[2013] UKPC 2
Privy Council Appeal No 0023 of 2012
Privy Council Appeal No 0024 of 2012

JUDGMENT

Cukurova Finance International Limited and Cukurova Holding A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)

before

Lord Neuberger
Lord Mance
Lord Kerr
Lord Clarke
Lord Sumption

From the Court of Appeal of the British Virgin Islands

JUDGMENT OF THE BOARD
DELIVERED ON

30 January 2013

Heard on 22-25 October 2012

Appellant
Kenneth MacLean QC
Arabella di Iorio
James Nadin
David Caplan

(Instructed by White & Case LLP)

Respondent
Iain Milligan QC
Blair Leahy

(Instructed by Hogan Lovells International LLP)

JUDGMENT OF THE BOARD:

1. This is a judgment to which all members of the Board have made substantial contributions. It arises from an appeal brought by Cukurova Finance International Ltd ("CFI") and Cukurova Holding AS ("CH") against a decision of the Court of Appeal of the Eastern Caribbean Supreme Court ("the Court of Appeal") handed down on 20 July 2011, reversing a decision of the trial judge, Bannister J.

The relevant factual background

Introductory

2. At the trial, there was substantial documentary evidence, including witness statements, and there were significant issues of primary and secondary fact, which were the subject of cross-examination and argument. The great majority of the factual evidence and almost all the contents of the voluminous documentation are irrelevant for present purposes. Further, with the exception of one important area, so far as any of the factual material was in issue, any dispute has been conclusively resolved by the trial judge, Bannister J. Accordingly, the relevant facts can be stated relatively shortly.

The negotiations

3. CFI and CH are members of the Cukurova Group of companies, a group which has extensive business interests, the majority of which are in Turkey. Prior to September 2005, CH owned 52.91% of a company called Turkcell Holding AS ("TCH"). The remaining shares in TCH were held by a company now called Telia Sonera Finland OYJ ("Sonera").

4. TCH held 51 of the 100 issued shares in a company called Turkcell Iletisim Hizmetleri AS ("Turkcell"), a Turkish cell phone network provider whose shares are traded on the Istanbul and New York Stock Exchanges.

5. During 2003 and 2004, the Cukurova Group was under considerable cash flow pressures. With a view to alleviating those pressures, the group's representatives had discussions during 2005 with representatives of the Alfa

Group, a substantial Russian conglomerate, with interests in various business areas including the provision of cell phone networks.

6. While those discussions were proceeding, Sonera raised a contention that CH was obliged to transfer its TCH shares to Sonera, pursuant to an alleged pre-emption agreement. In the course of the discussions it became apparent that the shares in Turkcell and TCH might feature in any agreement. Accordingly, with a view to defeating Sonera's claim to CH's shares in TCH, CH transferred those shares to a newly incorporated BVI registered company called Cukurova Telecom Holdings Limited ("CTH"), which was itself wholly owned by another newly incorporated BVI company, CFI, whose two shares were owned by CH.

The contractual documentation

7. Thereafter, the negotiations between the two groups proved successful, and, on 1st June 2005, CH and CFI entered into an agreement (the 'Subscription Agreement') with a newly formed company in the Alfa Group, Alfa Telecom Turkey Limited ('ATT'). In summary, the effect of the Subscription Agreement was as follows:

a) In return for a subscription price of just under US$1.6 billion, CFI was to procure that CTH issued to ATT convertible bonds which, when exercised, would give ATT 49% of the issued shares in CTH, leaving CFI with 51% of the issued shares in CTH;

b) ATT would enter into a 'Facility Agreement', under which it would agree to grant CFI (i) a facility in the sum of US$1.352 billion, secured by charges over CFI's shares in CTH and CH's shares in CFI, and (ii) an unsecured facility in the sum of US$355 million;

c) The parties also agreed to enter into a 'Shareholders' Agreement'.

8. Meanwhile, on 17th June 2005, Sonera began arbitration proceedings against CH in Geneva ("the Geneva arbitration") claiming specific performance of the pre-emption agreement relied on by Sonera. Four days later, the existence of these proceedings was disclosed by CFI and CH to the Alfa Group.

9. The Shareholders' Agreement was executed on 20th September 2005. About a week later, on 28th September 2005, the Facility Agreement was entered into. Under this agreement, ATT agreed to lend CFI US$1.352 billion, secured on CFI's 51% shareholding in CTH, and on CH's 100% shareholding in CFI. This borrowing was to be repaid in four equal annual instalments, the first of which was due, in the event, on 24th November 2008. Interest was payable on this facility at an annual rate of 8% over LIBOR Clause 6.4 of the Facility Agreement permitted CFI to prepay "the whole or any part of the loan" on giving "not less than 5 Business Days' prior notice." Clause 7.4 provided for default interest at a rate of 11.5% over LIBOR in relation to any payment once it becomes overdue.

10. The Facility Agreement imposed various obligations on CFI. They included, in clause 16.4 and clause 16.10 respectively, a qualified obligation not to increase the borrowings of the telecom companies in the Cukurova Group (which included CH, CFI and CTH), and an obligation to "take all such action as [ATT] may reasonably request for the purpose of perfecting the Security".

11. Clause 17 was headed "Events of Default", and its first seventeen sub-clauses identified what constituted such events. Clause 17.2(A) referred to non-compliance by CFI with any obligation in "the Finance Documents", which expression was defined as including the Facility Agreement itself and "any Security Document". However, clause 17.2(B) provided that if such non-compliance was "capable of remedy", it could not be relied on by ATT if it was remedied within five business days of ATT giving notice of the non-compliance or of CFI becoming aware of it. Clause 17.5 included the inability of any Cukurova Group telecom company "to pay its debts as they fall due".

12. Clause 17.16 of the Facility Agreement was in these terms (incorporating a relevant provision of the definitions clause):

> "Any event or circumstance which in the opinion of [ATT] has had or is reasonably likely to have a material adverse effect on the financial condition, assets or business of [CFI]".

13. Clause 17.18 of the Facility Agreement provided that, '[o]n and at any time after the occurrence of an Event of Default which is continuing', ATT could take one or more of three specified steps, including 'declar[ing] that all or part of the Loan, together with accrued interest …. be immediately due and payable, whereupon they shall immediately become due and payable'.

14. On the same day, 28th September 2005, ATT agreed to make an unsecured loan to CFI in the sum of US$355 million at the same rate of interest.

15. Also on the same day, CFI executed a charge by way of equitable mortgage, governed by English law, over CFI's 51% shareholding in CTH and on 25 November 2005 CH granted a similar charge over CH's 100% shareholding in CFI (together, "the Charges"), as security for the repayment by CFI of the US$1.352 billion facility to be provided by ATT. The Charges were in virtually identical terms, and each contained provisions disapplying the restrictions contained in the Law of Property Act 1925 in relation to the mortgagee's powers of sale and to appoint receivers.

16. Clause 9.3 of each of the Charges was in the following terms:

> a) "To the extent that this Deed constitutes a 'financial collateral arrangement' (as defined in the Financial Collateral Arrangements (No.2) Regulations 2003 (the 'Regulations') the Lender shall have the right (at any time after the charges become enforceable) to appropriate any Charged Asset which constitutes 'financial collateral' (as defined in the Regulations ('Financial Collateral') in or towards satisfaction of the Liabilities in accordance with the Regulations.'
>
> b) "Financial Collateral shall be valued at its Fair Price."
>
> By an addendum deed, "Fair Price" was defined as meaning "the value of the Shares calculated on a look-through basis, based on the weighted average market value of publically traded Turkcell shares over the previous 60 day period as reported in the Istanbul Stock Exchange Bulletin …".

Subsequent events

17. Completion of the arrangements did not take place immediately, because Sonera obtained an injunction in Switzerland. Following the discharge of that injunction, on 25th November 2005 ATT made the secured and unsecured advances contemplated by the Subscription Agreement and the Facility Agreement, and CH and CFI granted ATT the Charges over, respectively, CH's 100% holding in CFI and CFI's 51% holding in CTH (together "the charged shares").

18. As explained by Bannister J:

> "Thus, the position on closing was that CFI held 51% of CTH and ATT held the remaining 49%. ATT had paid Cukurova just short of

> US$1.6 billion for that interest which indirectly gave it 13.22% of Turkcell. CFI's 51% interest in CTH (amounting, to a 13.67% indirect interest in Turkcell), was charged to ATT to secure the US$1.352 billion lent to it by ATT. CH's interest in CFI was also charged to ATT in support of the secured facility. Taking into account the unsecured facility, Alfa's total outlay was therefore some US$3.3 billion. TS still held the 47% holding in TCH, which continued to give it an indirect holding in Turkcell of some 24%."

19. The judge found that "from the outset", Alfa entered into the transaction embodied in the Agreements executed in September 2005 with a view to exercising its rights, especially the power of appropriation under clause 9.3 of the Charges and its power to appoint a receiver, "in order to acquire the charged shares".

20. He also decided that ATT anticipated that CFI would fail to meet its liability to pay interest under the secured facility of $1.352bn (and the unsecured facility of $355m), when that interest became due on 24th November 2006. With a view to preventing CFI from paying that interest by "starving [it] of funds", the judge also found that ATT had blocked the payment of dividends by CTH. However, as the judge said, this 'was within ATT's rights as shareholder of CTH".

21. Despite this, the interest payments due on 24th November 2006 were paid, partly through the sale of some Turkcell shares by TCH. Nonetheless, the judge said that ATT's "commercial aim" continued to be "to assume direct or indirect ownership of the charged shares". By early 2007, ATT was envisaging that this aim would be achieved by accelerating CFI's liability to repay the $1.352bn by exercising is power under clause 17.18 of the Facility Agreement, an intention which it did not communicate to anyone in the Cukurova Group.

22. On 26th January 2007, Sonera issued a press release announcing that the Geneva arbitration had resulted in an award ("the Award"), which (i) concluded that there was a binding obligation on CH to transfer its 52.91% holding in TCH to Sonera for $3.1m, and (ii) ordered specific performance of that obligation. Those running ATT learnt of this very soon after, but said nothing about it to anyone in the Cukurova Group.

23. On 16th April 2007, without any prior indication that any of the matters complained of were of concern to ATT, its solicitors sent to CFI (with a copy to CH) a letter identifying sixteen alleged events of default under clause 17 of the Facility Agreement, and demanding immediate repayment of the $1.352bn. The letter was signed by Mr Nazarian, whom the judge described as the sole *de jure*

director of ATT. On the same day, ATT formally requested to be registered as the owners of the charged shares pursuant to paragraph 11 of the memoranda of association of CFI and CTH respectively.

24. Also on 16th April 2007, ATT issued two claims in the Commercial Division of the High Court of Justice of the Eastern Caribbean Supreme Court in the BVI ("the High Court"). The first claim was for a declaration that ATT was entitled to accelerate repayment of the $1.352bn loan and demanding immediate repayment of the loan together with contractual and default interest ("the repayment proceedings"). The second claim was for an order compelling CFI and CTH to comply with the registration requests ("the enforcement proceedings").

