Neutral Citation Number: [2020] EWHC 1943 (Ch)

Case No: CP-2018-000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMPETITION LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 20/07/2020

Before :

THE HONOURABLE MR JUSTICE ROTH

- -

Between :

PHONES 4U LIMITED (In Administration)	**Claimant**
- and -	
(1) EE LIMITED **(2) DEUTSCHE TELEKOM AG** **(3) ORANGE SA** **(4) VODAFONE LIMITED** **(5) VODAFONE GROUP PUBLIC LIMITED COMPANY** **(6) TELEFONICA UK LIMITED** **(7) TELEFÓNICA, S.A.** **(8) TELEFONICA O2 HOLDINGS LIMITED**	**Defendants**

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Kenneth MacLean QC and Owain Draper (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**

Meredith Pickford QC and David Gregory (instructed by **Clifford Chance LLP**) for the **First Defendant**

Robert O'Donoghue QC and Hugo Leith (instructed by **Covington & Burling LLP**) for the **Second Defendant**

Marie Demetriou QC and David Scannell QC (instructed by **Norton Rose Fulbright LLP**) for the **Third Defendant**

Hearing date: 3 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE ROTH

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 02:00 pm.

Mr Justice Roth :

INTRODUCTION

1. This judgment concerns applications by the First to Third Defendants for security for costs. The issue in dispute is not the question of security as such, since the Claimant ("P4U"), which is in administration, has agreed to provide security to all the Defendants. However, the First to Third Defendants seek security at a higher level than the 65% of their costs estimate which has been agreed by P4U with all the other Defendants. That is because these three Defendants submit that security should be ordered on the basis of a potential award of indemnity costs. P4U contends that this is inappropriate and that the standard basis, as applied in respect of the other Defendants, should be applied.

2. To appreciate how this issue arises, it is necessary briefly to explain the nature of the proceedings.

2. THE PROCEEDINGS

3. P4U was one of the two major retail intermediaries for mobile telephones in the UK until it went into administration in September 2014. The other major retailer of that kind was Carphone Warehouse ("CPW"), which merged with Dixons in mid-2014. These proceedings, which are brought by the administrators, are principally concerned with the events of 2013-2014, leading up to what was effectively the financial collapse of P4U.

4. The First Defendant ("EE") was at the time a 50-50 joint venture ("JV") between the Second Defendant ("DT") and the Third Defendant ("Orange"). At the material time, EE, the Fourth Defendant ("Vodafone") and the Sixth Defendant ("O2") were all mobile network operators ("MNOs") providing connections in the UK. The Fifth Defendant ("Vodafone Group") is the parent of Vodafone, and it is common ground that the two Vodafone defendants constitute a single undertaking for the purpose of EU and UK competition law. Similarly, the Seventh and Eighth Defendants are related companies to O2 and it is common ground that those three companies constitute a single undertaking for the purpose of EU and UK competition law. I shall refer to the Fourth and Fifth Defendants together as "Vodafone" and to the Sixth to Eighth Defendants together as "Telefonica".

5. P4U had a series of agreements with each of the MNOs for the supply of connections to retail customers, whereby P4U could arrange for a customer to 'sign up' for supply through one of the MNO networks. At various points between about January 2013 and September 2014, the agreements which each of O2, Vodafone and EE had with P4U either expired and were not renewed or the relevant MNO gave notice terminating its agreement. P4U alleges, in summary, that these events were not the result of independent action by these competing MNOs but followed exchanges or commitments between the Defendants, which infringed the prohibitions on anti-competitive agreements or arrangements under UK and EU competition law; and that such conduct was at least the principal reason why the MNOs ceased to deal with P4U. Further, P4U contends that the MNOs would have continued to deal with it in the absence of such anti-competitive conduct, in which case P4U would not have been forced to go into administration.

6. Hence the Particulars of Claim state, in the summary of P4U's case at para 3(j):

> "… P4U avers both as a primary fact based on the existence of the "commitments" and as a reasonable inference from the commitments and the other pleaded circumstances that the Defendants (or some of them) unlawfully colluded:
>
> (i) to each cease trading with one or other of the retail intermediaries in the UK market (which intermediary, in the event, was P4U);
>
> (ii) alternatively, to cease trading with P4U specifically; and/or
>
> (iii) further or alternatively, to put P4U out of business and then to acquire the whole or parts of P4U's business and/or assets at a fraction of their value once P4U was placed into administration."

