[2013] UKPC 20
Privy Council Appeal No 0023 of 2012; No 0024 of 2012

JUDGMENT

(1) Cukurova Finance International Limited (2) Cukurova Holdings A.S. (Appellants) *v* Alfa Telecom Turkey Limited (Respondent)

From the Court of Appeal of the British Virgin Islands

before

Lord Neuberger
Lord Mance
Lord Kerr
Lord Clarke
Lord Sumption

JUDGMENT DELIVERED BY LORD MANCE ON

9 JULY 2013

Heard on 4 March 2013

Appellants	*Respondent*
Kenneth MacLean QC	Iain Milligan QC
Arabella di Iorio	Blair Leahy
James Nadin	
David Caplan	
(Instructed by White & Case LLP)	(Instructed by Hogan Lovells International LLP)

LORD MANCE (WITH WHOM LORD KERR AND LORD CLARKE AGREE)

Introduction

1. This is a sequel to the Board's judgments delivered 5 May 2009, [2009] UKPC 19, and 30th January 2013, [2013] UKPC 2, which show the history and background. The Board held in the latter judgment (paragraphs 112-115) that relief against forfeiture should be available to Cukurova Holding AS ("CH") and Cukurova Finance International Limited ("CFI") on appropriate conditions. The Board invited further submissions as to the basis and terms upon which relief should be granted, and it identified in the annex to its judgment certain potentially relevant questions. The Board duly received detailed written submissions and heard oral argument on 4th March 2013.

2. The relevant facts can in the circumstances be briefly summarised. By a Facility Agreement dated 28th September 2005, Alfa Telecom Turkey Limited ("ATT") agreed to lend CFI US$1.352 billion, secured on CFI's 51% shareholding in Cukurova Telecom Holdings Limited ("CTH"), and on CH's 100% shareholding in CFI. These shareholdings gave control of Turkey's largest mobile telephone company, Turkcell. The borrowing was to be repaid in four equal annual instalments, the first due, in the event, on 24th November 2008; interest was payable at an annual rate of 8% over LIBOR, but clause 7.4 provided for default interest at a rate of 11.5% over LIBOR in relation to any overdue payment. By equitable mortgages also executed on 28th September 2005 and governed by English law, the shareholdings were duly charged to ATT as security for repayment.

3. The charges expressly permitted appropriation of the charged shares in accordance with the Financial Collateral Arrangements (No 2) Regulations 2003 in or towards satisfaction of liabilities arising under the Facility Agreement. An event of default occurred under the Facility Agreement, entitling ATT to declare the whole outstanding loan immediately repayable. On 16 April 2007 ATT did this, and on 27 April 2007, in default of repayment of the accelerated loan, it appropriated the charged shares to itself under the 2003 Regulations.

4. The Board in determining that it was appropriate to grant relief against the appropriation identified as relevant features the likelihood that the basis of valuation on appropriation agreed under the charges did not take into account the premium over the Istanbul Stock Exchange quoted price attributable to the fact that the charged

shares gave control of Turkcell (paragraph 125.a of its judgment of 30th January 2013). This was so, although:

> "125.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."

The Board further took into account that:

> "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'.
>
> d. …. ATT was primarily concerned with the shares not as security, but for the control over Turkcell that they would supply.
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> f. …. 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.
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> 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 *["The Namrun 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."

The maintenance of the Namrun account was a costly exercise. The interest earned on the deposit was US$77,339,523.82, but the cost of maintaining the deposit was US$349,360,001.37 (consisting of $47,345,425.37 in initial fees and expenses, $277,196,315 in interest and $24,818,261 in additional fees).

The appropriation

5. The appropriation of the shares on 27th April 2007 satisfied in law the outstanding debt then due. Article 4 of Directive 2002/47/EC (which the 2003 Regulations implemented in English law, with some gold-plating) contemplates the realisation of collateral consisting of financial instruments falling within the Directive "by sale and appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations". Paragraph 17 of the 2003 Regulations recognises a power for the collateral-taker (here ATT) to appropriate the collateral in accordance with the terms of the relevant secured loan "without any order for foreclosure from the courts"; paragraph 18 requires the collateral to be valued on such an appropriation "in accordance with the terms of the arrangement and in any event in a commercially reasonable manner" and for the collateral-taker to account for any excess of the value over the relevant debt. As permitted by these provisions, clause 9.3 of the charges expressly provides that appropriation takes effect "in or towards satisfaction of the Liabilities in accordance with the Regulations".

6. Appropriation under the Directive and Regulations thus operates differently to forfeiture of a common law mortgage. As Viscount Haldane LC explained in G & C *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 35 the operation of a forfeiture left the debt unpaid and running at law, and relief was afforded in equity "against what was virtually a penalty by compelling the creditor to use his legal title as a mere security". In contrast, in the present case the debt was discharged, but there is still a penal element consisting in the loss of title to the shares itself as well as the probability that the agreed basis of valuation on appropriation excludes a very substantial element of value attributable to control of Turkcell. The Board also noted in its judgment of 5th May 2009, paragraphs 13 and 27, that the power described in these provisions as appropriation "differs from the traditional (but now obsolescent) English remedy of foreclosure" and is "much closer to sale than it is to foreclosure". Nevertheless, the nearest analogy to the present situation may be the principle that, even after an order for foreclosure absolute and a sale, a mortgage remains in equity always security, with "the mortgagor still retain[ing] a claim to be treated as mortgagor, subject to the discretion of the Court" which "must depend upon the circumstances of each case": per Jessel MR at page 172 in *Campbell v Holyland* (1877) 7 Ch D 166, a case with some similar features to the present, in so far as both parties were "very desirous to possess for special reasons" and the purchaser of the mortgaged asset had contracted to purchase it from the mortgagee even before the foreclosure.

7. The parties to the present appeal differ on a point of principle. CH and CFI submit that the basis and conditions of relief are ultimately for the Board to determine in the exercise of its discretion. They accept that it would only be proper (or equitable) to exercise this discretion by requiring payment of the amount of the debt, together with appropriate interest and costs. But they submit that, in the unusual circumstances

of this case, what is appropriate is not necessarily determined by what the Facility Agreement would have provided had the loan continued unpaid under it until today and that account should be taken of two linked circumstances: first, the loan was due and about to be repaid at the time of the appropriation on 27th April 2007, which was in fact aimed at forestalling this, and, second, repayment was in fact tendered, and rejected by ATT, on 25th May 2007. ATT's rejection was, as the minority judgments accept, unjustifiable in the sense that it was always likely that CH and CFI would be held entitled to redeem and ATT by rejecting the tender took that risk accordingly. The Board accepts and will in what follows therefore proceed on the basis that the tender was for the full amount, including default interest, which would (but for the appropriation) have been outstanding on 25th May 2007, postponing until later in this judgment its reasons for rejecting a contrary contention, raised for the first time by ATT as part of its case for and at the hearing on 4th March 2013.

8. ATT submits, in contrast, that the Board's discretion is limited to *granting* CH and CFI an extension of the time by which the terms of the Facility Agreement must be performed in full and to *imposing on* CH and CFI additional conditions. In all other respects, the debt must be treated as remaining outstanding, or as retrospectively revived and outstanding, under the Facility Agreement as if nothing to the contrary had or would have happened up to the present date. At the previous hearing, ATT argued on this basis for interest at the basic contractual rate (LIBOR plus 8% p.a., with annual contractual rests) commencing on 17th April 2007 if relief against the appropriation were to be granted: see paragraphs 202 to 204 and 251 of its written Case. At the renewed hearing on 4th March 2013, ATT pursued its submissions to their apparently logical end (since no suggestion was made that the switch from 8% to 11.5% p.a. itself amounted to a penalty), viz that interest must be treated as accruing to date at the default contractual rate (LIBOR plus 11.5% p.a.) commencing on 17th April 2007, with rests of a duration which under clause 7.3(A) of the Facility Agreement was to be selected "reasonably" by ATT.

9. It follows that there are two main issues. The first is whether the grant of relief in respect of the appropriation made on 27 April 2007 is tied ineluctably to a conclusion or condition according to which the loan is to be treated as having remained unpaid from that date until today or whether a discretion exists to adopt a different approach if required by exceptional circumstances. The second concerns the effect of the circumstances of and leading up to the tender set out in paragraphs 4 and 7 above.

10. For reasons which will appear, the Board accepts that its discretion is not quite as confined as ATT submits. As to the second issue, the Board considers that the circumstances set out in paragraphs 4 and 7 are capable of affecting the conditions which should in equity be required for relief against the appropriation. It would in particular be inequitable or unconscionable to treat the loan as if it remained outstanding under the Facility Agreement from then until today, without having any

regard to actual intervening events. Interest should not run during the three year period when the monies tendered were kept in the Namrun account, and CH and CFI should not be treated as having been in default thereafter, but should pay interest at the standard contractual rate of LIBOR plus 8% p.a. with annual rests thereafter. This result is also reached by the minority of the Board, though by a different route.

Relief against forfeiture - analysis

11. On ATT's case, the power to relieve against forfeiture depends necessarily upon treating the contractual obligation to repay the debt with default interest *either* as running continuously despite the satisfaction of the debt (here by the appropriation which ATT effected on 27th April 2007) *or* as reviving retrospectively at some point during the process of affording relief. The Board does not accept either analysis.

12. As to the former analysis, the debt was discharged in law by the appropriation. It did not continue to run in a parallel equitable world despite its discharge. ATT relies upon the fact that the Facility Agreement (or, more accurately, the further performance of obligations under it) was not terminated by agreement, repudiation or otherwise. But that cannot alter the fact that the past obligation to pay the debt under it was discharged by the appropriation: see paragraph 5 above.