25. A day later, a Mr Reznikovich, on behalf of ATT, held a press conference in the Cukurova Group's home town, Istanbul, in which reference was made to the alleged sixteen events of default, and the issue of the two claims in the BVI. Mr Reznikovich stated at the press conference that ATT believed that the defaults were deliberate, and he made other statements suggesting that the Cukurova Group was in financial difficulties. The judge said that this was all motivated, at least in part, by "a determination to cast Cukurova in as bad a light as possible and make it difficult for them to raise finance". With the same motivation, ATT issued press releases on 30 April and 10 May 2007 in order, as the judge expressed it, "to put off anyone who might be thinking of advancing money on the charged shares", at a time when the Cukurova Group's attempts to refinance the loan were due to close in mid-May.

26. Also on 17 April 2007, CFI challenged ATT's right to accelerate the loan; however, despite saying it would do so, CFI provided no arguments in support of its contention. After some further correspondence, on 27 April 2007, ATT gave notice to CH and CFI that it had appropriated the charged shares under clause 9.3 of each of the Charges, shortly after which CFI obtained an interim injunction restraining ATT from proceeding with the appropriation, if the appropriation had not already been completed.

27. On 17 May 2007, CFI gave ATT formal notice that it intended to repay the $1.352bn together with contractual interest and default interest. The whole of that sum, $1,446,824,709.42, was formally tendered to ATT eight days later. Such a tender, if it had been within time, would have been entirely valid. However, ATT refused to accept the tender, on the ground that it was made too late. This was because, having exercised its right to accelerate the loan under clause 17.18 of the Facility Agreement, ATT contended that it was absolutely entitled, on CFI's failure to repay the loan, to appropriate the charged shares pursuant to clause 9.3 of the Charges, which it had done.

28. On 25 May 2007, CFI and CH began proceedings ("the tender proceedings") in the High Court against ATT, seeking an order requiring ATT to accept the sum tendered and to redeem the security.

29. The $1,446,824,709.42 had been raised through a syndicate of lenders through JP Morgan Europe Ltd ("JP Morgan"), who had agreed to lend $1.5bn to a wholly owned subsidiary of CH, formed for that purpose, called Namrun Finance SA ("Namrun"). The $1.5bn was paid into an escrow account ("the escrow account") in the name of Namrun with JP Morgan, and Namrun agreed to make the money in this account available to CFI by way of a loan to pay off its secured liability to ATT. While the details do not matter for present purposes, according to the evidence which the judge accepted, the arrangement was structured in this way to avoid any argument on the part of ATT that an event of default under clause 17 of the Facility Agreement had occurred.

30. The $1.5bn remained in the escrow account at JP Morgan, available for discharging the loan, until 25 May 2010, when it was paid out to Namrun.

The court proceedings

In the High Court

31. The enforcement, recovery and tender proceedings did not proceed swiftly, partly because it was ordered that a preliminary point be determined. That point was whether ATT's actions on 27 April 2007 were sufficient to appropriate the charged shares. That issue was finally resolved by the Board which, on 5 May 2009, decided in a judgment given by Lord Walker that ATT's actions were sufficient for that purpose, provided that ATT in due course established that it was entitled to enforce its security – see [2009] UKPC 19.

32. Meanwhile, the repayment proceedings and the tender proceedings effectively marched together. Apart from the point decided by the Board in 2009, initially there were two issues, namely (i) whether any event of default had occurred which entitled ATT to accelerate the loan, as it had purported to do in the letter of 16th April 2007, and, if it had, (ii) whether ATT was entitled to enforce its security by appropriating the charged shares. However, a third issue arose following an amendment by CFI and CH to their case on 11 July 2008, by which they sought relief from forfeiture, if they failed on the first two issues.

33. The repayment proceedings and the tender procedings were heard in the High Court together over twelve days in April 2010 by Bannister J, and he handed down a fully reasoned judgment on 20th May 2010.

34. The judge first had to consider whether ATT had established that there was any event of default which justified the acceleration of the loan and the subsequent appropriation of the charged shares. By the end of the hearing, ATT was relying on only six events of default identified in the 16th April 2007 letter and two further events of default. The judge held that none of them was made out.

35. While this conclusion made it unnecessary for the judge to consider any other issue, he went on to address the contention raised by CH and CFI, to the effect that, even if ATT had otherwise established the right to appropriate the charged shares, it would have failed to justify the appropriation, because of its bad faith or because it was seeking to enforce its security for an improper motive. The judge concluded that he would have rejected the argument raised by CH and CFI on that issue.

36. At the end of his judgment, the judge mentioned the claim for relief from forfeiture, but said that it was unnecessary for him to decide it. He then directed that, provided CFI came up with the appropriate sum by way of principal and interest, ATT would be obliged to permit them to redeem the charged shares.

37. There then followed a dispute as to the appropriate rate of interest payable on the $1.352bn from 25th May 2007, when, on the judge's findings, ATT had wrongly rejected CFI's tender of what was then owing. In another judgment given on 22 July 2010, the judge decided that, in the light of a number of 18th and 19th century authorities, interest should be payable by CFI at the contractual annual rate of 8% over LIBOR from 25th May 2007 until payment. He also ordered that ATT should pay 80% of CH's and CFI's costs of the proceedings.

In the Court of Appeal

38. ATT appealed to the Court of Appeal (Gordon, Redhead and Kawaley JJA), who heard the appeal on 13th December 2010, and gave judgment on 20th July 2011. The Court of Appeal, disagreeing with the judge, held that three of the events of default relied on by ATT had been established, and, in agreement with the judge, that the bad faith or improper purpose arguments did not avail CH and CFI. They therefore allowed ATT's appeal and held that ATT had properly accelerated the loan and had properly appropriated the charged shares.

39. Gordon JA, with whom Redhead JA agreed, did not go on to consider the claim for relief from forfeiture, but Kawaley JA effectively held that it could not succeed, given that the argument based on bad faith and improper purpose had failed.

This appeal

40. CH and CFI now appeal against the decision of the Court of Appeal, contending (i) that they were wrong to decide that ATT had established any event of default, but, if they were right, then (ii) that ATT's acceleration of the loan and/or its appropriation of the charged shares was vitiated by bad faith or improper purpose, and, if that argument fails, (iii) that CH and CFI should be accorded relief from forfeiture.

41. The first of these groups of argument involves deciding whether the Court of Appeal was right to reverse the judge's finding that there was no event of default on which ATT could rely. The second requires the Board to consider whether the Court of Appeal and the judge were right to conclude that ATT was not precluded from enforcing what otherwise would have been its rights of acceleration and appropriation on the ground of bad faith or improper purpose. The third group of arguments raises the issues of (i) whether there is jurisdiction to grant CH and CFI relief from forfeiture, (ii) whether relief from forfeiture should be granted in this case, and (iii) if so, on what terms relief should be granted.

42. The Board will consider these various issues in turn.

The events of default issue

Clause 17.16 of the Facility Agreement: the background

43. The first alleged event of default it is convenient to consider arises under clause 17.16 of the Facility Agreement ("clause 17.16"), namely, that there had been an "event or circumstance which in the opinion of [ATT] has had or is reasonably likely to have a material adverse effect on the financial condition, assets or business of [CFI]".

44. ATT's case, as advanced in the letter of 16th April 2007 and as maintained throughout these proceedings, was that the Award, as described in the press release issued by Sonera, was clearly such an event. To quote the words used in the letter, while "there can be no prospect of [CH] being able to close the alleged agreement

as reportedly required by the Geneva award", the "likely consequence will be that the award of specific performance will be replaced by a significant damages award". Accordingly, continued ATT's letter, "[i]n our opinion, this is likely to have a material adverse effect on the financial condition of [CH] and/or other members of the Group".

45. It was (and is) common ground that, in order to satisfy clause 17.16, an event need not objectively have such an adverse effect: all that is required is that ATT believes that it has such an effect. It is also common ground that the belief has to be both honest and rational.

46. The judge accepted that if it had been established that ATT had formed the opinion that the Award and its announcement satisfied clause 17.16, it could not have been challenged. This finding was not surprising in light of the evidence that damages payable as a result of the Award were likely to exceed $155m, and quite possibly be as much as $950m.

47. However, the judge decided that ATT had not satisfied him that it, or at least its relevant controlling mind, had formed the opinion to that effect. He accordingly held that ATT had failed to make out this event of default.

48. The judge's reasoning was along these lines. Mr Nazarian was the only director of ATT, and there was no evidence as to his opinion of the effect of the Award (or on any other topic). Moreover, Mr Nazarian was based in Luxembourg, and did not appear to have been in any real sense a directing mind or will of ATT.

49. Evidence was given at the trial on this topic by Mr Reznikovich, and a Mr Musatov. They were, respectively, the Chief Executive Officer and the Chief Legal Officer, of Altimo LLC ("Altimo"), a Russian company. It was ATT's case that the management of ATT had been delegated to Altimo, that, as its Chief Executive Officer, Mr Reznikovich, had authority to form the requisite opinion, and that he had done so.

50. The judge found the evidence of Mr Reznikovich and Mr Musatov "unsatisfactory". More significantly, he held that, in fact, the management of ATT had not been delegated to Altimo, but to its parent company, Alfa Holdings and Investment Limited ("AHIL"), a BVI company. As there was no evidence as to its ever having formed an opinion as to the effect of the Award, he concluded that this event of default was not made out.

51. The Court of Appeal disagreed. Gordon JA, with whom Redhead JA agreed, thought that the statement contained in the letter of 16th April 2007 signed by the sole director of ATT (who had also signed the Facility Agreement on behalf of ATT) made it clear that ATT had formed the requisite opinion. Agreeing on this point, Kawaley JA said that "if, as the judge found, [Mr Nazarian] only acted upon the instructions of other individuals … who were the true directing minds of ATT, the … letter could only have been sent upon such individuals' instructions".

Clause 17.16 of the Facility Agreement: discussion

52. It is convenient to deal with two points raised by Mr MacLean QC, for CH and CFI, before turning to the central issue. His two points together amounted to this, that, even if the Award could have founded an event of default under clause 17.16, it was premature for ATT to have raised it on 16th April 2007. First, he said, the Award had not yet been formally published: there was merely a press release about it. Secondly, he said that the Award was merely an order for specific performance, and involved no award of damages whatever.

53. There is nothing in either point. The Award had been made by 16th April, and, even if the press release announcing it was somehow premature, or even a breach of confidentiality, as between the parties to the Geneva arbitration, that is irrelevant. It might have been different if the press release had been untrue, or even inaccurate, but it was not. It is true that the Award was only for specific performance, but it clearly implied a potential, indeed a virtual certainty, of a very substantial order for damages against CH for the reasons given by ATT in the 16th April 2007 letter. It represented a classic case of a contingent liability, indeed a substantial contingent liability. It was therefore unquestionably "reasonably likely to have a material adverse effect on [CH's] financial condition" (to quote from clause 17.16).

54. Turning now to the central issue, namely whether ATT established that it had formed the requisite opinion, it might at first sight seem surprising that ATT be required to prove that it had formed the opinion that the Award had had a "material adverse effect on the financial condition, assets or business" of CH. This could be said to be a fairly obvious conclusion. After all, it had been expressed and explained in a letter written on behalf of ATT and signed by its sole director, and seems really self-evident on the facts.

55. While those points undoubtedly would have made it very difficult indeed to challenge the rationality or honesty of the opinion, they do not meet the point that there must be some admissible evidence at the trial to show that the Board of ATT had formed the opinion described in clause 17.16. The clause virtually entitles one

contractual party, ATT, to be judge in its own cause on the issue of whether the clause is satisfied, and, if it is so satisfied, has a potentially drastic effect on the economic position of the other contractual parties, CH and CFI. Accordingly, it is only right that the court has to be convinced by admissible evidence that ATT did in fact form the requisite opinion, as well as being convinced that that opinion was honest and rational.