7. As regards both Orange and DT, P4U contends, as clarified in its responses to Part 18 Requests for Further Information, that DT and Orange "participated directly and actively in the infringement", and further that the decision by EE to cease supplies was "in substance, taken by [DT] and/or Orange and/or was the result of decisive influence from those companies". P4U also argues that DT and Orange form part of the same undertaking as EE for the purpose of UK and EU competition law and are liable on that basis for any infringement by EE.

8. In addition, P4U raises a distinct breach of contract claim against EE based on an express obligation of good faith and on alleged implied terms in the P4U-EE agreement; and claims in tort as against Orange and DT for procuring or inducing that breach by EE, or alternatively conspiracy to injure P4U by unlawful means, i.e. the breaches by EE of its contract.

3. INDEMNITY COSTS AND SECURITY FOR COSTS

9. CPR rule 44.2 gives the Court a broad discretion as to costs. The rule provides, insofar as is relevant:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of his case, even if that party has not been wholly successful;…
>
> (5) The conduct of the parties includes -
>
> (a) conduct before, as well as during, the proceedings….
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue…."

10. In *Excelsior Commercial and Industrial Holdings Ltd* v *Salisbury Hammer Aspden & Johnson (A Firm)* [2002] EWCA Civ 879, the Court of Appeal held that while there was an infinite variety of situations which might justify an award of indemnity costs under the rules, "the critical requirement" was that "there must be some conduct or some circumstance which take the case out of the norm": per Lord Woolf LCJ at [32]. See also per Waller LJ at [39]:

> "The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

11. There are now a number of judgments at first instance which seek to summarise the circumstances which fall within this principle. The parties here relied on the summary by Tomlinson J in his costs judgment in *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm) at [25], which included the following:

> "(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.
>
> (6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.
>
> (7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.
>
> (8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;
>
> (a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;
>
> (b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;
>
> (c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;
>
> (d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

> (e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
>
> (f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;
>
> (g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

12. In argument, counsel for DT emphasised sub-para 8(a) in this summary and, to a lesser extent, 8(c).

13. The three Defendants making this application relied on two judgments at first instance: *Danilina v Chernukhin* [2018] EWHC 2503 (Comm) ("*Danilina*"); and *Re Ingenious Litigation* [2020] EWHC 235 (Ch) *("Ingenious").*

14. In *Danilina,* the claimant, a Russian national resident in Moscow, had for several years been in a relationship with the first defendant, Mr Chernukhin, a wealthy Russian businessman. She brought two claims: the first ("the TGM claim") claimed beneficial ownership of the second defendant company which in turn held 50% of a Russian company holding valuable real estate in Moscow. Mr Chernukhin asserted that he was the beneficial owner of the second defendant. The second claim ("the Family Assets claim") concerned the beneficial ownership of assets held in a certain trust. The claimant contended that pursuant to an agreement she made with Mr Chernukhin when their relationship came to an end, the assets accumulated during their relationship were to be divided as agreed and that pursuant to this agreement she had a beneficial interest in the assets held by this trust.

15. In his judgment on the defendants' application for security, Teare J said this:

> "14. The question on this application is whether an order for costs on the indemnity basis is a reasonable, not a speculative, possibility such that it is appropriate that the security ordered by the court should reflect that possibility. That does not involve a consideration of the merits of the claims. On the contrary it assumes that the Claimant loses her claims.
>
> 15. Upon that assumption it appears to me to be unlikely that the Claimant's TGM claim, if it fails, would have been dismissed because it was founded upon a mistaken recollection by her that she was the beneficial owner of a very valuable asset. It is more likely that if she loses her claim it would be because her evidence was dishonest. Similarly, if she loses her Family Assets claim it is unlikely that that would have been because she had a mistaken recollection of agreeing that assets acquired during the Claimant's and First Defendant's relationship were to be divided between them. There thus

> appears to me to be a reasonable possibility that costs will be ordered to be assessed on an indemnity basis in the event that the Claimant loses her claims.
>
> 16. [Counsel for the Claimant] submitted that the recent, and late, disclosure by the First Defendant of documents concerning events in 2007 supports the Claimant's case and suggests that if she loses the case that may have been brought about by a mistaken recollection by her rather than by the giving of dishonest evidence. It appears arguable that the recent disclosure supports her case, certainly the Family Assets claim. But even if they support both that claim and the TGM claim an order for indemnity costs, in the event that the claims fail, appears to be a reasonable possibility such that it is appropriate that the security ordered by the court should take that possibility into account. That conclusion does not involve an assessment of the merits of the claims but simply an appreciation of the nature of the claims. I do not say that indemnity costs will be ordered, only that there is a reasonable possibility that they will be."

