neither the dealer agreement nor the collateral agreement imposes any obligation on Opal to explain how it has arrived at its calculation. If therefore, it does not explain its calculation how is Openair to formulate any dispute? This is not the usual case of an agent-principal relationship where the agent has the means of knowledge but the principal does not. On the contrary, in this case it is the principal who has the knowledge (how much it has invoiced, how much it has received; what discounts it has allowed; how much it has paid the network operator etc) and the agent who has not. Whether, in these exceptional circumstances, an agent is entitled to an account from his principal was not explored at the hearing. I am not convinced that the answer is obvious.

48. I am not, therefore, persuaded that the claim for an account of dealings with the security deposit has no real prospect of success. Nor am I persuaded that on the special facts of this case the claim for an account of what sums are due by way of commission under the dealer agreement has no reasonable prospect of success.

49. In the result, therefore, I will give judgment for Opal on the claim for damages (in paragraph 1 of the prayer for relief) and allow the claims for payment of the deposit (paragraph 2); an account and inquiry into what amount of the deposit is due (paragraph 3); an account and inquiry into what amount is due by way of commission (paragraph 4) and the ancillary relief sought in paragraphs (5) to (7) to go to trial. I will also allow the amendments contained in paragraphs 20, 21, 22 and 23 of the draft amended Particulars of Claim; but otherwise refuse the amendments.