56. From this a second point follows, namely that the tribunal which primarily has to be convinced that the requirements of clause 17.16 are satisfied is the first instance court, in this case Bannister J. Before it can interfere with his conclusion on the point, an appellate court would have to be satisfied either that he misunderstood, misinterpreted or overlooked the relevant evidence, or that he reached a conclusion which he could not reasonably have reached.

57. In the Board's opinion, the judge did go wrong in reaching the conclusion that he did. First, he over-complicated the position with regard to ATT's decision-making process; secondly, he made a mistake as to which other companies were involved in the process. It is not surprising that such mistakes were made: the documentary evidence in this case seems to have been excessive and confused, the oral evidence seems, as the judge said, to have been unsatisfactory at least in some respects, and some of the arguments may have been rather more elaborate than necessary.

58. On behalf of ATT, Mr Milligan QC succinctly summarised the effect of the unchallenged evidence of Mr Reznikovich to the judge, supported by Mr Musatov's evidence and by some of the documents, especially a formal management agreement, in the following propositions. First, the management of ATT had been delegated to Altimo. Secondly, Altimo did not have a board. Thirdly, Mr Reznikovich was the directing mind of Altimo. Fourthly, he (therefore) had ultimate authority to make decisions on behalf of ATT. Fifthly, he made the decision to accelerate the loan. Sixthly, he had formed the opinion that the Award would have a material adverse effect as described by clause 17.16.

59. The judge seems to have made a mistake when he said that AHIL was responsible for decision-making on behalf of ATT. The mistake may well have been attributable to the fact that Altimo was previously called LLC Alfa Telecom, and AHIL was previously called Alfa Telecom Limited, and both of them seem to have been referred to somewhat indiscriminately in the oral and documentary evidence, and indeed during cross-examination, as "Altimo". However, the mistake clearly vitiates the judge's conclusion and undermines any reason he may have had for rejecting the evidence relied on by Mr Milligan to support the propositions he advanced on behalf of ATT.

60. It is difficult to identify any evidence which runs counter to the case made by ATT on this issue. The Board was taken to passages in the witness statements and the transcript of the evidence which supported ATT's propositions on the point and, despite Mr MacLean's attractively phrased attempts to undermine them by reference to other passages in the transcripts, those propositions are plainly well-founded.

61. ATT's case is also supported by two documents. First, the minutes of a meeting on 2nd April 2007 of the board of ATT's parent company, Alfa Finance Holdings SA, where it was resolved to approve the sending of what became the letter of 16th April and the subsequent appropriation of the charged shares. Secondly, on the same day, there are the minutes of a meeting of the "Board of Directors of Altimo sub-holding", an informal group of stakeholders in the Alfa Group, where the same approval was given.

62. In all these circumstances, albeit for somewhat different reasons from those given by Gordon and Kawaley JJA, the Board agrees with the Court of Appeal that this event of default was made out by ATT.

Other events of default

63. It follows from this that ATT has shown that it was entitled to accelerate the loan under clause 17.18 of the Facility Agreement. That is because it has established an event of default under clause 17.16 on which it can rely. It is therefore unnecessary to consider whether there were any other events of default on which ATT could rely for the purpose of deciding whether it was entitled to accelerate the loan under clause 17.18 of the Facility Agreement and to appropriate the charged shares under clause 9.3 of the Charges.

64. It might be suggested that other alleged events of default should be considered because, if they were found to have been made out, this would have some bearing on whether CH and CFI should be granted relief from forfeiture, and (possibly) the terms upon which such relief should be granted. For reasons that the Board will give in the succeeding paragraphs, it has concluded that such consideration is unnecessary.

65. The other events of default alleged by ATT are that (i) CFI incurred indebtedness without the prior consent of ATT, (ii) the financial statements as at 31st December 2006 showed that CFI had an excess of liabilities over assets, (iii) in the alternative, the financial statements as at 31st December 2006 were incorrect or misleading in a material aspect, (iv) CFI failed to procure the approval of the CTH board to the conclusion of two contracts, (v) CH sold some of its Turkcell

shares (in order to meet the November 2006 interest obligations under the Facility Agreement), (vi) CFI and CH failed to assist ATT in perfecting its security; indeed it sought to prevent it appropriating the charged shares.

66. Even if it is assumed that any or all of these events of default could be established, none involves any wrongdoing on the part of CH or CFI, apart from breach of their contractual obligations. Nor do these other alleged events involve any significant damage being caused to ATT. The most that can be said about them is that, in one or two instances, CFI or CH were less careful about, or alert to, their obligations under the provisions of the Facility Agreement.

67. Accordingly, while it is right to record that CFI and CH might have faced some difficulty in establishing that none of these other alleged events of default was made out by ATT (and it seems unlikely that ATT would have established by any means all of them), it is simply unnecessary to consider them further.

68. What does now need to be considered is the contention made by CH and CFI that, notwithstanding the fact that ATT has established the existence of an event of default entitling it to accelerate the loan, the appropriation of the charged shares was invalid because it was actuated by bad faith or improper purpose.

Bad faith and improper purpose

The facts

69. CH and CFI contend that ATT's decision to appropriate the charged shares was void, even if there was an event of default, because it was vitiated by its improper and collateral reasons. The factual basis of this submission is as follows.

70. The judge found that ATT had originally entered into the Facility Agreement and its associated instruments in the expectation that CH and CFI would default, and with the aim of obtaining de facto shareholder control of Turkcell by enforcing the security.

71. As mentioned above, he also found that, in the autumn of 2006, ATT deliberately obstructed the declaration of dividends with a view to starving CFI of funds, in an attempt to prevent it from servicing the loan and thereby to provoke a default. He also found that after accelerating and calling in the loan, Mr. Reznikovich painted an extremely unattractive picture of the Cukurova Group's financial situation at the press conference in Istanbul on 17th April, in order to

hamper the Cukurova Group's attempts to refinance. ATT also issued unflattering and defamatory press releases on 30th April and 10th May at least partly with a view to making it difficult for the Cukurova Group to refinance.

72. The judge characterised the press conference and press releases as acts of bad faith on ATT's part, but found that they were irrelevant because the Cukurova Group succeeded in refinancing anyway. In every other respect, the Judge considered that ATT could not be said to have acted in bad faith, because it was acting within its legal rights. He therefore rejected the defence raised by CH and CFI founded on the allegation of bad faith. The Court of Appeal agreed.

Discussion

73. In the Board's opinion the judge's findings afford no basis for treating the appropriation of the charged shares as ineffective, for essentially the reasons which he gave. In equity, a mortgagee has a limited title which is available only to secure satisfaction of the debt. The security is enforceable for that purpose and no other: *Quennell v. Maltby* [1979] 1 WLR 318, 322H (Lord Denning MR); *Downsview Nominees Ltd v. First City Corporation Ltd.* [1993] AC 295, 312G (Lord Templeman). It follows that any act by way of enforcement of the security (at least if it is purely) for a collateral purpose will be ineffective, at any rate as between mortgagor and mortgagee. The reason is that such conduct frustrates the equity of redemption which, as Sir John Stuart V-C observed in *Jenkins v. Jones* (1860) 2 Giff 99, a court of equity "is bound to regard with great jealousy."

74. In principle, this is straightforward enough, but the facts are rarely simple. The acceleration of the loan on 16th April 2007 in this case was not part of the process of realising the security. It merely brought forward the date of repayment of the loan and ascertained the amount. Given that there was an event of default, there was a contractual right to do this. It follows that the debt of $1.352bn (plus interest) was repayable in full at the time when ATT satisfied it by appropriating the charged shares.

75. Under clause 9.3 of the Charges, ATT was entitled to "appropriate any Charged Asset… in or towards satisfaction of the Liabilities in accordance with the Regulations", at its "Fair Price" (as defined). This means that, by virtue of Regulation 18 of the Financial Collateral Arrangements (No. 2) Regulations 2003, SI 2003 No 3226 ("the Regulations"), the lender was entitled to appropriate the security at that price, any difference between the valuation and the liabilities being settled separately.

76. It necessarily follows from an arrangement on these terms that the lender may satisfy the debt by crediting the borrower with the Fair Value of the security and retaining the charged assets as their own property: see the advice of the Privy Council delivered by Lord Walker – [2009] UKPC 19, paragraphs 12-13. As Lord Walker also observed at [2009] UKPC 19, paragraph 27, this is a remedy new to English law which allowed what was "in effect a sale by the collateral-taker to himself, at a price determined by an agreed valuation process."

77. CH and CFI do not dispute that ATT appropriated the charged shares in order to satisfy the debt. They hardly could do so, since appropriation is a mode of satisfying the debt. Their real complaint is that ATT only wanted to do so because that would enable it to obtain control over CFI and CTH and indirectly of Turkcell, instead of (say) selling the shares onto the market. Since this was the very thing that the contract and the Regulations permitted, it is impossible for them to contend that ATT was exercising its power of enforcement for a collateral purpose. The acquisition of control was a necessary incident of a permitted mode of satisfying the debt. The fact that it was an incident which was highly attractive to ATT does not mean that the right of appropriation was exercised in bad faith.

78. That is enough to decide this particular issue in the present case. More generally, however, the Board considers that if a chargee enforces his security for the proper purpose of satisfying the debt, the mere fact that he may have additional purposes, however significant, which are collateral to that object, cannot vitiate his enforcement of the security. If the law were otherwise, the result would be that the exercise of the right to enforce the charge for its proper purpose would be indefinitely impeded because of other aspects of the chargee's state of mind which were by definition irrelevant.

79. Of course, there may be other ways of satisfying the debt which involve less drastic consequences for the Cukurova Group. But since no alternative mode of satisfaction was available at the time when ATT were entitled to, and did, appropriate the security, that consideration is relevant only to the question of relief from forfeiture. To that question, therefore, the Board now turns.

Relief from forfeiture

Introduction

80. In the courts below, CH and CFI argued that, if, contrary to their submissions, ATT was entitled to give both notice of acceleration and notice of appropriation and was therefore in principle entitled to retain the charged shares, the court should give them relief in equity.

81. As explained above, before the judge, CH and CFI succeeded on the basis that there was no event of default, and, although the judge expressed obiter views on bad faith and improper purpose which were adverse to CH and CFI, he did not express any opinion on the issue of relief in equity. In the Court of Appeal only Kawaley JA mentioned relief in equity. He said that, having rejected the bad faith argument on the ground that there was no basis for depriving ATT of its contractual rights on equitable grounds, it followed that the alternative equitable forfeiture claim must also be rejected.

82. The Board considers that this approach is not correct as a matter of principle. The case made by CH and CFI that the court should afford them relief in equity is distinct from their case on bad faith and improper purpose. It does not follow from the rejection of the latter case that the court cannot or should not afford equitable relief on appropriate terms. Relief from forfeiture must be considered on its own terms as a possible freestanding remedy.

83. The equitable relief sought is either (i) relief pursuant to the general equitable jurisdiction to relieve from forfeiture or (ii) relief pursuant to the particular equitable jurisdiction to revive a mortgagor's equity of redemption after it has been destroyed, and to give the mortgagor a further opportunity to pay the debt and recover its property. The Board agrees with Mr MacLean that, whether these two jurisdictions are separate, or whether the latter is merely a particular application of the former, is open to question, but this is of academic interest only in the present case.