And Teare J added, at [17]:

> "It appears to me that where there is a reasonable possibility of indemnity costs the order should be made (at any rate in this case where very substantial costs are involved) by reference to about 75% of the incurred and expected costs."

16. *Ingenious* was an interim judgment in a number of claims in the Ingenious litigation brought by taxpayers who had invested in the 'Ingenious' tax schemes which were intended to achieve significant tax savings by way of so-called 'sideways loss relief'. After the schemes had been successfully challenged by HMRC, the taxpayers sued to recover their losses not only from the relevant Ingenious limited liability partnerships but also from intermediaries such as financial advisers. In addressing an application for security for costs, Nugee J said:

> "93. I was not taken through the Particulars of Claim in the present case in any great detail, but even a cursory glance at them shows that although the claims against the Ingenious Defendants are based on a number of causes of action, those put at the forefront are fraudulent misrepresentation and deceit, and the bulk of the factual allegations consist of particulars of representations made in relation to each Ingenious scheme, particulars of why those representations are said to have been false, and particulars of fraud in which it is alleged that certain specific individuals knew that the representations were false (or were reckless as to their truth). And there is a further claim in unlawful means conspiracy which is brought against certain of the Ingenious Defendants and HSBC, the conspiracy consisting of a combination to injure prospective investors by the use of the fraudulent misrepresentations.

> 94. This in my judgment certainly makes the possibility of indemnity costs a real one…."

17. Nugee J proceeded to reiterate, at [95], what he had said in his oral judgment:

> "… I certainly regard claims of deceit and of unlawful means conspiracy, based on fraudulent misrepresentations being the unlawful means, as serious allegations which at least open the door to the possibility of indemnity costs in the event that the claims are found at trial to be unfounded."

And following *Danilina*, he stated at [100] that "the appropriate percentage in a case where there is a realistic prospect of indemnity costs is 75%."

4. THE PRESENT APPLICATIONS

18. On the basis of *Danilina* and *Ingenious*, the First to Third Defendants seek security at 75% of their costs in this case.

19. These Defendants point out that the claim raises wide ranging and serious allegations of impropriety, which may include deceit in that P4U alleges that although the MNOs were outwardly presenting an appearance that they were independently competing in fact they were, as regards P4U, engaged in secret collusion. The Defendants all deny that there was any collusion and assert that the decision of each MNO to end its relationship with P4U was an independent commercial decision. Therefore, if P4U's case on collusion should fail, it will most likely be on the basis of the Defendants' evidence. Mr O'Donoghue QC, appearing for DT, submitted that the fact that the claim is not expressly based on dishonesty is therefore irrelevant: in substance what is alleged is that the Defendants engaged in a form of deceptive activity, and that the reasons given for their conduct were not the true reasons.

20. Mr Pickford QC, for EE, and Ms Demetriou QC, for Orange, added that in addition to the seriousness of the claim it was relevant to have regard to what they described as the flimsiness of the pleading against these three Defendants. Drawing by implication a contrast with the position of Vodafone and Telefonica, they stressed that the pleadings identify no instance of attempted collusion by EE, still less by DT or Orange who were not MNOs and did not directly deal with P4U at all. As regards EE, the express occasions pleaded concerned approaches which EE received from Vodafone or Telefonica from which, it is alleged, EE failed sufficiently to distance itself. As against Orange, P4U can refer only to a general statement by its Deputy CEO that he "would like to get rid of" both P4U and CPW as third party intermediaries, if he had his way. Otherwise, there were just generalised allegations that Orange and DT exercised "decisive influence" over EE.

21. As regards the additional claims against EE for breach of contract and against DT and Orange in tort related to that breach, EE, DT and Orange recognised that those were not claims that realistically might lead to an order for indemnity costs but pointed out that they were not a major part of the case. The great majority of their costs would be incurred on the collusion allegations and indemnity costs on that part of the case would cover most of their costs.