13. As to the latter analysis, the Board accepts that in the ordinary course relief in equity will only be granted on the basis of conditions requiring performance, albeit late, of the contract in accordance with its terms as to principal, interest and costs: see e.g. per Lord Parker of Waddington in *Kreglinger*, at pp 49-50 and per Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, at pp 722C and 723H. But the Board does not accept that this is an entirely inflexible rule which must be applied even where there are strong countervailing considerations of equity or unconscionability associated with events subsequent to a forfeiture; and, in particular, it does not accept that relief after appropriation necessarily involves rewriting a contractual history which never in fact occurred, ignoring both what would have occurred and did occur in the meantime.

14. On ATT's case, no moment in fact exists at which it can be said that the debt necessarily revived. Revival cannot yet have occurred. That is common ground. ATT argues that "If the debt was discharged by forfeiture, the grant of relief sets aside the forfeiture and the debt inevitably revives, albeit only momentarily when the condition as to payment is fulfilled". But this acknowledges that the setting by the Board of any conditions as to payment precedes and is separate from any contractual obligation. However, the Board agrees that this does not resolve the issue on what principle equity operates or should operate when setting such conditions, and whether in setting conditions it must necessarily assume an unremitting default from the appropriation to

the time when relief takes effect under a court order (see in particular Lord Sumption's judgment, para 186).

15. Lord Parker in *Kreglinger* noted (at page 56) that a stipulation contained in a mortgage securing a loan might be open to objection because it was unconscionable, or a clog on the equity of redemption or a condition repugnant to the contractual as well as the equitable right to redeem. In the present case, the question is not whether any of the original stipulations falls within any of these three categories. There is no suggestion that they do. The question is whether equity has any power to identify particular circumstances making it, exceptionally, inequitable or unconscionable to insist on redemption taking place on a basis which treats the loan as if it had remained continuously outstanding to date. In the Board's view, equity has such a power, albeit only exercisable in exceptional circumstances such as the present.

16. First, there is a distinction in practice between a situation where an extension of time to redeem is being sought while a loan remains outstanding and a situation like the present where the loan has been discharged at law by appropriation. In the former situation, the role of equity is likely to be circumscribed by the consideration that obligations will have continued to fall due for performance and actually remained unperformed. It will be correspondingly difficult to identify any reason why they should not, if unperformed, be performed as a condition of relief. In the latter situation, the discharge of the loan will mean necessarily that no obligations will have fallen due for performance in the meantime and that there may have been other developments (including, though not relevant in this case, relevant benefits obtained by the lender from the appropriation, which equity will require to be brought into account). In the latter situation, therefore, equity's role must extend to considering such matters, and it would, in the Board's view, be remarkable if the principles of equity were so inflexible that it was unable to take any account of circumstances making it inequitable or unconscionable to insist on treating the loan as if it had run continuously until relief was actually granted under a court order.

17. The former situation was the context for a statement of general principle, on which ATT relies, made by Lewison J in *Law Debenture Trust Corporation plc v Concord Trust* [2007] EWHC 1380 (Ch), paragraph 53:

> "The essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, but late. Apart from time stipulations, I do not consider that the court, in the exercise of its equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor. …. To do that would in effect allow the mortgagor to benefit from his own breach of contract. So the question I must answer is: what liabilities are secured by the security?"

As the passage itself indicates, the mortgagee was maintaining that the securities which it held, but which the mortgagor was trying to recover, continued to be required to cover outstanding liabilities. The mortgagor could be given more time in which those liabilities should be met, but could not be relieved of them. The Board accepts that as the standard rule, but the issue in this case is whether exceptional circumstances may make it inequitable or unconscionable to apply the general rule in the latter situation identified in the previous paragraph.

18. Second, the Board notes that, in origin, equity's intervention in aid of mortgagors after forfeiture appears to have been based on general considerations of equitable conscience, rather than the (later) rationalisation that time was not to be treated as of the essence. In *The Equity of Redemption* (CUP 1931), RW Turner examined the historical origins of equity's willingness to interfere in cases of forfeiture in the early 17th century. Quoting Sir George Cary, writing in the first decade of that century, he concluded (p25) that the courts of equity developed in relation to mortgages a jurisdiction to grant relief (at first confined to limited cases, later general) paralleling that exercised in relation to penalties and compelling "the obligee to take his principal, with some reasonable consideration of his damages". Later, at p41, Turner concluded that the basis of equity's intervention after a forfeiture was "a sort of equitable conscience" based on the fact that "the mortgagee got all he had really bargained for, or ought in fairness to expect" and that an analysis, according to which equity intervened on the theory that time was not of the essence and could be extended, only arose later and was anachronistic (p.41):

> "It is often said that the establishment of the equity of redemption was due to the fact that a mortgage was a matter of contract; and that in agreements for the payment of money time was not regarded in equity as of the essence of the contract, and so the Chancellor was willing to extend the period of payment. This is an anachronism. It is putting into the mind of the Chancellor theories which were not current for at least another half century, theories which were not the cause of the interference of the Court of Chancery in early cases of forfeiture, but which were rather the result of an attempt by a later generation to justify that interference.
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> The fact that, even though the money was not paid at the time stipulated, the mortgagee got all that he had really expected, or ought in fairness to expect, was perhaps in the mind of the Chancellors when they first granted relief to the mortgagor in special circumstances, or later when they dispensed a more general relief; for they were administering a sort of equitable conscience, and some such considerations as these, connected with the fairness of their decisions, must have passed through their minds before they dared to interfere with the course of the common law."

R W Turner's analysis is discussed in Professor Fiona Burns's chapter on *Clogs on the Equity of Redemption* in *Fault Lines in Equity* (Hart Pub, 2011), where at p.48 she concludes that: "More broadly speaking however, the Court of Chancery was concerned that the mortgagee did not unduly take advantage of the mortgagor", citing in a footnote Viscount Haldane's speech at p35 in *Kreglinger*.

19. Third, there are, as Lord Neuberger notes in para 88, close similarities between the equitable relief available in respect of mortgages and leases. Forfeiture of a lease proceeds on the ground that the right to forfeit is security for the rent. Lord Wilberforce, giving the leading speech in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722, equated equity's role in these two contexts, stating that

> "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 copy holds, or where the forfeiture was in the nature of a penalty".

Likewise, Nicholls LJ in *Jobson v Johnson* [1989] 1 WLR 1026 treated forfeiture of a lease on non-payment of rent and forfeiture of a mortgage together and both as stemming from the same underlying principle as that governing penalty clauses. For centuries, he said, "equity has given relief against such provisions by not permitting the innocent party to recover... more than his loss" (p1038E and G).

20. The leading text-book, *Meagher Gummow and Lehane's Equity – Doctrines and Remedies* (4th ed), (2002), treats both subjects in parallel in chapter 18 and states in para 18-025 under the head "Forfeiture of Property":

> "This jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and other instances were found in copy hold tenure. There was also a well-developed jurisdiction in cases of landlord and tenant of relief against forfeiture for non-payment of rent; for the right of re-entry was deemed to be intended as mere security for a payment of the rent. The jurisdiction could be exercised even after a peaceable re-entry by the lessor without the assistance of a common law court. ….."

Older textbook authority also draws no distinction between the principles governing relief against penalties agreed to secure repayment of a given sum and interest, and

relief against forfeiture of a lease: see eg H A Smith's Principles of Equity, (1882) pp206-207.

21. It is therefore, in the Board's view, legitimate to test the present situation by a comparison with the position governing leases at common law. Two points can be made. When a lease was forfeit, it was at common law at an end. So too, in the present case, the debt was discharged (in contrast with the common law position after forfeiture of security for a mortgage debt, where the debt remained alive: see para 6 above). After forfeiture of a lease, equity could therefore only operate by granting relief on conditions which required the grant of a new lease: see the Board's judgment of 20th January 2013, paragraph 119. Hence the need for the English legislator to intervene in this limited area as provided by the 1852 and 1860 Acts (and in fact by their predecessor Landlord and Tenant Act 1730: see, in addition to the authorities referred to in paragraph 119, *Dendy v Evans* [1910] 1 KB 263, 267, per Cozens-Hardy MR). There has been no such statutory intervention in the British Virgin Islands, where all that exists is the common law. The analogy of forfeiture of a lease therefore supports a conclusion that, when equity grants relief after an appropriation has discharged a debt, it does so by setting conditions, which will of course take close account of the terms of the original loan, but may by the same token take account of the fact that the appropriation only occurred to forestall a repayment of that loan, which was tendered and rejected shortly after it occurred.

22. The other point arises from authorities cited in paras 121 to 124 of the Board's previous judgment dated 30th January 2013. It concerns the breadth of the discretion contained in section 14(2) of the Conveyancing and Law of Property Act 1881 and its successor section 146(2) of the Law of Property Act 1925, set out in para 120 of the Board's previous judgment. It would be strange if Parliament in legislating in relation to forfeiture of the security for payment of rent constituted by a lease should have operated on a conceptual basis which has no possible parallel in equity. Indeed, the Board concluded in its judgment dated 30th January 2013, that, apart from certain additional provisions protective of tenants in the statutory scheme:

> "the breadth and flexibility of the equitable discretion to grant 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."