84. For present purposes, it is convenient to refer to both heads of relief compendiously as relief from forfeiture. The forfeiture against which relief is sought is the forfeiture of the charged shares. The issues which arise under this head are whether the court has jurisdiction to grant such relief; if so, whether the court should grant relief; and, if so, on what terms.

85. Whether the court has jurisdiction to grant relief from forfeiture depends upon the relevant facts, upon the jurisdiction of the court in equity and upon the effect of the Regulations.

Jurisdiction to grant relief in equity

86. The critical aspect in this regard is the nature of the transaction which is summarised above and reiterated shortly here. Repayment to ATT of the loan of US$1.352bn was secured by equitable mortgages over the charged shares, which are and were of substantial value. It is not in dispute that the charges may properly be described as mortgages.

87. CH and CFI contend that the mortgages in this case are a classic example of the type of transaction in which the courts of equity have jurisdiction to grant relief. They rely upon the classic statement of principle by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722:

> "There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power. *There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate and also costs (Peachy* v. *Duke of Somerset* (1721) 1 Stra 447 and cases there cited). Yet even this head of relief has not been uncontested …" (emphasis added).

88. In the passage of his speech which begins at 722G, Lord Wilberforce discussed the historical development of a number of different issues and, at 723G, he continued, albeit in the context of real property, as follows:

> "I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve from forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

89. In *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana*, "*The Scaptrade*" [1983] 2 AC 694, the House of Lords robustly rejected the submission that the court had power to grant relief from forfeiture in a case where the owners had withdrawn a vessel for non-payment of hire under a withdrawal clause in a time charterparty. At 702B, Lord Diplock, with whom the other members of the House agreed, quoted the passage from Lord Wilberforce's speech in *Shiloh* which appears in italics in the first citation above, and said at 702C that that mainly historical statement was not intended to apply generally to contracts not involving any transfer of proprietary or possessory rights.

90. The commonest cases in which equity has power to intervene were identified by Lord Wilberforce as mortgages, which give rise to the equity of redemption, and leases, which commonly contain re-entry clauses. The paradigm case for relief in such instances is where the primary object of the bargain is to secure a stated result which can be effectively attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result.

91. That was precisely the position here. This is a case of a mortgage in which the primary object of the bargain was to secure the repayment of the loan together with contractual interest and the forfeiture provision, namely the power to appropriate, was added in order to secure that result.

92. It follows that, unless it can be said that the jurisdiction to give relief in the case of a mortgage is limited to mortgages of real property, no convincing reason has been identified why there should not be jurisdiction here. On the contrary it is a classic case for the exercise of the jurisdiction. The Board has reached the clear conclusion that there is no principled basis upon which the jurisdiction can be limited to real property. Nor is there any authority for such a distinction.

93. The issue was addressed in *BICC Plc v Burndy Corporation* [1985] Ch 232, 252A-C, where Dillon LJ said this:

> "There is no clear authority, but for my part I find it difficult to see why the jurisdiction of equity to grant relief from forfeiture should only be available where what is liable to forfeiture is an interest in land and not an interest in personal property. Relief is only available where what is in question is forfeiture of proprietary or possessory rights, but I see no reason in principle for drawing a distinction as to the type of property in which the rights subsist. The fact that the right to forfeiture arises under a commercial agreement is highly relevant to the question whether relief from forfeiture should be granted, but I

> do not see that it can preclude the existence of the jurisdiction to grant relief, if forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, is in question. I hold, therefore, that the court has jurisdiction to grant Burndy relief."
>
> Kerr LJ agreed with that part of Dillon LJ's judgment, and Ackner LJ agreed with the whole of it at 253C and 260A respectively.

94. That reasoning, with which the Board agrees, supports the conclusion that relief from forfeiture is available in principle where what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, regardless of the type of property concerned. See also *Jobson v Johnson* [1989] 1 WLR 1026 and *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13, [2003] 1 AC 368, where it was held that there was jurisdiction to grant relief in respect of a commercial agreement for the purchase of shares and in respect of a finance lease respectively. However, as already stated, the commonest such case is that of a mortgage or charge where the mortgagor or chargor retains the equity of redemption. In our opinion this is such a case.

95. As Dillon LJ observed in *BICC*, the mere fact that the transaction is commercial in nature does not preclude the jurisdiction to grant relief from forfeiture, provided that the forfeiture is of possessory or proprietary rights and not of purely contractual rights. There are many cases in which relief has been granted in the context of mortgages of land in which the underlying transaction is a commercial transaction. Lord Hoffmann said much the same in giving the judgment of the Board in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, 519F-G, where he observed that it is necessary to look more closely at the nature of the transaction than its subject matter.

96. Finally, the Board notes that in *The Scaptrade* at 704G, Lord Diplock expressly stated that the reasoning in his speech had been directed exclusively to time charterparties that are not by demise, that identical considerations would not apply to charterparties by demise, and that it would be unwise for the House to express any views about them. The same was true of the judgment of Goff LJ, giving the judgment of the Court of Appeal in the same case: see [1983] QB 529.

97. For these reasons the Board concludes that, subject to the effect of the Regulations, on the facts of this case, it has jurisdiction to grant relief from forfeiture.

Do the Regulations exclude or limit the grant of relief from forfeiture?

98. Apart from the Regulations, relief against forfeiture is in principle available in equity, notwithstanding a foreclosure order absolute: see *Cocker v Beavis* (1665) 1 Ch Cas, *Campbell v Holyland* (1877) 7 Ch D 166 and *In re Farnol, Eades, Irvine & Co* [1915] 1 Ch 22. But ATT submits that relief is here excluded, expressly or by necessary implication, by the Regulations.

99. The Regulations were introduced by the Treasury under section 2(2) of the European Communities Act 1972 in order to give effect to Council Directive 2002/47/EC on financial collateral arrangements. As Lord Walker's earlier judgment records, the Regulations went significantly wider than was required by the Directive in respect of the categories of transaction covered. The application of the Directive was mandatory only in respect of transactions between public authorities, central banks and institutions authorised to participate in financial markets (the precise terms are set out in Article 1.2(a) to (d)). Its application was optional if one party was an authority, bank or authorised institution and the other was an ordinary company (within Article 1.2(e)).

100. The Treasury, after consultation, decided to include not only the optional case but also transactions between ordinary companies. In separate judicial review proceedings in England (*R (Cukurova Finance International Ltd) v HM Treasury* 29 September 2008 [2008] EWHC 2567 (Admin)), the appellants applied for leave to challenge the Regulations as being on this account ultra vires section 2(2) of the European Communities Act 1972, but leave was refused on the ground of delay.

101. The Directive covers two mutually exclusive categories of financial collateral arrangements (article 2(1)(b) and (c)). One of these is a security financial collateral arrangement ("SFCA"), defined as:

> "an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established."

This definition is not easily applied to an English charge (whether legal or equitable), under which each party has a proprietary interest in the collateral so long as the security is in place (see per Lord Walker at [2009] UKPC 19, para 5). Nevertheless, it is common ground that each of the English share charges is to be regarded as a SFCA.

102. The Board is thus concerned with the interpretation and application of the Regulations as between parties to which the Directive, as a matter of European Union law, neither required nor contemplated that its terms would apply. Nevertheless, the Regulations are in the Board's opinion to be interpreted in their

full width against the background of the Directive, so as to give effect, even as between ordinary companies, to a similar scheme to that which is required or contemplated under European Union law to apply to transactions involving public authorities, central banks and financial market institutions.

103. This is so not because European law has any immediate relevance to transactions between ordinary companies, but on conventional principles of domestic construction. The Regulations were at their core rooted in the Directive, and they must in their extended domestic reach have been intended to operate on the same basis as at their core. Accordingly, in considering whether the Regulations exclude or limit the possibility of relief against forfeiture after appropriation, account must be taken of the purpose and effect of the Directive in relation to the transactions which it covers or contemplates. The Regulations must be construed as far as possible consistently therewith, even in relation to transactions outside the scope of the Directive.

104. The situation is similar to that considered in *In re Maxwell Fleet & Facilities Management Ltd* [2000] 2 CMLR 948 (HHJ Mackie QC), rather than that which arose in *R v Portsmouth City Council, Ex p Coles* CMLR 1135 (CA). In the former case, a regulation which was not required by the relevant directive was construed to operate consistently with other regulations which were central to the directive (para 38). That was an orthodox approach. In the latter case, the domestic regulations did not apply to the relevant contract, but it was argued that the directive had direct effect and that it could be construed by reference to a regulation for which no basis could be found in the directive (paras 7 and 13). That was self-evidently impermissible.

105. The aim of the Directive is explained in recital (17):

> "This Directive provides for rapid and non-formalistic enforcement procedures in order to safeguard financial stability and limit contagion effects in case of a default of a party to a financial collateral arrangement. However, this Directive balances the latter objectives with the protection of the collateral provider and third parties by explicitly confirming the possibility for Member States to keep or introduce in their national legislation an *a posteriori* control which the Courts can exercise in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations. Such control should allow for the judicial authorities to verify that the realisation or valuation has been conducted in a commercially reasonable manner."

106. The enforcement procedures to be provided are stated in article 4:

"1. Member States shall ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise in the following manners, any financial collateral provided under, and subject to the terms agreed in, a [SFCA]:

(a) financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations;

(b) cash by setting off the amount against or applying it in discharge of the relevant financial obligations.

2. Appropriation is possible only if:

(a) this has been agreed by the parties in the [SFCA]; and

(b) the parties have agreed in the [SFCA] on the valuation of the financial instruments.

3. Member States which do not allow appropriation on 27 June 2002 are not obliged to recognise it. If they make use of this option, Member States shall inform the Commission which in turn shall inform the other Member States thereof.

4. The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the [SFCA], be without any requirement to the effect that:

(a) prior notice of the intention to realise must have been given;

(b) the terms of the realisation be approved by any court, public officer or other person;

(c) the realisation be conducted by public auction or in any other prescribed manner; or

(d) any additional time period must have elapsed.

5. Member States shall ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker.

6. This Article and Articles 5, 6 and 7 shall be without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner."

107. The Regulations apply to "SFCAs", defined for this purpose by regulation 3 as meaning:

"An agreement or arrangement, evidenced in writing, where—

(a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral taker;

(b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations;
(c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; …. and
(d) the collateral-provider and the collateral-taker are both non-natural persons."

108. Regulation 3 further defines "security interest" as:

> "Any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security including - (a) a pledge; (b) a mortgage …..".

"Financial collateral" is defined as either cash or financial instruments, and the latter expression is widely defined as including shares in companies.

109. The Regulations contain in Part 2 (regulations 4-8) provisions excluding certain legislative requirements and in Part 3 (regulations 8-15) provisions excluding or modifying various rules governing insolvency. In Part 5 (regulations 16-18), they state that, where a SFCA

> "provides for the collateral-taker to use and dispose of any financial collateral provided under the arrangement, as if it were the owner of it, the collateral-taker may do so in accordance with the terms of the arrangement" (regulation 16).