22. I agree with the Defendants that the inclusion in the proceedings of the additional claims is not in itself a reason to refuse a higher level of security by reference to the level of indemnity costs. The competition claim clearly constitutes the principal part of the proceedings, and any eventual costs order can be expected to reflect the outcome of that claim, even if the contract and tort claims might possibly merit different treatment when it came to costs.

23. However, when considering the two authorities on which the Defendants relied, it is necessary to consider the factual context of the claims in those proceedings. In *Danilina*, the claims were heavily dependent on the claimant's evidence, and Teare J held that if the claims failed there was a real possibility, if not a probability, that this was because the court found that she was being dishonest. *Ingenious* was very different in that in those proceedings the core allegation against the defendants was that they made fraudulent misrepresentations about the tax schemes they were promoting. It was for that reason that Nugee J felt that, should the court reject those allegations at trial, that could lead to an award of indemnity costs.

24. Counsel for the Defendants here emphasised the words used by the judges in those two cases: "a reasonable possibility" that indemnity costs will be ordered (Teare J); and "the possibility of indemnity costs [is] a real one" (Nugee J). But in my judgment, it is important not to read the words used in *Danilina* and *Ingenious* as if they were a statutory test. Mr Pickford QC, for EE, indeed submitted that the question should be whether the court is "able to strike out a contention that [the Defendants] may be able to obtain indemnity costs in the future, or is that simply not arguable." I reject that submission, which in my judgment puts the threshold much too low. Moreover, if the judgments in *Danilina* and *Ingenious* are to be interpreted as expressing a general test for such a higher level of security as being simply that there is "a real possibility" or "reasonable possibility" of an ultimate award of indemnity costs, I respectfully disagree with them. I am fortified in that view by the judgment of the Court of Appeal in *Stokors SA v IG Markets Ltd* [2012] EWCA Civ 1706. In that case, the defendants sought an order for security at a high percentage of their costs on the basis that the claimants were making serious allegations of dishonest conduct against professional men, which could have the outcome of ruining their careers. Upholding the judge's refusal to order security at that higher level, Tomlinson LJ, in a judgment with which Munby and Lewison LJJ agreed, observed (at [42]):

> "The only basis for seeking 80 per cent of the estimate to which the judge referred in his judgment was the suggestion that the defendant might recover indemnity costs. For what it is worth, I have never heard of security for costs being awarded on a more generous basis for that reason, …."

Tomlinson LJ was of course the judge who at first instance had summarised the principles governing an award of costs on an indemnity basis in *Three Rivers.* I note that the judgment in *Stokors* was apparently not cited in either *Danilina* or *Ingenious*.

25. Moreover, I think that there are various reasons here why the main claim by P4U could fail other than by a conclusion that there was no collusion between the Defendants. The Defendants strongly dispute P4U's case on causation in two distinct respects. First, as noted above, they say that the decision of the MNOs to cease

dealing with P4U was in each case taken because of independent commercial considerations, and not in consequence of any alleged anti-competitive exchange or commitment as between the Defendants. Secondly, they contend that the collapse of P4U into administration was the result of its precarious financial position, so that in all probability this would have happened in any event. P4U's case is therefore liable to fail if it cannot overcome both these causation arguments, irrespective of any question of collusion. Even if aspects of causation should be split off from the initial trial (which has not yet been determined), a significant part of the Defendants' costs will be incurred in analysing the extensive financial disclosure they have sought and will receive now from P4U.

26. Further, even as regards collusion, the court could reject the allegations of anti-competitive conduct because P4U had failed to discharge its burden of proof. See *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 2688 (Ch), a stand-alone competition case where the defendants by their counterclaim made serious allegations that the four major UK bookmakers (Ladbrokes, William Hill, Coral and BetFred) had secretly agreed that none of them would take the services of the horseracing television channel which the defendants had set up. The trial involved allegations that senior executives (including the CEO of Ladbrokes) were lying in their evidence. The judge dismissed the counterclaim on the basis that the matters relied on by the defendants were "nowhere near strong enough" to justify rejection of the sworn evidence of the claimants' witnesses. But when it came to costs, there was never a suggestion that the claimants should recover their costs of the counterclaim on an indemnity basis.