23. In *Hyman v Rose* [1911] 2 KB 234 and [1912] AC 623, the courts were concerned with forfeiture of a lease, i.e. a situation in which the lessee sought reinstatement and continuation of a lease. In the present case, CH and CFI are seeking no such thing. Even so, the position is instructive. At pp.241-242 in [1911] 2 KB, Cozens-Hardy MR thought it "expedient to attempt to lay down some general

principles" to govern what he himself, at the same time, referred to as "the wide discretion … given either to the Court to grant or refuse relief [against forfeiture]" and the power to impose "such terms …. as the Court in the circumstances thinks fit" under the Conveyancing Act 1881, section 14. First, he said, "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". Second, the applicant 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. The other member of the majority, Fletcher Moulton LJ, spoke to similar effect at p.246, saying "The Court cannot vary the contract between the parties" and "cannot condone future breaches or free the contracting party from the obligations imposed upon him by his covenant".

24. These statements by the Court of Appeal in *Hyman v Rose* would, if they had been correct, be broadly consistent with ATT's submission that any discretion is strictly limited to reflecting the contractual obligations, at least in so far as the tenant wishes the contract's continuation. That such an approach might be taken in relation to a lease which a tenant wishes to continue under the English statutory power is at least comprehensible. But, even in this context, the House of Lords was emphatic in rejecting any such limitation on the discretion. Allowing the appeal, Earl Loreburn LC, with whom all other members of the House agreed, said (as quoted in paragraph 121 of the Board's previous judgment) that, although, no doubt, the rules enunciated by the Master of the Rolls were "useful maxims in general", and "in general they reflect the point of view from which judges would regard an application for relief"

> "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."

25. Nor was this a mere dictum on the part of the House. On the contrary, Earl Loreburn LC noted at p632 that the tenants were "asking for an indulgence in regard to other admitted breaches of covenant" (evidently relating to alterations to the chapel to convert it into a cinema which the tenants were not proposing to rectify, at least until the lease expired in some 29 years). The House's grant of relief gave them this "indulgence". Earl Loreburn's principle rests therefore on a solid foundation. It is confirmed not only by Woodfall, but, again at the highest level, by the citation and application of Earl Loreburn's words in *Hyman v Rose* in *Associated British Ports v C H Bailey plc* [1990] 2 AC 703: see paragraph 123 of the Board's previous judgment.

26. Fourthly, "the object of the court when granting relief is to put the lessor (as well as the lessee) back in the position in which he would have been if there had been no forfeiture; ….the court must take into account the fact (if it be so) that the lease

contains a provision for rent review at a date between the date of forfeiture and the date of relief": *Bland v Ingrams Estates Ltd (No 2)* [2002] Ch 177, paras 14-15, per Chadwick LJ. The minority accepts that as the correct approach in principle, but only in so far as it enures to the benefit of the party forfeiting: see per Lord Neuberger, paragraph 153 and Lord Sumption, paragraph 185. Normally, what the court will have in mind is matters, such as a rent review, which would have occurred to the benefit of the lessor. But the underlying consideration, restoring both parties to the position in which they would have been, may in the Board's view also be relevant, if considerations of equity or unconscionability associated with events subsequent to a forfeiture so require.

27. In this regard, ATT accepts, indeed asserts, that the logic of its position is that it is entirely irrelevant, in all circumstances, what would have happened but for or did happen after the appropriation. The whole period since appropriation must be viewed, or reconstructed, on a hypothesis of unremitting default. Thus, even if, one day after an appropriation made to forestall a repayment, the defaulting party actually tenders full repayment, together with default interest up to the moment of such tender, and claims relief against the appropriation, that is irrelevant. If the party appropriating refuses the tender (eg on a ground like that which ATT actually advanced in the present case, that relief was excluded under the Financial Collateral Arrangements (No 2) Regulations 2003 S1 3226) and it takes six years of litigation to establish the right to relief, default interest must still run and be paid for this whole period if relief is to be granted. By the same token, in this case, the circumstances that appropriation occurred to forestall the tender and that the tender was made on 25th May 2007 are, on ATT's case, irrelevant. The Board cannot accept that equity must ignore such matters, and is trapped within a conceptual framework which requires it to be assumed that the loan has remained continuously outstanding until the date of court ordered relief, whatever and however exceptional the circumstances of and after the appropriation.

28. ATT supports its case by a submission that default interest at the contractual rate reflects the credit risk that it agreed to bear and bears, so long as a possibility exists that CH and CFI may either change tack and leave the shares with ATT or simply fail to fulfil whatever terms the Board sets for relief. If that is a risk at all, it is one that ATT has at all times been keen to run, and which it could have avoided by embracing CFI's evident willingness to tender all outstanding monies in and after May 2007 or the claim for relief made in July 2008. The risk has never materialised, and has, so far as appears, never been likely to: see also paragraph 125(f) of the Board's previous judgment. Appropriation, from ATT's viewpoint, offered the opportunity to acquire control of Turkcell without paying the usual premium for control. The rates of standard and default interest payable under the Facility Agreement are likely to have reflected Cukurova's financial weakness and urgent need for a short-term facility pending refinancing. Ownership of the charged shares and consequent control of Turkcell, Turkey's largest mobile telephone company, was at all times (and

notwithstanding any governance problems arising from the present dispute) the primary commercial objective of all concerned.

29. Sixthly, as the Board has noted, both the majority and the minority views expressed by the Board on this appeal accept the tender is directly relevant to the running of interest. The minority treats it as a valid tender which, once relief is given and the loan fully revived, eliminates any right to interest during the period when the Namrun account was kept open. The majority of the Board considers it as relevant to the conditions on which, in exceptional circumstances such as the present, relief in equity is appropriate. The end result on either analysis is however the same.

30. Seventhly, it is of some interest to look at equity's response to tenders or offers of repayment which are refused or do not, for other reasons involving the lender's fault, lead to actual repayment. In a number of such cases, the court has held, on equitable rather than legal grounds, that the mortgagor was as a result relieved of any obligation to pay interest.

31. In *Manning v Burges* (1663) 1 Cases in Chancery 29, after a mortgage was forfeited, the mortgagor had stated his willingness to come and redeem, to which the mortgagee had responded that "he would hold the mortgaged Premises as long as he could; and then when he could hold them no longer, let the Devil take them if he could". Later the mortgagor had tried to tender the money but had not found the mortgagee at home. The Master of the Rolls "decreed a Redemption, with the Defendant to have no Interest from the Time of the Tender, because of his Wilfulness".

32. *Manning v Burges* was cited by Parker J in *Webb v Crosse* [1912] 1 Ch 323, a claim for a mortgage account, as supporting the proposition that a tender for the purpose of preventing interest running "need not be such a tender as would afford a defence to an action at law" (p328). Parker J also said (p330):

> "No doubt the Court can and will, in settling the terms on which a mortgagor may be allowed to redeem, take into consideration any misconduct on the part of the mortgagee, and sometimes because of such misconduct relieve the mortgagor of interest and costs which but for the misconduct he would have been bound to pay. *Rourke v Robinson* [1911] 1 Ch 480 was pre-eminently a case for the exercise of this power".

Webb v Crosse is cited as authority on this point in the current (32nd) edition of Snell's Equity, paragraph 38-040.

33. In *Rourke v Robinson* (decided 21 January 1911), the mortgagee's solicitor had declined without good reason to execute a reconveyance on 17 August 1909 when the mortgagor attended to redeem. Warrington J held in a redemption action that the technical rules as to tender, and whether or not the mortgagor had complied with them, were irrelevant. Citing a test set by Lord Selborne LC in *Cotterell v Stratton* (1872) LR 8 Ch App 295, 302), he concluded that the mortgagee had been guilty of "such inequitable conduct … as [amounted] to a violation or culpable neglect of his duty under the contract" and was therefore capable of depriving him of the right to interest subsequent to 17 August 1909 and costs in the action. Another less egregious case where fault on the mortgagee's part was held to deprive him of interest is *Midleton v Eliot* (1847) 15 Sim 531, where the court held that redemption would have occurred on 25 March 1842 but for the mortgagee's loss of three of the deeds, and deprived the mortgagee of interest thereafter.

34. In the Privy Council case of *Chalikani Venkataryanim v Zamindar of Tuni* [1922] 50 Ind App 41,45, one ground of appeal was that interest should not run on one instalment, tender of which had been rejected as having been made late. The money had not been put aside. This ground appears, from the parties' written cases in that appeal, to have gone unanswered by the respondent, and the Privy Council gave effect to it without demur. The main issue argued and decided on the appeal was whether the mortgagee had refused to accept payment of further larger instalments, dispensing with the need for a tender. The courts below had decided this on the basis that the mortgagor had not at that time either the money or the control of the money to enable him to make the tender of the large amount due. As the Board reads the Privy Council's decision (and contrary to the impression given by the head-note), the Privy Council rejected that question as irrelevant; it considered that "the real question to be determined here is not whether the money was within the power of the appellants, but whether the mortgagee in the letter he sent …. definitely and unequivocally refused to accept the money were it tendered". The appeal failed on this point, because the Privy Council did not so read the letter.

35. These authorities show that equity will consider whether the mortgagee by his conduct or fault may have disentitled himself from insisting on the usual conditions on which equity insists for redemption. On the other side, ATT relies upon *Gyles v Hall* (1762) 2 P Wms 378, *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273, *Kinnaird v Trollope* (1889) 42 Ch D 610 and *Edmondson v Copland* [1911] 2 Ch 301. The Board is not persuaded that they should lead to a different conclusion.

36. In *Gyles v Hall*, the mortgagor gave notice, and attended, to repay in Lincoln's Inn Hall, but it appears (by inference from the very brief report) that the mortgagee did not attend and lived in Oxford. According to the report, the Lord Chancellor held that "it ought to appear, that the mortgagor from that time always kept the money ready; whereas the contrary being proved, that the mortgagor was not ready to pay, therefore the interest must run on it". *Manning v Burges* was not cited.