110. Then, importantly, they provide in regulations 17 and 18:

> "17. **No requirement to apply to court to appropriate financial collateral under a security financial collateral arrangement**
> Where a legal or equitable mortgage is the security interest created or arising under a security financial collateral arrangement on terms that include a power for the collateral-taker to appropriate the collateral, the collateral-taker may exercise that power in accordance with the terms of the security financial collateral arrangement, without any order for foreclosure from the courts.
>
> 18. **Duty to value collateral and account for any difference in value on appropriation**
> (1) Where a collateral-taker exercises a power contained in a security financial collateral arrangement to appropriate the financial collateral the collateral-taker must value the financial collateral in accordance

with the terms of the arrangement and in any event in a commercially reasonable manner.

(2) Where a collateral-taker exercises such a power and the value of the financial collateral appropriated differs from the amount of the relevant financial obligations, then as the case may be, either–

(a) the collateral-taker must account to the collateral-provider for the amount by which the value of the financial collateral exceeds the relevant financial obligations; or

(b) the collateral-provider will remain liable to the collateral-taker for any amount whereby the value of the financial collateral is less than the relevant financial obligations."

111. As Lord Walker noted at [2009] UKPC 19, para 11, the Treasury, when introducing the Regulations, appears to have been under the misapprehension that appropriation as a remedy was already generally available in English law. In reality, certainly in relation to shares in a company (and especially unquoted shares which cannot easily be valued), the notion of appropriation by the unilateral act of the collateral-taker was a novel concept. Before the Directive, it would have been open to attack not only as self-dealing but also as a clog on the equity of redemption, a long established, and by no means obsolete, doctrine of equity. In these circumstances, it seems unlikely that the Treasury contemplated that the Regulations would alter equity's power, inherent in such appropriation, to relieve against forfeiture. However, the primary question, in the light of what the Board has already said, is whether the Directive contemplates or permits the survival of any such power after appropriation.

112. ATT submits that the Directive, and therefore the Regulations, are inconsistent with any power to relieve against forfeiture after an appropriation. It submits that the only *a posteriori* control which the Directive contemplates by recital 17 is to "verify that the realisation or valuation has been conducted in a commercially reasonable manner". In any event, it submits, this is the only type of control contemplated by regulation 18 of the Regulations, which provides that "the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner" and that the parties must thereafter account to each other for any excess value received or balance remaining unpaid after the appropriation.

113. The Board cannot accept ATT's submissions on these points. Recital 17 of the Directive states that the Directive explicitly confirms the possibility for Member States to introduce or retain *a posteriori* control in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations in general terms. Its final sentence requires that such control should enable judicial verification "that the realisation or valuation has been conducted in a commercially reasonable manner". The only reference in any article of the Directive to judicial control of the realisation or valuation of collateral

occurs, however, in article 4(6), which provides that articles 1, 5, 6 and 7 are all without prejudice to any national law requirements that realisation or valuation must be conducted in a commercially reasonable manner. Neither recital 17 nor any of these articles puts any limit on the scope of the *a posteriori* control permissible in respect of realisation, of which appropriation is one form under the Directive.

114. The incidents attaching to the grant of a security interest, and the courts' power to intervene to protect the collateral provider, are quintessentially matters for domestic law, as recital 17 recognises. The Board considers that *a posteriori* control includes, under English law, the possibility of granting relief against forfeiture. There is nothing in the Directive which could exclude that particular incident of the grant of a security interest over shares, so far as it exists in domestic law. As to the Regulations, regulation 17 expressly recognises in its concluding words a parallel between appropriation and forfeiture, and there is nothing in regulation 18 which bears on or could exclude the possibility of relief against forfeiture so far as that exists as a matter of general law.

115. The Board therefore concludes that nothing in the Regulations precludes the availability of relief against forfeiture in circumstances such as arise in the present case. In principle it remains available following the appropriation by ATT of the charged shares.

Should relief from forfeiture be accorded in this case?

116. This leads the Board to consideration of whether it should grant CH and CFI such relief, and if so on what terms. These questions require further examination of the nature of the jurisdiction to grant relief. In the passages in *Shiloh* [1973] AC 691 quoted above, Lord Wilberforce noted that equity is willing, in cases of security for the payment of money, to relieve from forfeiture on terms that the payment is made with interest, if appropriate, and also costs. Factors bearing on the appropriateness of relief were said to include the applicant's conduct, "in particular whether his default was wilful, the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach". Commenting on this form of relief, Snell's Equity (32nd Ed), para 13-015 observes that:

> "Although this confers an apparently broad discretion, it is likely to be very difficult to establish a case for relief against forfeiture in a commercial context involving a freely negotiated contract. In such cases courts will place considerable emphasis upon the need for certainty."

117. The authority cited for this qualification is the decision of Cooke J in *More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship Jotunheim* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep 181. That was a case of a

demise charter for 48 months with an option to purchase at its end. The owners had the familiar right to terminate for non-payment of hire, a right intended to secure the payment of future hire and other sums. The owners terminated the charter after three months on account of late payment or non-payment of hire which Cooke J found to have been deliberate and to have been accompanied by invalid excuses (para 61). The demise charterers were "plainly unsatisfactory charterers with whom the owners [could] rightly anticipate further problems" (para 66). The commercial nature of a freely negotiated contract militated against relief, although termination would mean that the charterers incurred some modest wasted expenses and incurred "limited hardship …. because of the lost opportunity to purchase the vessel, the wasted payments and potential exposure to third parties". That was however a risk they took by not paying the hire.

118. Cooke J, viewing the issue as one of discretion, declined to grant relief – a conclusion which the Board regards as unsurprising in the circumstances. Assuming the existence of a discretion, a court is even less likely to regard relief against termination as appropriate in respect of a chattel lease under which the payments represent the agreed rate for use of the chattel up to termination and no more: see *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd* [2010] EWHC 185 (Comm), [2011] 1 Lloyd's Rep 9, paras 82-83. In contrast, it is in the Board's view material that the present case does not involve a commercial contract in the same sense as that being considered in the *Jotunheim* or *Celestial Aviation*. It is a conventional case of borrowing on security.

119. In the case of forfeiture of leases and underleases of real property, the legislature has regularly intervened to regulate the power to grant relief in both parties' interests. By the Act, 4 Geo. 2. c.28, re-enacted in this respect in the Common Law Procedure Act 1852, the right to claim relief in equity was limited to a period of six months after judgment in ejectment, but the lessee was given the right before trial of any ejectment action to seek relief in a common law court. The Common Law Procedure Act 1860 further extended the lessee's rights by enabling relief to be obtained in a summary manner, though subject to the same terms and conditions as in Chancery. In equity, relief was accompanied by an order compelling the lessor to grant a new lease, but, under the 1852 Act and later the 1860 Act, it became possible for the court to order that the lessee should continue to hold on the terms of the old lease: see the discussion and order in *Howard v Fanshawe* [1895] 2 Ch 581, 590-592, *A Compendium of Modern Equity*, Andrew Thompson (1899), pp.264-265 and Snell's *Principles of Equity* (18th ed. (1920), p.347.

120. An important limitation on Equity's power to grant relief against forfeiture was that it did not apply to breaches of covenant not involving the payment of rent or other sums: see e.g. *Principles of Equity*, H. Arthur Smith (1882), p.206, para. 6. By the Act, 22 & 23 Vict. c.35, relief was made possible against a forfeiture for breach of covenant or condition (occurring without fraud or gross negligence) "to insure against loss or damage by fire, where no loss or damage by fire has occurred

…. and there is an insurance on foot at the time of the application" to the court. By the Conveyancing Act 1881, s.14(2), and its successor section 146(2) of the Law of Property Act 1925, the power to grant relief against forfeiture has been statutorily enacted in broad discretionary terms, extending (with some exceptions) to breaches of covenant generally, whether remediable or not. Under section 146(2):

> "the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the foregoing provisions of this section [provisions requiring notice of any breach and "a reasonable time thereafter, to remedy the breach, if it is capable of remedy"], and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit".

121. The breadth of the discretion conferred by the predecessor provision in the Conveyancing Act 1881, section 14(2) was underlined by Earl Loreburn LC in *Hyman v Rose* [1912] AC 623, 631:

> "I desire in the first instance to point out that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express as to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted."

122. In the Court of Appeal, *Hyman v Rose* [1911] 2 KB 234, 241-242, Cozens-Hardy MR had suggested general principles to the effect that, in the first place, "the applicant must, so far as possible, remedy the breaches alleged in the notice and pay reasonable compensation for the breaches which cannot be remedied" and must also undertake in future to observe any negative covenant broken, to make good any waste if possible and to comply in future with any other covenant. In the

House, Earl Loreburn was therefore stressing that even these modest general principles should not be regarded as inflexible. His words have been cited and adopted in cases under section 146(2) of the 1925 Act. *Southern Depot Co Ltd v. British Railways Board* [1990] 2 EGLR 39 and *Darlington BC v Denmark Chemists Ltd* [1993] 1 EGLR 62 are examples. In the former case, Morritt J said, p.44, that

> "to impose a requirement that relief under section 146(2) should be granted only in an exceptional case seems to me to be seeking to lay down a rule for the exercise of the court's discretion which the House of Lords in *Hyman v Rose* said should not be done. Certainly Lord Wilberforce in *Shiloh Spinners Ltd v Harding* did not purport to do so in cases under the statute."

123. Thus, in relation to leases, relief may in an appropriate case be granted without the identified breach being remedied. Woodfall's Landlord and Tenant (2007) states (at para 17.169.2) that there is:

> "no inflexible rule to the effect that the tenant must make good the breach. In an appropriate case relief against forfeiture may be granted without requiring the tenant to make good the breach immediately or at all."

Cited in support are *Westminster (Duke) v Swinton* [1948] 1 KB 524, where two years was allowed for reinstatement of alterations, and *Associated British Ports v C.H.Bailey plc* [1990] 2 AC 703, where reinstatement would have cost over £600,000, in circumstances where the tenants' evidence was that "immediate remedying of the breaches of covenant is not requisite for preventing substantial damage to the value of the reversion and is wholly out of proportion to the extent of damage to the reversion". Lord Templeman, in a speech with which all members of the House agreed, recalled Earl Loreburn's words in *Hyman v Rose* and said:

> "…. therefore, it would be open for a judge in the exercise of the discretion conferred on him by section 146 of the Act of 1925 to grant relief against forfeiture of a lease with nearly 60 years to run without requiring the tenant to spend over £600,000 without substantial benefit to anyone" (p.708F).

Again, this affirms the breadth of the court's discretion both in granting relief and as to the terms on which to grant it.

124. The statutory scheme of section 146 is more protective of tenants than the general principles of equity, in that it requires notice to be given, thus affording an

opportunity to remedy remediable breaches. But, apart from this, the breadth and flexibility of the equitable discretion to relief against forfeiture are, in the Board's opinion, as great outside the scope of section 146(2) as it is within it. The purpose of the various statutory interventions in the property field was self-evidently not to alter the court's fundamental approach to the grant of relief against forfeiture.