27. While these three Defendants emphasised the paucity of the factual basis of the allegations against them of collusion, in my view that is not so remarkable for a competition case alleging secret, anti-competitive conduct. It is inherent in such cases that there is a marked asymmetry of information as between the claimant and the defendants who engaged in conduct of that kind. As the Competition Appeal Tribunal (chaired by Sir Christopher Bellamy) stated in *JJB Sports PLC v OFT* [2004] CAT 17, at para 206:

> "…cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances may be sufficient to meet the required standard…"

Furthermore, here P4U advances what has been termed an economic case that it would have been "commercially irrational for EE and/or Vodafone UK to decide independently to terminate their commercial relationships with P4U": Particulars of Claim, para 3(i)(*iii*). In addition, as regards DT and Orange, P4U contends that for the purpose of competition law they are part of the same 'undertaking' as EE and thereby liable together with EE for any infringement. I note that none of EE, DT or Orange (or indeed Vodafone or Telefonica) have sought to strike out any part of the competition claim or applied for summary judgment in their favour.

28. It is well established that the court should not engage with the merits of a case when considering the question of security for costs, save in the most obvious of cases: see the judgment of Hamblen LJ (with whom Sir Stephen Richards and Longmore LJ

agreed) in *Danilina v Chernukhin* [20181 EWCA Civ 1802, at [69]-[70].[1] In view of the nature of the claim, I consider that it would be wholly inappropriate to do so here.

29. I refer also, although it was not cited before me, to the statement by Etherton C, with whose judgment Richards and Patten LJJ agreed, when reversing the decision of a judge to award indemnity costs in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883, at [83]:

> "The weakness of a legal argument is not, without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit."

30. As for the Defendants' reference to para 25(8)(c) of the considerations set out in *Three Rivers* (the deliberate courting of publicity: see para 11 above), Mr O'Donoghue referred to the fact that the administrators of P4U have set up a website on which they have posted all the pleadings, skeleton arguments and transcripts of court hearings. However, this point, which was advanced somewhat faintly, is without substance. Since P4U is in administration and presumably has many creditors, the administrators responsibly wish to be transparent about the litigation on which such significant funds are being spent. Indeed, this will also make clear the vigorous denial by the Defendants of P4U's allegations. I consider that this is far removed from the deliberate courting of publicity to which Tomlinson J was there referring.

31. Altogether, I accept that it is possible that P4U could be ordered to pay the costs of EE, DT and Orange on an indemnity basis. But in all the circumstances, I am wholly unable to reach a conclusion that this is such a significant possibility or, to put it another way, that there is a real prospect of such an order so as to justify a requirement to provide security for costs on that basis.

32. I have not thought it necessary to consider the position of the Defendants under insolvency law as regards a claim for costs against P4U, on which I heard conflicting submissions. It is because there is reason to believe that P4U will be unable to pay the Defendants' costs that the relevant condition under CPR rule 25.13(2)(c) is satisfied for the court to make an order for security in the first place. I do not see that the extent to which assets may be shielded from the claims of other creditors assists in deciding whether or not that security should be determined on the basis of indemnity costs. The so-called 'balance of prejudice' underlying an order for security always favours the defendant and I do not think it affects the question presently for determination.

33. Finally, I consider that there is some force in the argument of policy indicated in the skeleton argument of P4U. The prohibitions under competition law exist to protect the public interest in maintaining a competitive economy. However, the public

[1] This was an appeal from previous orders for security by Cockerill J and preceded the judgment of Teare J referred to above.

authorities with responsibility for enforcement of that law have limited resources and cannot pursue every alleged violation. It is therefore recognised that private enforcement of competition law complements public enforcement. As the Court of Justice stated in its seminal judgment in Case C-453/99 *Courage Ltd v Crehan* EU:C:2001:465:

> "26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.
>
> 27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."

34. An allegation that large companies made secret anti-competitive arrangements or agreements of the kind here alleged is not out of the norm when considered against the substance of numerous competition law decisions. Because of the difficulties of proving such arrangements or agreements, those decisions are generally made by competition authorities which have much greater powers of investigation than a private claimant. Although the protection of security for costs for defendants is important, and while I recognise that there may be some claims that are so weak as to justify an exceptional order, I think that the court should in general be cautious about awarding costs on the indemnity basis just because a claim making such allegations fails at trial, and still more so about ordering security for costs in advance at the higher-than usual rate. To do otherwise would create a further incentive against private claimants bringing such claims.

35. For all these reasons, this application by EE, DT and Orange is dismissed. P4U will provide security to those three Defendants on the same basis as to the other five Defendants.