37. In *Bank of New South Wales v O'Connor*, O'Connor had borrowed money from the bank and claimed damages to his business nominally on the basis that the bank had improperly retained his deeds, but in substance on the basis that it had wrongly rejected his tender of the outstanding monies. The Privy Council's essential conclusion was that there was "no authority for saying that refusal to accept a proper tender is a breach of contract" (page 284). It cited *Gyles v Hall* in passing for the proposition that a proper tender stops the running of interest, if the mortgagor keeps the money ready to pay over to the mortgagee (which O'Connor had not done). No other relevant authority in this area appears as having been cited in argument.

38. In *Kinnaird v Trollope* (in which *Manning* was again not cited) Stirling J's reasoning tends actually to support Parker J's statement in *Webb v Crosse* [1911] 1 Ch 323 that a tender need not to prevent interest running "be such a tender as would afford a defence to an action at law". However, Stirling J ultimately found it unnecessary to decide this point, and contented himself with deciding the case on the basis that, "where no actual offer of money is made, and advantage is not taken of the opportunity …. to make payment into Court, I think the Court ought to be satisfied … on that continued readiness to pay, which both at law and in equity are essential to the success of a plea of tender" (p618).

39. So far as concerned costs, however, Stirling J recognised a mortgagee's general entitlement to costs on redemption, but, citing Lord Selborne's test in *Cotterell v Stratton*, noted authority to the effect that "a mortgagee who denies the mortgagor's right to redeem may be deprived of costs, or may even be ordered to pay them", and held that "justice will be done if I disallow the Plaintiffs of such of the costs as are fairly attributable to their having put forward a case which has failed".

40. Finally, in *Edmondson v Copland* (decided 9 May 1911) the mortgagee had unjustifiably insisted on execution in a way which prevented repayment on the agreed date (9 March 1910), but the money was not set aside and was presumably used in the mortgagor's business. The mortgagee's counsel cited *Gyles v Hall*, *O'Connor's* case and *Kinnaird v Trollope*, while the mortgagor's counsel does not appear to have cited any of the other relevant authorities (including *Rourke v Robinson* decided on 21 January 1911). Joyce J considered at some length the position where a tender was made and wrongly refused and concluded:

> "Upon the whole, and not without some doubt, I think that I cannot relieve the mortgagor from payment of interest in this case down to the date of the actual payment of the principal, he having for that time had the mortgagee's money and never having actually set aside the amount for the purpose of payment or having kept the money ready at the bank".

While this passage may be read as an (on any view, hesitant) statement of principle, it can also be read as having more of the flavour of a conclusion reached as an exercise of discretion than an absolute rule of law. It is also notable that Joyce J went on, as a matter of discretion, to make an order for costs the opposite of the usual, since he ordered the mortgagee to pay the mortgagor's costs throughout.

41. Eighthly, it is relevant to note the modern position regarding costs due under the terms of a mortgage as summarised by Scott LJ in *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, 194A-B, in particular in points (ii) and (iii):

> "(i) An order for the payment of costs of proceedings by one party to another is always a discretionary order: section 51 of the [Senior Courts] Act 1981.
>
> (ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.
>
> (iii) The power of the court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from section 51, but from the power of courts of equity to fix the terms on which redemption will be allowed.
>
> (iv) A decision by a court to refuse costs, in whole or in part, to a mortgage litigant may be a decision in the exercise of section 51 discretion or a decision in the exercise of the power to fix the terms on which redemption will be allowed or a decision as to the extent of a mortgagees' contractual right to add his costs to the security or a combination of two or more of these things. ….
>
> (v) A mortgagee is not … to be deprived of a contractual or equitable right to add costs to the security merely by reason of an order for payment of costs made without reference to the mortgagees' contractual or equitable rights and without any adjudication as to whether or not the mortgagee should be deprived of those costs."

42. The conclusion which the Board would reach in relation to its seventh and eighth points above is that equity can and should respond by a special order as to interest or costs in exceptional situations where the mortgagee has by words or conduct rejected, made impossible or delayed repayment of the mortgage debt, and that such a situation may exist where there is a tender or offer of repayment,

particularly one backed by monies actually paid into court or an account. With reference to the Privy Council decision in *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 (para 37 above), the Board would also question whether in modern conditions the wrongful rejection by a lender of properly offered repayment during the currency of a loan should not be viewed as constituting a positive breach of a loan agreement such as the present Facility Agreement which expressly provides for repayment and, in an event of default, acceleration. It is however unnecessary to go further into this last point.

43. Ninthly, the Board is very conscious that the importance of certainty is not confined to common law contexts, but extends to equitable contexts: see Lord Neuberger's observations in para 98, even if the Board is not entirely convinced by the example of all the cases cited. In *Sheddon v Goodrich* (1803) 8 Ves 481, 497 Lord Eldon felt himself bound by a precedent which led him to conclude that a will meant something which he was confident was not intended. In *Walton v Tryon* (1753) Dick 244, 245, Lord Hardwicke LC said that "certainty is the mother of repose" when rejecting as a "dangerous innovation" a suggestion that the use for which wood was cut might be relevant to determine whether it was titheable in favour of the local rector. Oliver Wendell Holmes could have had Lord Hardwicke's aphorism in mind when he wrote:

> "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion and repose is not the destiny of man". (The Path of the Law, 10 Harvard Law Review 457 (1897))

See further the citation in *BCL Old Co Ltd v BASF SE (formerly BASF AG) (No2)* [2012] UKSC 45, [2012] 1WLR 2922, para 24. Reference might also be made - in the context of Lord Simon of Glaisdale's view in *Shiloh Spinners*, pp 726-727, that the courts have "an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties" – to Meagher Gummow and Lehane's approbatory comment (para 18-020) that what was really involved was "a return to the more remote past when equity jurisprudence had dynamism lost with the attainment of the rigidity for which Lord Eldon was so praised by nineteenth century positivists". Nor is the tension between certainty and justice confined to issues about the scope of equity: see e.g. *Golden Strait Corpn v Nippon Yusen Kubishka Kaisha* [2007] UKHL 12 [2007] 2 AC 353 for a common law instance.

44. Nevertheless, the Board emphasises that it is in no way suggesting that equity recognises any general or open-ended discretion. The Board's reasoning and decision in this case are based on and confined to what it sees as an exceptional situation, in which it would, in the Board's view, be both inequitable and unconscionable to ignore

the background and circumstances of the tender made on 27th May 2007 and to treat the grant of relief as conditional upon the loan reviving and remaining outstanding for six years as if nothing would have or had ever happened in the meanwhile. The unusual facts of this case are in this respect probably unlikely to be repeated.

45. Summarising these, first, the loan was under its terms repayable according to a schedule which would have led to its repayment in full long ago. Second, the obligation to repay it in full was further accelerated to become immediate on 16th April 2007. Third, ATT appropriated the shares on 27th April 2007 for the very reason that they knew that the loan was about to be repaid and wanted to avoid this. Fourth and critically, repayment of the loan was in fact tendered on 25th May 2007. Fifth, the tender was for three years backed by the Namrun deposit account. Sixth, in the Board's view, to insist, in the face of these facts, on an axiomatic and unchallengeable assumption that CH and CFI would, instead of repaying the loan, have continued remorselessly in breach of every repayment obligation, made no payment at all and incurred default interest for six years would be unjustified and unconscionable. It would also conflict with the general aim of equity in giving relief, as described by Nicholls LJ in *Jobson v Johnson*, where he said that it was to ensure that the innocent party does not "recover more than his loss".

46. It is clear what the position would have been both if there had been no appropriation and if, after the appropriation, ATT had accepted the tender made on 25th May 2007. There would have been no continuing default. The very reason why ATT accelerated the loan without notice was to avoid the impending refinancing and repayment which it knew that CH and CFI were aiming to achieve, and which resulted in the tender made on 25th May 2007. There is therefore in the Board's view considerable attraction in a result which has the effect of broadly restoring ATT to the position in which it would have been but for its refusal to accept the tender, including default interest, made on 25th May 2007, as opposed to a result based on the unreal hypothesis of nothing happening, save continuous defaults, for the past six years.

47. The making of the tender, backed by the Namrun account, is thus in the Board's view of critical relevance in relation to the conditions on which relief should be afforded. It means that CH and CFI were at all times both willing and able to redeem the shares forfeited by ATT's appropriation. They would have done so but for the appropriation which ATT effected in order to forestall redemption, and they would have done so, had ATT accepted the tender made on 25th May 2007. The tender meant that ATT had the opportunity to realise the proper object of the loan facility, by obtaining payment in full. Since ATT was never in reality interested in anything other than the ownership of the shares and control of Turkcell, ATT rejected that opportunity, leading CH and CFI to incur the very large expense of maintaining the Namrun account for the next three years. While it is true that no formal claim to relief against forfeiture was pleaded until 2008, it is equally clear that this made no difference. CH and CFI were in effect also seeking such relief on 25th May 2007

when they tendered an amount, including default interest up to that date which could only have been due on the basis that ATT's acceleration notice of 16th April 2007 was correct in alleging that there had been an event of default.