125. ATT in its submissions has stressed the need for commercial certainty. It claimed that general uncertainty would result in the market from the grant of relief against forfeiture in this case. The Board accepts that the need for certainty and the desirability of avoiding uncertainty are very relevant considerations, but the present case involves a combination of unusual features which are most unlikely to be repeated. For that reason, it does not consider that the grant of relief in this instance will be productive of uncertainty. The Board identifies the following particular features as relevant to the exercise of the discretion here:

a. The basis of valuation of the shares after appropriation is for present purposes, under clause 9.3(b) of the Charges, read with the definition of "Fair Price", i.e. the weighted average market value of publicly traded Turkcell shares over the previous 60 day period as reported in the Istanbul Stock Exchange. This makes no allowance for the value of acquiring control over Turkcell, which is what this litigation is largely about. The value of that premium could be very substantial indeed. An indication of its worth is provided by the "Buy Out Price" payable under the CTH Shareholders' Agreement between CFI and ATT. This provides that, if either is required to buy out the other, a 20% premium is added to the 60 day weighted average market value on the Istanbul Stock Exchange. ATT submitted, with understandable circumspection, that, when Regulation 18 specifies that "the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner", the concluding nine words could enable CH and CFI to require ATT to credit them with the premium, contrary to express terms of the charges. But, as Mr Milligan in effect accepted, ATT would be likely vigorously to resist any such suggestion. When ATT announced that it had appropriated the charged shares on 27th April 2007, it did so expressly on the basis that it would value them under clause 9.3 of the Charges. The Board need do no more than express scepticism that the concluding nine words of Regulation 18 could over-ride this agreed basis.
b. From the outset, the transaction was structured to preserve CH's control over Turkcell. That is why, despite the Alfa Group's wish to acquire control, CH was only willing to sell 49% of the shares in CTH to ATT.
c. Also from the outset, the Alfa Group knew that it was CFI's intention to refinance the loan as quickly as possible, but, as the judge found, "it was the expectation and aim of Alfa that [CFI] would default in November 2006 and [the] remaining [51%] stake in [CTH] would fall into Alfa's lap" (see also paras 19 to 21 above).

d. ATT acted within its rights in November 2006 in voting against any distribution of dividends until audited financial statements were available (judgment, para 184; para 20 above). It also acted within its rights in remaining silent about its plans to call in the loan because it wished to spring acceleration on CFI and in reducing the window within which the Cukurova Group might be able to achieve a refinancing (para 21 above). The press conference statements on 17th April 2007, although designed to hamper any such refinancing, were not actually causative of the Cukurova Group's inability to complete its refinancing prior to the appropriation on 27th April 2007. But all these factors expose the reality that ATT was primarily concerned with the shares not as security, but for the control over Turkcell that they would supply.

e. Even if all the events of default which ATT alleged could be relied on, they were limited in number and are not shown to have occurred wilfully:
    i. The Award, giving rise to an event of default relating to 'material adverse effect', involved a decision on a strongly contested issue, whether CH and Sonera had ever reached final agreement for a sale of the shares in TCH then held by CTH. The Award held that final agreement was reached, but there is no reason to think, and there has been no suggestion, that CH did not believe that there was no binding agreement, nor that the Alfa Group was not kept fully informed about Sonera's claim.
    ii. As already mentioned, the other events of default relied on by ATT, even if they had all been established, demonstrate no bad faith on the part of any company in the Cukurova Group and caused no significant damage to ATT: at worst, a couple of these alleged events of default can be said to show that CFI was somewhat casual in giving notice of certain transactions (see para 66 above).

f. The Board regards the event of default constituted by the Award as one of potential gravity, in so far as it was likely to (and did eventually) lead to a major financial liability in damages. But its actual gravity is diminished by the consideration that ATT's financial position was never really threatened or prejudiced by the Award. ATT's financial interests as lender were protected by its charges over the charged shares. At the material times, the value of those shares was sufficient to cover the whole of CFI's borrowing from ATT, even ignoring any premium attaching to them for the control over Turkcell that they would have brought. However CFI was intending to refinance its borrowing from ATT. ATT knew, and was concerned, that CFI was close to achieving that. It was ATT's aim to forestall this, and to convert its charges into ownership of the shares, giving it control of Turkcell.

g. Within a month of the appropriation, on 25th May 2007, CFI tendered what would have been valid prepayment under clause 6.4 of the Facility Agreement, five days' notice to do so having been given on 17th May

2007, and the monies tendered were thereafter kept for three years in an interest earning escrow account until 25th May 2010. Consistently with its overall aim to control Turkcell, ATT rejected the tender as well as CH's and CFI's subsequent claim to relief against forfeiture.

h. It was not until the defence was amended on 11th July 2008 that relief against forfeiture was claimed, with particulars of the essential matters relied upon, and a considerable period has elapsed since then. But the position regarding use of the appropriated shares and control of Turkcell has been frozen since April 2007, so that relief against forfeiture to restore the status ante quo is in principle feasible. It is also clear that, whenever relief against forfeiture was claimed, it would have been strongly contested, with the result that the matter would inevitably have come before this Board in any event. Para 22 of ATT's reply to the amended defence was a summary denial both of any jurisdiction to grant relief and of the appropriateness of any relief if jurisdiction existed.

126. In these circumstances, notwithstanding ATT's submissions based on the interests of commercial certainty, the Board considers that relief against forfeiture should be available to CH and CFI on appropriate conditions. The Board requires further assistance upon the basis and terms of such relief before humbly advising Her Majesty as to the terms of any final order disposing of the appeal. The points on which the Board requires particular assistance have been identified in a separate note to the parties, in terms which are annexed to this judgment.

ANNEX

1. For the reasons given in its judgment, the Board has concluded that it is necessary for relief from forfeiture to be sought, that it is available in principle, and that it ought to be granted provided that the terms upon which it is granted are complied with.

2. However, the Board requires further submissions as to the basis and terms upon which it should be granted. Different views may be taken as the conceptual basis of relief against forfeiture, for example: (i) that it restores a chargor's property in shares charged, upon terms imposed by the Court to compensate the chargee appropriately in the light of all the circumstances; or that it not only restores the chargor's property in the shares, but (ii) that it retrospectively recreates and requires performance of all contractual obligations which would otherwise have existed, but for the appropriation; (iii) that the consequence in consequence subsists and continues to govern the incidents of the debt, e.g. the borrower's liability to interest. The Board invites submissions on these and any other possible analyses and their consequences.

3. When analysing the conceptual basis of relief, the Board invites the parties to address it on, in particular, the historical basis on which equity operates, as discussed in, for example, Principles of Equity by H. Arthur Smith (1882) p.206, Story's Principles of Equity (1st ed) (1884) paras 1314-1315, A Manual of Equity Jurisprudence by Josiah Smith (1884) pp.407-409, A Compendium of Modern Equity by Andrew Thompson (1899), pp.264-265 and Snell's Principles of Equity (18th ed) (1920).

4. The Board also invites submissions upon any light thrown on the correct analysis by:

    a. the parallel statutory jurisdiction introduced in relation to real property by the Act, 4 Geo 2, c.28, the Common Law Procedure Acts 1850 and 1860, the Conveyancing Act 1881 and its successor section 146(2) of the Law of Property Act 1925;

    b. any relevant authorities, including Hyman v Rose [1911] 2 KB 234 and [1912] AC 623, Croft v London and County Banking Co (1885) 14 QBD 347, Howard v Fanshawe [1895] 2 Ch 581, Westminster (Duke) v Swinton [1948] 1 KB 524 and Associated British Ports v C H Bailey [1990] 2 AC 703.

If (i) is the right analysis:

5. The Board invites further submissions as to the conditions which it might be appropriate to impose upon the grant of relief – and, in particular, assuming one such condition to be repayment of the amount of the loan debt as it stood until discharged by the appropriation on 27th April 2007, as to:

    a. the rate(s) of interest such amount should carry thereafter and

    b. the nature and quantum of any costs, payment of which should also be made a condition of relief.

6. In this connection, the Board invites submissions as to and upon such evidence as there may be showing:

    a. the rate(s) and amounts of interest incurred in order to borrow from J P Morgan Europe Ltd the monies held in the Namrun Escrow account for the three year period from 25th May 2007 to 25th May 2010 – the Board understands such monies to have been borrowed under the Facilities Agreement dated 17th May 2007 found in Bundle 4d at p.2109, but invites submissions on the effect of the provisions of that Agreement,

    b. the rate(s) and amounts of any interest earned on such monies while in the Namrun Escrow account for such three year period, and

    c. the rate(s) of interest at which CFI could have borrowed monies to repay the debt at other times up to the present date.

7. Whether or not there is evidence on all three points mentioned in the previous paragraph, the Board also invites submissions as to the basis on which the Board should proceed, if it concludes that it is or may be relevant to have regard, even generally, to any difference between the Facility Agreement rates and the rates incurred and/or earned in respect of the Namrun Escrow account and/or the rates which CFI would have incurred, had the loan been repaid by CFI it on 25th May 2007 or at any later date up to the present.

If (ii) is the right analysis:

8. The Board invites submissions as to:

a. the precise nature and extent of the obligations regarding payment of principal, interest and, if applicable, costs, which are to be treated as having been revived retrospectively as from 25^{7h} April 2007 to date,

b. whether the effect of the revival of the contractual obligations is by the same token to enable the tender of 25th May 2007 to be taken into account retrospectively, if and to the extent that it would have been relevant had there been no appropriation, and

c. if that is the effect of the revival,

    i. what the effect of the tender having been retrospectively rendered effective would be,

    ii. whether the effect of the case-law is as Bannister J decided in his judgment on 13 July 2010, and, if so, whether the Board should distinguish or depart from those cases;

    iii. how the court should exercise its equitable jurisdiction to grant relief from forfeiture, and in particular, what terms with regard to the rate of interest it should impose on CFI; and

d. the nature and quantum of any costs, payment of which should be required of CH and CFI as a condition of relief.

e. the nature and quantum of any costs, payment of which should be required of CH and CFI as a condition of relief.

9. In this context also, the Board invites, so far as may be relevant, submissions in the like areas to those identified in paras 5 and 6 above.

[2012] UKPC 20
Privy Council Appeal No 0016 of 2012

JUDGMENT

Cukurova Finance International Ltd and others (Appellants) *v* Alfa Telecom Turkey Ltd ("Alfa") (Respondent)

From the Court of Appeal of the British Virgin Islands

before

Lord Walker
Lord Mance
Lord Sumption

JUDGMENT DELIVERED BY LORD MANCE ON

23 May 2012

Heard on 8 May 2012

Appellant
Kenneth Maclean QC
James Nadin

(Instructed by White & Case LLP)

Respondent
Stephen Smith QC
Robert Levy QC

(Instructed by Hogan Lovells International Ltd)

LORD MANCE

1. The Board has before it an interlocutory issue arising in the course of the continuing litigation following its judgment on 5 May 2009 on preliminary issues in Privy Council Appeal No 60 of 2008. In that judgment the Board concluded that it was not necessary for a valid appropriation for a collateral-taker to become registered owner of the shares. The continuing litigation concerns, inter alia, questions as to (a) whether there was any event of default entitling the collateral-taker to accelerate the loan and appropriate the charged shares, (b) whether the exercise of the power of appropriation was vitiated by improper purpose or bad faith, (c) whether the debtor was entitled to relief in equity from the forfeiture of its interest in the charged shares and (d), if the debtor was on any of these grounds entitled to treat as invalid or to have relief in equity from the appropriation, what sums were and are payable by the debtor by way of principal and interest.