48. In these circumstances, ATT should be viewed as having had and rejected the opportunity on 25th May 2007 to receive payment in full. The tender, coupled with the opening and maintenance of the Namrun deposit account for the next three years, should prevent interest running from 25th May 2007 to 25th May 2010. Thereafter, ATT should receive interest, but this should not be on the basis that CH and CFI remained in default. Rather, the essential reason why the loan remained unpaid after 25th May 2007 can be identified as having been ATT's rejection of the full repayment then tendered. As from 25th May 2010, ATT should therefore receive interest at the standard contractual rate of LIBOR plus 8% per annum with annual rests on the amounts outstanding as at 25th May 2007.

Further points regarding the tender made on 25th May 2007

49. However, at the hearing on 4th March 2013, ATT raised further points regarding the adequacy and so therefore the potential effect of the tender made on 25th May 2007. For reasons which follow, the Board does not regard these points as affecting the conclusion expressed in paragraph 48 above.

50. The first point relates to the effect on the running of interest of ATT's notice of acceleration on 16th April 2007. As at 16th April 2007 interest was running at the ordinary contractual rate of LIBOR plus 8% p.a. in respect of a one year interest period which under clause 8.1 had started on 25th November 2006 (the anniversary of completion of the loan). By its acceleration letter dated 16th April 2007 ATT gave notice that

> "pursuant to clause 7.3 of the secured Facility Agreement, interest on the full amount due on the loan (including accrued interest) from the date of this Notice until full repayment is received by us will be charged at the Default interest rate. We hereby demand immediate repayment of such interest."

51. Clauses 7.3 and 7.4 provide in full:

> "7.3 Default interest

(A) If the Borrower fails to pay any amount payable by it under a Finance Document on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment in full (both before and after judgment) at a rate which is 3.5 per cent. higher than the rate which would have been payable if the overdue amount had, during the period of non-payment, constituted the Loan in the currency of the overdue amount for successive Interest Periods, each of a duration selected by the Lender (acting reasonably). Any interest accruing under this clause 7.3 shall be immediately payable by the Borrower on demand by the Lender.

(B) Default interest (if unpaid) arising on an overdue amount will be compounded with the overdue amount at the end of each Interest Period applicable to that overdue amount but will remain immediately due and payable."

7.4 Notification of rates of interest

The Lender shall determine the applicable rate of interest for each Interest Period at or about 11.00 a.m. (London time) on the first day of the relevant interest Period. The Lender shall promptly notify the Borrower of the determination of a rate of interest under this Agreement."

52. ATT maintains that the notice which it gave on 16th April 2007 was sufficient to start a new interest period on 17th April 2007 based on the LIBOR rate on that date (put at 5.33688%) plus 11.5% p.a. CH and CFI maintain that the existing interest period starting on 26th November 2006 must be taken to have continued with the interest rate continuing to be based on the LIBOR rate prevailing on 26th November 2006 (5.2875%), and that all that the notice involved was the acceleration coupled with an increase from 8% p.a. to 11.5% p.a. in the amount to be added to the LIBOR rate on and after 17th April 2007.

53. The Board finds this a not entirely easy point. But the Board is unable to accept ATT's submission that its notice on 16th April 2007 amounted to a determination of a new rate of interest on the first day of any interest period within clause 7.4. Equally, it seems to the Board difficult to regard it as selecting a new interest period commencing on 17th April 2007 for the purposes of either clause 7.3 or clause 7.4. Had these

matters been in mind when the notice of 16th April 2007 was sent, they would no doubt have been expressly covered. The notice therefore amounted in the Board's view to no more than a notification that henceforth interest would be charged firstly on the whole outstanding debt and secondly at the default rate. That is consistent with the interest period continuing to be that starting on 26th November 2006. The Board concludes that that represents the position.

54. The second point is that the tender made on 25th May 2007 was calculated on the basis of 38 days default interest, starting on 17th April 2007 (the day after acceleration of the loan), whereas the actual period should have been 39 days, including 25th May 2007 itself, the date of tender. The Board did not ultimately understand CH and CFI to dispute this shortfall. But it has never previously been identified. Indeed, in submissions at the previous hearing, ATT expressly accepted the tender as having been in an appropriate amount "in the event that ATT's appropriation notice was ineffective or the court grants relief against the forfeiture which appropriation entails" (Case, para 202), and submitted only that the tender was irrelevant because the amount tendered was "never kept dead" (para 207).

55. For the purpose of calculating the amount outstanding as at 25th May 2007, on which any interest ordered should run thereafter, the shortfall of one day must be taken into account. But the Board considers that the shortfall can and should for other purposes be disregarded. First, it is too late for ATT to be permitted to take the point as a reason for challenging the validity, sufficiency or relevance of the tender made on 25th May 2007: see e.g. *Ketteman v Hansel Properties* [1987] AC 189. Second, had ATT not determined to reject any tender or claim to relief, it would either have accepted the tender as having been calculated correctly, as it did up until January 2013, or it would have spotted the small discrepancy which it is clear would have been rectified by CH and CFI forthwith. The amount kept aside in the Namrun account was in fact sufficient, as ATT knew, to cover an extra day's default interest as well as the principal and remaining interest due as at 27th May 2007.

Costs

56. It remains to consider the question of costs. Clause 12.2 of the Facility Agreement provided:

> "The Borrower shall, within three Business Days of demand, pay to the Lender the amount of all costs and expenses (including legal fees) incurred by the Lender in connection with the enforcement of, or the preservation of any rights under, any Finance Document."

ATT submits that resistance to a claim for relief against forfeiture falls within this clause. By letter dated 28th January 2013 it has demanded payment of costs in a total of £3,970,033.34, and given notice that it regards default interest as accruing thereon from 31st January 2013. At the same time, it has offered to accept three-quarters of such sum as the measure of the appropriate condition for relief, while reserving the right to claim to enforce any balance independently.

57. The Board is content to proceed on the basis that resistance to a claim for relief against forfeiture falls within clause 12.2. Even apart from any such contractual provision, relief against forfeiture will as a general rule be made conditional upon payment on an indemnity basis of costs incurred by the party against whom relief is claimed, save to the extent that it is shown that such costs were unreasonably incurred or unreasonable in amount: *Bank of New South Wales v O'Connor* (1889) 14 PC 273, 278 and *Patel v K & J Restaurants Ltd* [2010] EWCA Civ 1211, para 104; and even an express contractual provision regarding costs will not affect or prevail over the exercise of the court's ultimate discretion to determine what costs ought reasonably to be met: *Bank of Baroda v Panessar* [1987] Ch 335, 355 D-F, per Walton J, and *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, 186H-187A.

58. CH and CFI submit that ATT has not only lost on the issue of relief against forfeiture, but also acted unreasonably both in the circumstances leading up to the forfeiture and in resisting any form of redemption since. ATT, on the other hand, maintains that there was and is nothing wrong with its insistence upon its strict rights, and that it has been proved correct by the Board's previous judgments on a considerable number of points going to the question whether the acceleration of the loan on 16th April 2007 and the appropriation of the shares on 25th May 2007 were valid under the Facility Agreement and Regulations. It has lost only on the question whether relief was and is possible under the Regulations and should be afforded in the particular circumstances.

59. Looking at the position overall, there is general force in the points made by CH and CFI. If ATT had at any stage approached this matter in the spirit of a lender with security, rather than that of someone eager to use the security to acquire ownership of shares and control of Turkcell, without paying the usual premium for control, the matter would never have taken the course it did or reached the stage it has now. On the other hand, CH and CFI were to blame for the initial event of default, they have argued and lost on a considerable number of other points and they have ultimately required the exercise of the Board's discretion to give effect to a claim for relief in equity. In the Board's view, the appropriate order in the particular circumstances is that, instead of any order which would otherwise follow from the terms of clause 12.2 or be made under the Board's general discretion, (i) it should be made a condition of relief that CH and CFI should pay £2 million on account of such costs, and further (ii)

ATT should recover its costs of these proceedings on the standard, rather than indemnity, basis, to be assessed if not agreed.

The date for satisfaction of conditions of relief

60. The final point for consideration is the date by when the conditions for relief should, subject to any further exercise of the Board's discretion, be satisfied. In their submissions dated 4th February 2013, CH and CFI ask for 90 days from the date of the Board's order on the basis that, until the terms of that order are known, they cannot effectively seek to raise the necessary money. ATT submits that 30 days would be more than ample, bearing in mind that the Board's previous judgment was released in draft as long ago as 11th December 2012. The sum requiring to be raised is very large, and no particular prejudice is suggested as likely to result from any period granted for fulfilment of the conditions of relief. The Board considers that a period of 60 days from the date on which this judgment is handed down should be allowed.

Conclusions

61. In summary, therefore, the Board will humbly advise Her Majesty that relief against the appropriation of shares should be available to CH and CFI on conditions that CH and CFI do pay to ATT within 60 days of the date of this judgment the Redemption Sum of US$1,564,719,492.62, calculated as set out in (a) to (d) and (f) minus (g) below, plus further interest accruing between the date of this judgment and the date of payment as set out in (e) below.

a. US$1,421,254,218.75 (being the principal sum of US$1,350,000,000 outstanding plus contractual interest thereon from 25 November 2006 to 16 April 2007).

plus

b. US$25,847,580.63 (being interest on the sum in (a) above at the default rate of LIBOR (taken as 5.2875%, the rate in force on 25th November 2006) plus 11.5% p.a from 17th April 2007 to 25th May 2007 inclusive);

plus

c. US$395,132,507.96 (being interest on the total of the sums in (a) and (b) from 26th May 2010 to 1 March 2013 inclusive (the date of the part payment referred to in paragraph (g) below) at the rate of LIBOR

(determined in accordance with clauses 1.1 and 8.1 of the Facility Agreement) plus 8% p.a. compounded annually);

plus

d. US$48,421,946.28 (being interest on the total sums in (a), (b) and (c) above minus (g) below at the rate of LIBOR (taken as 0.86100%, the rate in force on 21 November 2012) plus 8% p.a. from 2 March 2013 to the date of this order inclusive);

plus

e. A further sum by way of interest, calculated as the daily rate of US$372,476.51 (being the appropriate amount of interest on the total of the sums in (a), (b), (c) and (d) above minus (g) below at the rate of LIBOR (taken as 0.86100%, the rate in force on 21 November 2012) plus 8% p.a.) multiplied by the number of days between the date of this order and the date on which the Redemption Sum is received in ATT'S Bank Account inclusive of the date of receipt;

plus

f. US$3,019,772 on account of costs (being the equivalent of £2,000,000 at the prevailing exchange rate of US$1.51 to £1.00);

minus

g. US$328,956,533 being the amount of the CTH dividend authorised in favour of CFI and paid to ATT on 1 March 2013 in part payment of the sums above.