2. Under a Facility Agreement dated 28 September 2005 Cukurova Finance International Ltd ("CFI"), a British Virgin Islands ("BVI") company, borrowed US$1.352 million from Alfa Telecom Turkey Ltd ("Alfa"). CFI was owned 100% by Cukurova Holdings AS ("CHAS"), a Turkish company. The loan was secured by charges of CHAS's 100% shareholding in CFI and CFI's 51% shareholding in Cukurova Telecom Holdings Ltd ("CTH"), another BVI company. CTH has a 52.9% holding in Turkcell Holding AS ("THAS") which in turn has a 51% holding in Turkcell Ilititsim Hizmertleri AS ("TIHAS"), which is listed on the Istanbul and New York stock exchanges and is Turkey's largest mobile telephone company. The charged shares are the effective key to control of TIHAS. The chart appended to this judgment shows the overall shareholding position.

3. Under a shareholder agreement between CFI, CTH and Alfa dated 20 September 2005, CFI had the right to appoint three, while Alfa only had the right to appoint two, directors to CTH, and each party further agreed to use all of the powers at its disposal and exercise all its voting rights to ensure that no action was taken or decision made relating to a series of "reserved matters" set out in a schedule (schedule 1) unless CTH's Board had given its unanimous approval to proceed. The reserved matters include decisions or actions to be taken at directors' or shareholders' meetings of CTH, THAS and TIHAS. Under article 10 of THAS's articles of association, THAS's board consists of seven members. Three are presently nominated by Sonera Holdings, owner of 47.09% of THAS's shares, and four by CTH (two of these being presently Cukurova nominees and two Alfa nominees). If Alfa had 100% control of THAS and was free of the constraints involved in the shareholder agreement, Alfa could replace the Cukurova directors.

THAS's board controls the way in which THAS's majority 51% shareholding in TIHAS is voted at TIHAS shareholder meetings.

4. On 16 April 2007 Alfa gave notice of sixteen alleged events of default under the Facility Agreement, maintained that these entitled it to accelerate the loan and commenced proceedings for a declaration accordingly. On 27 April 2007 Alfa purported to enforce its security by appropriating the charged shares. On 25 May CHAS tendered the principal with contractual interest up to that date, making a total of US$1,446,824,709.42, and issued proceedings for a declaration that the tender was valid and that Alfa was obliged to deliver up the charged shares. Alfa rejected the tender as too late.

5. At first instance on 20 May 2010 and by order dated 29 June 2010 Bannister J held that that there was no event of default on which Alfa could rely and that the charged shares could be redeemed on payment of principal and contractual interest to redemption. CHAS and CTI had argued that contractual interest should not run after 25 May 2007, when they had tendered the principal with contractual interest up to that date. On 20 July 2011 the Court of Appeal (Gordon, Redhead and Kawaley JJA (Ag)) allowed Alfa's appeal. It dismissed CHAS's and CTI's cross-appeal on interest on the basis it did not arise.

6. On 29 July 2011 CHAS and CTI applied for leave to appeal the Court of Appeal's decisions. Final leave to do this was confirmed without opposition by the Court of Appeal (Rawlins CJ, Pereira and Baptiste JJA) in a judgment on 16 January 2012. Meanwhile on 1 September 2011 CHAS and CTI also applied for a stay of the Court of Appeal's judgment and injunctive relief relating to registration of the shares and other actions. By agreement the status quo was preserved until 5 December 2011 when the Court of Appeal (Edwards, Pereira and Baptiste JJA) granted a stay, and gave further interim injunctive relief on condition that CHAS and CTI pay US$1,446,824,709.42 (the sum tendered in May 2007) into court within 90 days. Leave to appeal that order was refused by the Court of Appeal in a judgment on 16 January 2012.

7. On 6 February 2012 the Board indicated that it would grant permission to appeal against the Court of Appeal's order of 5 December 2011, and that the stay and injunctive relief should continue pending the hearing of the appeal, but with the discharge and omission of the condition of payment into court in respect of the injunctive relief. The Board gave Alfa liberty to apply by 11 April 2012 for the discharge or variation of its order. A corresponding order was approved by Her Majesty on 14 March 2012. The issue now before the Board arises from Alfa's application, made on 7 March 2012 pursuant to the liberty given, for discharge of the order approved on 14 March 2012, or in the alternative, if the Board were

minded to vary the Court of Appeal's order of 5 December 2011, for discharge of the Court of Appeal's order and its replacement by various undertakings by Alfa.

8. The issue at the heart of the present applications is who should manage the affairs of the Turkcell mobile telephone business pending the Board's final adjudication (after a hearing which should take place this autumn) on the rights and wrongs of what happened in April and May 2007 and on the question whether, if Alfa is otherwise entitled to forfeit the charged shares, any and if so what relief can and should be given to CTI and CTH against such forfeiture. Until now CHAS has, through its shareholdings and the shareholder agreement and the continuing stays and injunctive relief which have been granted, retained a dominant interest in the management of the Turkcell business. Alfa submits that, now that the Court of Appeal has accepted its entitlement to the charged shares, there is no basis for continuing the previous status quo in every respect. It should be entitled to take over day to day management, subject to undertakings which it proposes and which should in its submission protect CHAS, CTI and CTH against any action against their interests which could not be reversed, were the outstanding appeals to the Board to succeed.

9. The Court of Appeal in its judgment on 5 December 2011 did not accept Alfa's submissions on these points. Edwards JA, giving the sole reasoned judgment, concluded that

> "42. Cukurova contends that despite Alfa's offered undertakings, Cukurova's interests are not protected as Alfa is still free to take other actions such as removing the Cukurova appointed directors from the Board of [CTH] which would destroy Cukurova's director or shareholder influence over the management of Turkcell. Alfa would still be able to cause Turkcell and its subsidiaries to dispose of assets other than shares.
>
> 43. …. Having weighed and considered the balance of convenience and the competing rights of the parties, it appears that there is a risk that if a stay of paragraphs (7C), (7D) and 8 of the reliefs granted to Alfa [that is, paragraphs requiring CHAS and CFI to take all steps within their power to secure the cancellation of the registration of the charged shares in their names and their registration instead in Alfa's name] is not granted, Cukurova's appeal will prove abortive if the Cukurova appellants succeed...
>
> 44. I would exercise my discretion and grant a stay of those paragraphs. [CHAS and CFI] have also demonstrated that the

> undertakings offered by Alfa are inadequate to ensure that Alfa will not deal with the charged shares while the appeal is pending in a manner that will prejudice the interests of Cukurova while the appeal is pending. In the event that this occurs I have no doubt that damages would in fact not be an adequate remedy."

However, Edwards JA went on to note that, were CHAS and CFI to succeed, they would be "bound to pay over to Alfa a sum as previously tendered by them in May 2007", and without further reasoning she attached to the continuation of the injunctive relief a condition of payment into court of that sum, US$1,446,824,709.42.

10. In the result, the full terms of the Court of Appeal's order were to the effect that, in addition to the stay pending the appeal to the Board of paragraphs (7C), (7D) and 8 of the reliefs granted to Alfa, Alfa was, upon condition of payment in of US$1,446,824,709.42, also to be

> "restrained, whether acting by its directors, officers, servants, agents or otherwise howsoever from:
>
> (a) exercising or purporting to exercise any of the rights attaching to or derived from the Charged Shares;
>
> (b) causing or permitting or assisting [CTH] to dispose of charge or otherwise deal with its shareholding in [THAS];
>
> (c) causing or permitting or assisting [THAS] to dispose of, charge or otherwise deal with its shareholding in [TIHAS];
>
> (d) causing or permitting or supporting any change to the composition of the board of directors of [CTH], [THAS] or [TIHAS] without the written consent of [CFI];
>
> (e) causing or permitting or supporting any change in the memorandum and/or articles of association of [CTH], the articles of association of [THAS] or the articles of association of [TIHAS], without the written consent of [CFI];

(f) causing or permitting or supporting any change in the authorised share capital of [CTH], [THAS] or [TIHAS] (or the issue of any shares or securities convertible or exchangeable into shares or the right to subscribe for shares in [CTH] or [THAS] or [TIHAS] without the written consent of [CFI];

(g) causing or permitting or assisting [TIHAS] to dispose of, charge or otherwise deal with its shareholding in any of its subsidiaries, without the written consent of [CFI]; and

(h) causing or permitting or assisting (a) [CTH] or [TIHAS], (b) the respective boards of directors or shareholders or shareholders' meetings of such companies or (c) [Alfa's] nominees or representatives on the boards of directors or at shareholders' meetings of such companies, to take any action or make any decision in respect of any of the matters specified in Schedule 1 to the shareholders' agreement dated 20 September, 2005 between [Alfa], [CFI] and [CTH] without the unanimous prior approval, confirmation or endorsement of either the board of directors of CTH or a general meeting of the shareholders of [CTH]."

11. *The condition for payment of US$1,446,824,709.42:* Alfa's insistence on the maintenance of this condition has become decreasingly prominent in its submissions. This is for good reason. First, while it can be appropriate to order security in respect of indebtedness which will exist if an appeal fails, there is no question of that in this case. On the contrary, it is accepted that the value of the shares appropriated exceeded any outstanding indebtedness at the date of their appropriation in May 2007 and that Alfa accordingly owes a substantial sum (at least US$165 million and maybe more) on that basis. The Court of Appeal's order was a most unusual order, requiring CHAS and CFI to put up security for a future sum which could only become payable if they were to succeed on their appeal and at that stage to seek to redeem the charged shares.

12. Second, the Court of Appeal reasoned that, were CHAS and CFI to succeed, they would be bound to have to pay that sum. But it would be open to CFI to default in repayment, and to CHAS to fail to put up the monies necessary to repay the loan, and this might well occur if repayment would involve paying interest at the contractual rate after May 2007. That would leave Alfa free on any view to appropriate the charged shares to itself. As Alfa accepts, that is exactly what Alfa hopes would occur, if CHAS and CFI were to succeed on their appeal on questions (a), (b) and (c) identified in para 1 of this Advice. So the Court of Appeal's order grants security for a payment which Alfa hopes cannot and will not be made. In reality, Alfa wants the condition for payment into court, not to provide it with

security, but in the hope that the condition will prove one that CHAS and CFI cannot meet, so that their appeals to the Board will lapse.

13. Further, this is, on the evidence, a very likely result of the condition. CHAS and CFI kept the sum tendered in May 2007 available for three years in a separate account. But thereafter they were unable to do this, and, without full control over the charged shares, the indications are that they would be unable at this stage to raise either themselves or from others the necessary monies to meet the condition. Alfa challenges the sufficiency of CHAS's and CFI's evidence on this last factual aspect, but it is in the Board's opinion made sufficiently good for present purposes. The suggestion made by Alfa during the oral hearing that some alternative form of security might be contemplated, other than by payment into court, does not resolve any of the above objections.

14. In the light of all these considerations, the condition imposed by the Court of Appeal has no logic or basis, and cannot stand.

15. *The injunctive relief and the undertakings offered in lieu:* Before the Court of Appeal, Alfa offered undertakings that it would not pending the appeal (a) dispose of, or otherwise deal in, the charged shares, (b) cause CTH to dispose or otherwise deal in its shareholdings in THAS, (c) cause THAS to dispose of, or otherwise deal in, its shareholding in TIHAS or (d) cause TIHAS to dispose of, or otherwise deal in, its stakes in non-Turkish telecoms companies outside the ordinary course of TIHAS's business. These stakes include a 41.45% interest in Fintur Holdings Ltd, holder of TIHAS's overseas telecoms interests. The remaining 58.55% of Fintur's shares is held by TeliaSonera, which has under a joint venture agreement with Alfa dated 12 November 2009 a right of first refusal over TIHASs' shares in Fintur. Fintur is a company about which the Cukurova companies have in these circumstances expressed particular concerns.