62. The Board will further humbly advise Her Majesty that CH and CFI should pay ATT its costs of these proceedings on the standard, rather than indemnity, basis, to be assessed if not agreed.

63. The parties should liaise with each other and the Registrar to finalise and agree the draft order already prepared in terms appropriate to give effect to the above conclusions. There will be liberty to apply.

LORD NEUBERGER:

Introductory

64. On 28 September 2005, ATT lent $1.35bn to CFI, a member of the Cukurova group of companies ("the group"), with interest payable at an annual rate of 8% over LIBOR, with provision for a default rate of 11.5% over LIBOR. The $1.35bn was to be repaid over a fixed period, but it was to be immediately repayable if an "event of default" occurred. CFI also had the right to repay the whole sum outstanding after giving five business days prior notice to ATT. By two charges made on the same day, CH, another member of the group, and CFI, respectively, charged 100% of the shares in CFI and 51% of the shares in CTH (another member of the group) as security for the loan of $1.35bn. Also on 28 September 2005, CH and CFI executed blank transfers ("the transfers") of those shares ("the shares") and handed them over to ATT. By virtue of the incorporation of European Directive 2002/47/EC ("the Directive") into the charges, ATT was entitled to appropriate the shares in the event of a default.

65. On 16 April 2007, ATT gave CFI notice of a number of events of default, and contended that the repayment of the loan accordingly had been accelerated. As the $1.35bn was not repaid, ATT proceeded to appropriate the shares, by entering itself as the transferee on the transfers and seeking to be registered as the proprietor of the shares in the share registers of CTH and CFI. CH and CFI obtained an *ex parte* order restraining such registration. With the assistance of another company in the group, Namrun, they raised the $1.35bn (and interest), and, after giving the requisite notice, tendered the sum to ATT, who refused to accept it, on the basis that it had appropriated the shares and that was the end of the matter. This was not accepted by CH and CFI who began proceedings for a determination that they had validly tendered what was due to ATT, which also began proceedings. Meanwhile, a bank account ("the Namrun account") was opened by the group, and $1.5bn was paid into it on the basis that it was there to pay ATT what was due to it. The Namrun account was finally closed on 25 May 2010.

66. Apart from a number of hearings on procedural issues, the court proceedings resulted in two hearings: (i) the determination of a preliminary point, followed by (ii) a full trial, each of which resulted in an appeal to the Court of Appeal and from there to the Board. The appeal in connection with the preliminary point resulted in a determination that, contrary to the contention of CH and CFI, ATT had appropriated the shares on or about 27 April 2007 – [2009] 3 All ER 849. The appeal from the final hearing resulted in the Board deciding that, contrary to the case of CH and CFI, (i) at least one event of default had occurred, (ii) accordingly, ATT had been entitled to

appropriate the shares, but, contrary to ATT's case, (iii) CH and CFI were entitled to "relief from forfeiture" – ie that they were entitled to recover the shares from ATT – [2013] UKPC 2.

67. The issue now to be addressed concerns the terms on which CH and CFI should be permitted to recover. In order to resolve this issue, two main questions need, in my view, to be answered. The first concerns the basic principles upon which the relief being sought by CH and CFI is to be accorded, given that the shares were lawfully appropriated by ATT in the exercise of its contractual right on 27 April 2007. The second main question is the effect of the tender on 25 May 2007 by CH and CFI to ATT of what was thought to be owing under the contractual arrangements summarised at [2013] UKPC 2, paras 8-17 and in paras 2-3 above (which for convenience I shall call "the contract"), and the subsequent retaining of the $1.5bn in the Namrun account.

68. CH and CFI argue that, once the shares were lawfully appropriated by ATT on 27 April 2007, the provisions of the contract irrevocably ceased to apply, and therefore the terms upon which they are now to be accorded relief, particularly as to interest in respect of the period after 25 May 2007, are at large. ATT contends that the provisions of the contract continue to apply, and that therefore interest is to be calculated pursuant to the contractual terms agreed between the parties. In order to address that dispute it is, I think, necessary to identify precisely the nature of the relief which CH and CFI are seeking.

The basic principles upon which CH and CFI are to be granted relief

69. In that connection, the effect of the arrangement very briefly described in paras 64-65 above was to constitute ATT an equitable mortgagee of the shares. However, in the light of the execution and handing over of the transfers, ATT could have converted itself into a legal mortgagee by filling in its name in the transfers and getting registered as the proprietor of the shares – ie to perfect its security. As Lord Millett explained in his expert evidence given in this case at first instance, ATT would have had the right to do this at any time, irrespective of whether or not there had been a default on the part of CH or any other event of default. As explained at [2013] UKPC 2, para 83, CH and CFI characterised the relief they were seeking as "(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". In the following paragraph, the Board said 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.

70. While I consider that the answer to the question which now has to be addressed is the same however the relief is characterised, it is right for the purposes of the present stage of this appeal to consider that relief in a little more detail. While it is certainly not inappropriate to characterise it as relief from the forfeiture of the shares, most property lawyers would more naturally characterise the order as giving effect to the equitable right of CH and CFI to redeem the shares, given that the shares were charged, or mortgaged, to ATT as security for the loan it advanced to CH and CFI.

The relief sought by CH and CFI: the equitable right to redeem

71. Until statute intervened in 1925, the common form of mortgage conveyed the land to the mortgagee subject only to a proviso for redemption within a specified period (normally six months). That date, the legal redemption date, would almost always pass (and was normally intended by the parties to pass) without repayment, so that the land would then belong absolutely to the mortgagee as a matter of common law - see *Cheshire and Burn's Modern Law of Real Property,* 18th edition, 2011, p 799 and *Megarry & Wade, The Law of Real Property*, 8th edition, 2012, p 1117. However, as those books go on to explain, despite the land having become the absolute property of the mortgagee in the eyes of common law, the Court of Chancery invariably recognised that the mortgagor's right to redeem survived notwithstanding the fact that, in common law, the land had absolutely passed to the mortgagee. As it is put in *Megarry & Wade* op cit, p 1118, "[t]he mortgagor was thus given an equitable right to redeem at a time when the agreement between the parties provided that the mortgagee was to be the absolute owner of the land."

72. This right arose because the Court of Chancery, exercising its equity jurisdiction, recoiled from the notion that a borrower who had provided the lender with security, which traditionally was always in the form of land, should lose its land simply because it was late in repaying the loan secured on that land – see per Lord Haldane LC in *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 35. Thus, the equitable right to redeem does not arise until the contractual redemption date has passed – see *Brown v Cole* (1845) 14 Sim 427. So, under a normal form of mortgage, a mortgagor had two rights to redeem, a legal right only exercisable on the contractually stipulated date, and an equitable right exercisable at any time after the contractually stipulated date – see *Megarry & Wade* op cit, p 1119.

73. Save where it was inequitable to do so, the Court of Chancery recognised the borrower's right to redeem the land even after the legal effect of the agreement between the lender and the borrower was that the lender had become the absolute owner of the land – see *Salt v Marquess of Northampton* [1892] AC 1, 18. This equitable right to redeem ("the right to redeem") is part, normally the most important part, of the parcel of rights, known as the equity of redemption, which equity considered that a mortgagor should enjoy. The equity of redemption was treated by

the Court of Chancery as an equitable interest in land – see *Casborne v Scarfe* (1738) 1 Atk 603, 605.

74. As Sir George Jessel MR put it in characteristic terms in *Campbell v Holyland* (1877) 7 Ch D 166, 171,

> "The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and … the doctrine arose when mortgages were made in the form of a conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract of the parties; yet Courts of Equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and that the mortgage money should be a debt; and they gave relief in the shape of redemption on that principle".

As Harman LJ explained in *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 WLR 139, 142-143, "Chancery would treat as a mortgage that which was intended to be a conveyance by way of security … . Once a mortgage always a mortgage, and nothing but a mortgage" – and see eg per Lord Lindley in *Samuel v Jarrah Timber Wood and Paving Corporation Ltd* [1904] AC 323, 329 to the same effect.

75. The equity of redemption could classically only be lost by release from the mortgagor, by sale of the land by the mortgagee under a statutory power, or by lapse of time – see *Cheshire and Burn* op cit, p 837. As Lawrence LJ put it in *re Wells, Swinburne-Hanham v Howard* [1933] Ch 29, 52, "no agreement between the parties that the mortgage should not be redeemable has any effect in equity, and any attempt to fetter the equity of redemption with any other condition than the payment of the money secured is null and void".

76. Although a mortgagee has always had power to enter into possession of the mortgaged land, it had no power to sell the land free of the equity of redemption (unless statute permitted it or the mortgage deed validly entitled the mortgagee to do so) - see eg *Stevens v Theatres Ltd* [1903] 1 Ch 857. In order to enable the mortgagee (and any purchaser in good faith) to know that it was free to deal with the land, equity introduced the order for foreclosure, whereby, once the contractual date for redemption had passed, the mortgagee could apply to the court for a declaration that the right to redeem was at an end – see per Sir George Jessel MR in *Carter v Wake* (1877) 4 Ch D 605, 606. (However, where the land was worth more than the sum due to the lender, the court would normally refuse foreclosure, and order a sale of the land,

on the basis that the proceeds would be used to pay the lender in full, with any balance going to the purchaser – see *Silsby v Holliman* [1955] Ch 552.)

77. Foreclosure could only be achieved by order of the court and "not by any person" – per Warrington in *In re Farnol Eades Irvine & Co Ltd* [1925] 1 Ch 22, 24. Normally, a foreclosure action would initially lead to a foreclosure order *nisi*, giving the mortgagor a last chance to redeem - see eg *Platt v Mendel* (1884) 27 Ch D 246. If it did not do so within the time stipulated by the court (which could be extended or "enlarged"), the mortgagee could apply for the order to be made absolute.

78. However, such was equity's enthusiasm for the mortgagor's right to redeem that it could even be invoked after the foreclosure had become absolute and the mortgagee had got well under way in selling the land, as in *Thornhill v Manning* (1851) 1 Sim (NS) 451. In that case, Lord Cranworth V-C said at 454 that a contract "between a mortgagor and a mortgagee has been treated by this Court from time immemorial as being … a contract for the repayment of money for which the mortgaged estate is a pledge, which the borrower may redeem notwithstanding the day named in the proviso for redemption has long passed". And in *Campbell* 7 Ch D 166, Jessel MR permitted a mortgagor to redeem despite the fact that the mortgagee had sold the property concerned after obtaining a foreclosure order absolute, as the mortgagor had acted promptly and the purchaser had bought within a day of the foreclosure, knowing of the mortgage. As Sir George explained at 7 Ch D 166, 169 and 171-2, "[a]n order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute, nor can it be so now", "the decree, though final in its terms, was not final in fact", and equity came to regard a foreclosure order in "form only, just as the original deed was form only".

79. Accordingly, when a mortgagor is permitted by the court to invoke its right to redeem, the court is simply extending the time within which the money due under the mortgage must be paid. As Lewison J said in *Law Debenture Trust Corporation Plc v Concord Trust* [2007] EWHC 1380 (Ch), para 53, "[t]he essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, but late". He immediately added, correctly in my view, that "[a]part from time stipulations, I do not consider that the court, in exercise of its equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor".

80. The right to redeem could be exercised subject to any valid restriction in the mortgage (ie a restriction which did not amount to an unlawful "clog" on the equity of redemption), or, in any event, if the mortgagee took possession of the land. Redemption could, and normally did, take place out of court, although it could also do so in court, either in the course of proceedings brought by the mortgagee (eg for foreclosure) or through a redemption action brought by the mortgagor. The mortgage

remains in being until the money due has been tendered and accepted – see *Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1971] 1 WLR 43.

81. As is clear from this brief summary, the right to redeem, like the rest of the law relating to mortgages, was developed by the Chancery Courts in relation to mortgages of land. However, as explained in the Board's judgment in [2013] UKPC 2, there is no reason why the same principles should not apply to mortgages of chattels or of choses in action. Furthermore, although, since 1925, the law in this field has, in many areas, been subject to an overlay of statutory provisions, it has not been suggested that any of those provisions apply in this case, so I shall say no more about them.

Appropriation

82. The nature of appropriation was discussed in the Board's judgment on the preliminary issue. It was there explained that it was "a self-help remedy", "a novel remedy in English law", and that "appropriation is much closer to sale than it is to foreclosure" – see [2009] 3 All ER 849, paras 13, 14 and 27. In its more recent decision, [2013] UKPC 2, para 113, the Board stated 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". In the following paragraph, the Board concluded that "*a posteriori* control includes, under English law, the possibility of granting relief against forfeiture".

83. The effect of that more recent decision of the Board is, accordingly, that, notwithstanding the fact that the charge in the present case relates to shares which have been validly appropriated (paras 86-97), and notwithstanding the Regulations (paras 98-115), it is open to CH and CFI to invoke their right to redeem the shares in the present case. How long the right to redeem would have survived the appropriation in this case without CH and CFI taking action is inevitably fact-sensitive. It would almost certainly lapse once ATT had sold the shares to a third party bona fide purchaser without notice of the right to redeem, and it may well be that it is inherent in the concept of appropriation that even if a purchaser had notice, that would not be fatal to the contention that the right to redeem has been lost. It may well be that the right to redeem could be lost in other ways after appropriation; however, it is unnecessary to consider that issue on this appeal.

84. The essential point for present purposes is that the appropriation did not destroy Cukurova's equitable right to redeem, in the same way as the fact that the land had become the absolute property of the mortgagee as a matter of common law, or that a foreclosure order *nisi* (or even a foreclosure order absolute, at least if the mortgagee

had not yet sold the land) had been made in respect of the land, would not have destroyed the mortgagor's equity of redemption in the eyes of equity.

85. Because the shares have been lawfully appropriated by ATT owing to the failure to pay on the part of CH and CFI, who now want those shares back, the description of the relief they seek as relief from forfeiture, as opposed to exercising their right to redeem, is not a mischaracterisation, but it can, I think, lead to misunderstandings, or at least to misleading analogies, in the present context.

Relief from forfeiture and the equitable right to redeem

86. Relief from forfeiture for non-payment of money was, like the equity of redemption, a creation of the Court of Chancery born of equity's distaste for property-owners losing their property for failing to pay money strictly on time. Accordingly, both relief from forfeiture and the equitable right to redeem involved equity extending time for a property-owning debtor to pay money, thereby enabling it to recover that property, which had been taken away from it lawfully (in the eyes of the common law) because of its failure to pay in time. To invoke another well-known (if not infrequently misapplied) principle, both forms of relief may be said to be based on the fact that equity did not generally regard time as being of the essence of an obligation, particularly an obligation to pay money – see (in relation to mortgages) per Lord Parker of Waddington in *Kreglinger* [1914] AC 25, 47-48.

87. In its most familiar form, namely in relation to a proviso for forfeiture in a lease, the similarity between relief from forfeiture and the right to redeem is reinforced by equity's view that such a proviso was to be treated as security for the payment of rent – see eg per Lord Erskine LC in *Davis v West* (1806) 12 Ves Jun 476, and per Farwell LJ in *Dendy v Evans* [1910] 1 KB 263, 270.

88. Given these close similarities, it is obviously sensible that the court's approach to the two rights is, so far as possible, consistent, and this is reflected by what was said in the passage cited at [2013] UKPC 2, para 87 from the speech of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722. In his judgment in *Dendy* [1910] 1 KB 263, 270, Farwell LJ made it clear that relief from forfeiture for a lessee and the right of a mortgagor to redeem had the same equitable origin.

89. Having said that, care must be taken when relying, in a case concerning a mortgagor's right to redeem, on the circumstances in which, and terms on which, relief from forfeiture for non-payment of rent is accorded to a lessee. In the case of relief from forfeiture for non-payment of rent under a lease, the original equitable jurisdiction recognised that a forfeited lease (at least when forfeited by the court) had ceased to exist. Accordingly, where relief was granted by the Court of Chancery after a common law court had forfeited the lease at the suit of the lessor, the court had to

order the grant of a new lease to the tenant – see per Sir Herbert Cozens-Hardy MR in *Dendy* [1910] 1 KB 263, 266. In 1730, Parliament intervened by enacting sections 2-4 of the Landlord and Tenant Act 1730 (which have now been replaced by sections 210-212 of the Common Law Procedure Act 1852). The 1730 Act first introduced the notion that a lease which had been forfeited for non-payment of rent would be revived by the court granting relief from forfeiture.

90. The fact that the grant of relief from forfeiture in equity involved the court creating a new lease seems to me to highlight a potentially important distinction between the grant of such relief and the equitable right to redeem. Where a lessor has forfeited a lease, the legal estate that constituted the lease has come to an end, so, when the Court of Chancery granted relief from forfeiture, a new lease had to be created. Even where a mortgagee forecloses, there is no destruction of, or change in, any legal estate, because (save in the relatively rare cases where the mortgage was effected by demise) the effect of the creation of a mortgage, until statute provided otherwise in 1925, was to vest the legal estate in the mortgagee – see *Cheshire and Burn*, op cit, pp798-800. Indeed, that is close to what happened in this case, where ATT could have become the registered proprietor of the shares at any time after the contract was entered into, by filling in the transfers and becoming the registered proprietors.

91. Now that relief from forfeiture for lessees is statutory, rather than equitable, in nature, it is unsafe to rely on the reasoning in judgments concerned with such relief when assessing the approach of equity as developed by the Court of Chancery. Thus, I do not think it possible to derive support for the contention that the court has a broad and general discretion in a case such as this, which involves the equitable right to redeem, from the observations of Lord Loreburn LC in *Hyman v Rose* [1912] AC 623, 631. His remark that the court's discretion to grant relief from forfeiture of a lease amounted to a "free discretion" without "rigid rules", was quoted with approval by Lord Templeman in *Associated British Ports v C H Bailey plc* [1990] 2 AC 703, 708B-D to support the proposition that "it would be open for a judge in the exercise of the discretion... to grant relief against forfeiture of a lease with nearly sixty years to run without requiring the tenant to spend over £600,000 [on repairs] without substantial benefit to anybody", in a case where the lessor was seeking to forfeit a lease on the ground of disrepair.