16. In their skeleton argument before the Board dated 3 May 2012, CTH and CFI pointed out that the undertakings offered to the Court of Appeal left Alfa free to exercise the rights attached to the charged shares free of the shareholder agreement, in a way that would enable (i) removal of all Cukurova directors from the boards of CTH, THAS and TIHAS, (ii) the issue of shares by CTH or THAS to dilute the interest in TIHAS represented by the charged shares, (iii) the making of other fundamental changes in the constitutional documents of CTH and/or THAS (e.g. the creation of super-majorities for certain classes of decision) to entrench the rights of Alfa and limit those of the Cukurova interests and (iv) the disposition by subsidiaries of TIHAS of their assets. As part of the background, they pointed to the fact that under the joint venture agreement dated 12 November 2009 between Alfa and TeliaSonera Finland (47.09% holder of shares in THAS through Sonera

Holdings), these two companies had agreed to pool their interests in TIHAS and to work together to remove Cukurova's interest.

17. CFI and CTH further noted that, if steps were permitted to be taken in respect of reserved matters contrary to the shareholder agreement between CFI, CTH and Alfa, it would not be possible to reverse them under the shareholder agreement, if that were held subsequently binding, without further unanimous agreement. Even if Alfa were ordered to give such agreement, third party interests might intervene to preclude the reversal being achieved. For example, TeliaSonera might by absenting its three directors from any directors' meeting of THAS prevent the meeting being quorate (since THAS's board consists of seven directors and five are required for a quorum).

18. In its skeleton argument before the Board also dated 3 May 2012, Alfa sought to meet these points by amplifying the fourth of its previous undertakings (above) and adding two further undertakings, as follows:

> "(d) cause [TIHAS] to dispose of or otherwise deal in its stake in any company or with any other assets outside the ordinary course of business;
>
> (e) cause or permit any change in the memorandum and/or articles of association of CTH, or the articles or association of THAS;
>
> (f) cause or permit any change in the authorised share capital of CTH, THAS or [TIHAS] (or the issue of any shares or securities convertible or exchangeable into shares or the right to subscribe for shares in CTH or THAS or [TIHAS]".

19. During the course of oral submissions before the Board, Mr Smith QC for Alfa accepted that these amplified undertakings (e) and (f) should be still further expanded to cover CFI as well as TIHAS. He also tendered a letter from TeliaSonera dated 7 May 2012 addressing the point outlined in para 17 above and confirming that "we are prepared to submit to the jurisdiction of these proceedings for the limited purpose of undertaking that in the event that [Alfa] is ordered by the Privy Council in these proceedings to seek to procure any change in the individuals appointed as directors on the [TIHAS] board, TeliaSonera will not take any steps (or fail to take any steps) via its representatives on the [THAS] holding board that will prevent the changes that [Alfa] is ordered by the Privy Council to make from being effected." Mr Smith confirmed that he was authorised by TeliaSonera to give an undertaking in these terms.

20. Mr Smith was further prepared on behalf of Alfa to undertake that no transaction or contract would be proposed between CFI, CTH, THAS or TIHAS and Alfa or any affiliate of or person having a substantial financial interest in Alfa or any affiliate (terms reflecting clause 4.2 of the reserved matters set out in Schedule 1 to the shareholder agreement). But he was not prepared to give any undertaking mirroring clause 4.1 of the reserved matters, relating to the appointment of directors or representatives at any general meeting of CFI, CTH, THAS or TIHAS, or to any decision with respect to decisions or actions to be taken by the boards or at shareholders' meetings of these companies. The only restriction offered in that regard was in the terms of undertaking (d) – covering disposals of or dealings with assets or companies outside the ordinary course of business.

21. With regard to the day to day management of TIHAS, there was disagreement in the evidence as to whether the present disputes create any real difficulty or impasse. On the material before it, the Board is not persuaded that there is any impasse, or indeed any real difficulty. The long-established current management is continuing. There is evidence (from Mr Osman Berkman) of substantial numbers of recent board resolutions, including resolutions agreeing two successive major bids and other significant matters, which throw doubt on a suggestion (by Mr Mustafa Kiral) that "reaching agreement on any decisions at the [TIHAS] level is proving very difficult, if not impossible" and that there is a damaging "impasse in the company's management". Mr Kiral is not a member of the board of either CTH or TIHAS, and Mr Kuhyakov, who is an Alfa-appointed member of the board of both, is on record as saying at a CTH board meeting on 5 April 2012 that, apart from a disagreement about a Ukrainian subsidiary Astelit, "the board [of TIHAS] is functioning on every other matter".

22. Were TIHAS's existing management to be removed or put entirely at the disposal of Alfa and TeliaSonera now, there would be a risk of two successive management changes, if CFI's and CTH's appeals succeeded later this year. It is difficult to be sure that the undertakings offered would prove watertight or really effective to secure the position in a sense which would enable the status quo to be fully restored were the appeal to succeed. They would clearly be reviewed with a keen eye by lawyers acting for Alfa in the intervening period, and the continuing need to expand and add to the undertakings which has been demonstrated in the period since the matter was before the Court of Appeal and before the Board does not encourage optimism that all possibilities have indeed been covered.

23. Still more importantly, there is very considerable room for argument and differences about what may or may not constitute disposals of or dealings with assets or companies in the "ordinary course of business" (proposed undertaking (d)). A disposal or dealing in the ordinary course of business may well involve a

business strategy or decision to which CFI and CTH would never have agreed and which may involve quite fundamental and irreversible change.

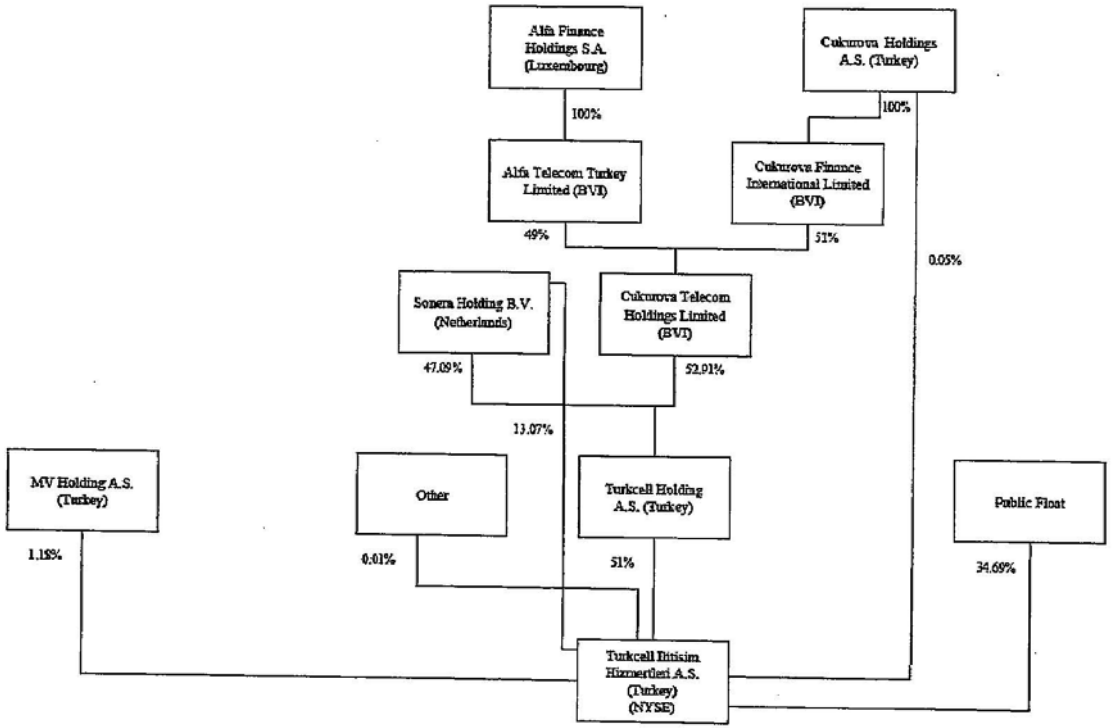
24. Finally, Mr Smith relied upon evidence submitted very late in the form of Mr Mustafa Kiral's witness statement dated 3 May 2012, asserting that Alfa's current inability to control TIHAS meant that a real risk exists that TIHAS may fail to comply with the amended corporate governance rules, first announced by presidential decree on 11 October 2011, as amended by Turkish Capital Markets Board ("CMB") communiqués dated 20 December 2011 and 11 February 2012. The proposed rules as amended will require at least one third of board members to be independent, and a majority of the independent directors to vote in favour of any transactions of a substantial value (failing which such transactions should be submitted to a shareholders' meeting). There appears to be general agreement that TIHAS's board should be expanded to nine, with Alfa, TeliaSonera and Cukurova interests each having (subject to the resolution of the present dispute between Alfa and Cukorova interests) two directors, and three independent directors. But disagreement exists as a result of Cukurova's proposal, made it appears as early as 20 March 2012, that any resolution of the TIHAS board should involve the affirmative vote of at least six directors when only seven directors were present, or seven directors if more than seven were present. Mr Kiral suggests that the Cukurova proposal is designed to prejudice Alfa (and presumably) TeliaSonera's ability to control TIHAS in the event that CFT and CRH lose their appeals on the merits before the Board. According to Mr Berkman's evidence in reply dated 8 May 2012, there has, however, been no formal counter-proposal by Alfa interests since 20 March 2012, despite a number of CTH board meetings on the subject, the Cukurova proposal is designed broadly to transpose the existing requirements for a quorum and for voting into the new regime requiring independent directors and giving them a significant say, and the underlying issue is Alfa's and TeliaSonera's joint wish to ensure that the independent directors have the least possible impact on the board contrary to Alfa's previous position and the aim of the CMB requirements.

25. The Board is not in a position to resolve these differences, but again it is not satisfied that it can accept Mr Kiral's statement (para 8) that Cukurova is "blocking" compliance with the new CMB rules. Any dispute about the form amended articles should take is one which could and quite probably would have arisen, had there never been any appropriation by Alfa of the charged shares. Clearly it would not exist if Alfa and TeliaSonera had by themselves full control over CTH, THAS and TIHAS. But the present appeals may lead to the conclusion that they should not have such control. The general purpose of the Court of Appeal's order was to preserve the status quo in case the appeals do succeed. If the appeals fail, then the strong likelihood is that Alfa and TeliaSonera will be able to re-amend the articles to restore any position they wish. In the meantime, the parties will have to reach such agreement as they can. It seems to the Board extremely

unlikely that they will cut off their noses by refusing to agree any amendments at all which would bring TIHAS's articles into compliance with the CMB requirements, or that they will allow a situation to arise in which CMB would resort to legal proceedings or the appointment of a trustee to implement such requirements.

26. In the circumstances, the Board is not satisfied that the position pending appeal can or should be held on the basis of undertakings as proposed by Alfa. The Board will humbly advise Her Majesty that Alfa's application pursuant to the liberty contained in paragraph 3 of the Order confirmed on 14 March 2012 should be dismissed and that the said Order be continued pending the hearing of the appeal or further order.

TURKCELL STRUCTURE CHART AS AT 27 APRIL 2007[1]



1 i.e. does not reflect changes to beneficial ownership as a result of ATT's 27 April 2007 appropriation of shares in CFI and CTH from Cukurova