92. In my opinion, however, these observations are of no relevance to the present problem. They were not directed to a case where an equitable right to relief from forfeiture was being invoked for non-payment of money: they were concerned with a statutorily conferred right to relief from forfeiture for lessees for breaches of covenant other than non-payment of rent – relief which had been accorded by equity only very sparingly indeed. In particular, the observations were expressly based on the wording of what is now section 146(2) of the Law of Property Act 1925 (and what was in 1912 section 14(2) of the Conveyancing Act 1881), which states (and stated) that relief

from forfeiture may be granted "on such terms … as the court, in the circumstances of each case thinks fit". The distinction between the equitable and statutory powers to grant relief from forfeiture was considered by the Court of Appeal in *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 510-519, 520-522, and 525-531. (Although that decision was successfully appealed to the House of Lords, nothing was said in the speeches in relation to that distinction.)

93. In any event, the right to damages for breach of the covenant to repair would exist whether or not the lease was forfeited. Accordingly, Lord Templeman was not by any means necessarily saying that relief from forfeiture would be given without requiring the breach of covenant to be remedied; he was merely emphasising that the lessor should be left to his secondary remedy, damages, as opposed to what might be called its primary remedy, namely specific performance. This would anyway reflect the legal realities: the Court of Chancery would rarely, if ever, grant specific performance of a repairing covenant (see *Hill v Barclay* (1810) 16 Ves Jun 402), especially in circumstances such as those described by Lord Templeman.

94. I know of no case where a lessee has been granted relief from forfeiture on terms which involve its liabilities to the lessor being less onerous than they were under the original lease (save where the relaxation is agreed between the parties or is contingent on a term imposed for the benefit of the lessor).

The appropriate approach in principle in this case

95. It seems to me to follow from this discussion that the effect of granting the relief which CH and CFI now seek is simply to extend the time for paying what is due from them to ATT under the contract. On that basis, subject to any other specific point in this case, I consider that it is clear that the terms of that contract with regard to the payment of interest must apply until CH and CFI pay the whole of what is due. Subject to the same point, I would accept the submission of Mr Milligan QC, on behalf of ATT, that this means that CH and CFI have to pay (i) $1,421,254,218.75 or thereabouts (being the principal of $1.35bn plus interest to 16 April 2007 at the contractual rate of 8% over LIBOR), together with (ii) interest on that sum at the default rate of 11.5% over LIBOR, with annual rests, until payment.

96. The fundamental basis for this conclusion is my view that the terms of the contract as agreed between the parties continue to apply (or are at least now to be treated as continuing to apply) given that the mortgagor is invoking and enforcing its right to redeem, irrespective of whether or not the mortgagee has appropriated the charged property. That this view is correct appears to me to follow for a number of reasons, which may, in some cases, overlap.

97. First, as the cases referred to in paras 86-94 above show, the intervention of equity in a case such as this is simply to extend the mortgagor's time for repayment in order to enable it to redeem the security. The right to redeem may have gone as a matter of common law contract, but it has survived in equity, and equity prevails over the common law, and therefore the time for repayment is extended. It is inherent in that extension that the rest of the contractual arrangements must be treated as continuing during that period. The notion that, every time that the equitable right to redeem is successfully invoked after the mortgagee has appropriated or foreclosed on the charged property, the court can simply do whatever it thinks just, seems to me to demonstrate a fundamental misunderstanding of the role of equity in the context of commercial arrangements. While equity developed principles to mitigate some of the harsher effects, and to remedy some of the deficiencies, of the common law in connection with contracts, it did not provide some sort of cure-all whereby a judge could simply do what seemed just to him in the particular case.

98. Many judges sitting in the Court of Chancery have made this point. Lord Eldon LC said that it was "better that the law be certain, than that every judge should speculate on improvements" – *Sheddon v Goodrich* (1803) 8 Ves 481, 497. To the same effect, Lord Redesdale observed in *Bond v Hopkins* (1802) 1 Sch & Lef 413, 428-9, that:

> "There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain, as the principles on which the courts of common law proceed."

More recently, in *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 626, Lord Radcliffe, after saying that "'[u]nconscionable' must not be taken to be a panacea for adjusting any contract … when it shows a rough edge to one side or the other", pertinently added that he had noticed that "equity lawyers are … sometimes both surprised and discomfited by the plenitude of jurisdiction, and the imprecision of the rules that are attributed to 'equity' by their more enthusiastic colleagues".

99. Secondly, I consider that the obligations embodied in the contract were not all simply discharged by the appropriation of the shares by ATT on 27 April 2007; what was discharged was the liability of CH and CFI to repay the $1.35bn and any interest payable as at that date, save to the extent that the value of those shares was insufficient to discharge that debt in full. It seems to me that, if the value of the shares was insufficient to cover the whole of what was due to ATT under the contract, it could have sued CH and CFI for the shortfall, with interest continuing thereon

meanwhile at the contractual rate. (This certainly appears to be the case according to the Board's judgment on the preliminary point – see at [2009] 3 All ER 849, para 13). In such a case, were CH and CFI then to obtain relief, it would be somewhat surprising, and hard to justify as a matter of principle, if they had to pay interest at the contractual rate on the shortfall, but interest on some wholly different basis on the sum equal to the value of the shares. If, as seems to me correct, interest would be payable at the contractual rate on the whole sum in such a case, then it must logically follow that the same conclusion applies where, as I understand to be the case here, the value of the shares exceeds what is due.

100. Even if the contract was discharged when ATT appropriated the shares, then it appears to me that the contract must be retrospectively revived on CH and CFI accepting the terms on which they are granted relief. Otherwise, it would mean that the court could, for instance, grant such relief on terms that CH and CFI would not have to pay the whole of the principal, as there would be no basis for ATT contending that CH and CFI legally owed it repayment of the principal. Equally, if CH and CFI's liability under the contract had been guaranteed, it would be bizarre if the guarantor's liability was, or remained, discharged if CH and CFI were granted the relief they now seek.

101. Thirdly, there is an inherent logical inconsistency in CH and CFI saying not merely that their liability under the contract to repay the principal and to pay any contractual interest was discharged by ATT's appropriation of the shares, but also that their liability remains discharged notwithstanding the grant of relief to CH and CFI. The liability to repay the principal and to pay contractual interest was an unqualified legal obligation. If ATT's appropriation of the shares had been irreversible, then I can see how it might be said to have permanently discharged any liability on the part of CH and CFI to repay the principal and pay contractual interest (at least if the value of the shares was sufficient to cover those sums). However, it would be little short of absurd if CH and CFI could have the benefit of the appropriation being reversible, without the concomitant consequence of the reversal reviving their contractual liability to repay the principal and to pay interest at the agreed rate.

102. Fourthly, it would be surprising if CH and CFI could be better off as a result of ATT having appropriated the shares than they would have been if the shares had not been appropriated. If the shares had not been appropriated, and CH and CFI were now seeking to redeem the shares (because, of course, redemption would be necessary even if there had been no appropriation), there can be no doubt but that they would be required to pay the sums due in accordance with the contract, namely as claimed by ATT and summarised in para 95 above. I can see no reason in principle why CH and CFI should be better off just because the shares have been appropriated. Indeed, it seems positively perverse that the mortgagor should be better off, and the mortgagee worse off, as a result of a difference in the terms upon which relief granted to the mortgagor, (i) in a case where there has been a tender following a default by the

mortgagor and an appropriation, as opposed to (ii) a case where there has been a tender without an appropriation following a default by the mortgagor; yet that would be the effect of the argument of CH and CFI prevailing.

103. Fifthly, in this case, whether one proceeds on the basis that ATT's action on 27 April 2007 amounted to taking beneficial possession of the shares, a self-sale, or some sort of out-of-court foreclosure, it seems clear that the Court of Chancery would have permitted CH and CFI to redeem the shares only on the basis that they repaid the principal, and, centrally for present purposes, that they paid interest at the contractual rate, both before and after the mortgagee had foreclosed, self-sold or taken possession, until payment (see paras 79-80 above). As is stated in *Fisher and Lightwood's Law of Mortgage* (13th edition), para 32.36, "the sum to be paid to redeem the mortgage is the same whether the claim is the mortgagee's for foreclosure or the mortgagor's for redemption".

104. Sixthly, I draw support from the decision of the Court of Appeal in *Farrer v Lacy, Hartland & Co* (1885) 31 Ch D 42, where the mortgagee had foreclosed and had attempted to sell the land concerned. It was held that, in addition to repayment of the principal and recovery of costs, the mortgagee was entitled to be paid interest "under the [mortgagor's] covenant to pay contained in the [relevant] indenture of mortgage" in the "Form of judgment" appended to the report at 31 Ch D 42, 51. This form was described as "approved by their Lordships" for "future cases". If interest continues to be payable at the contractual rate after foreclosure has become absolute, I find it hard to see how, as a matter of logic, a different conclusion can apply in a case such as this, which involves the security being appropriated, which is not unlike foreclosure, but more like sale according to the first decision of the Board in this case. The mortgage in that case was effected by a lease, but the attitude of equity was the same whether the mortgage was effected by transfer or lease.

105. Seventhly, as Fry LJ made clear in that case, a mortgagee has remedies both at common law and in equity – see at 31 Ch D 42, 50. The common law right is for "principal, interest, and costs", whereas the equitable right is for "foreclosure … and the costs of the suit". As Fry LJ explained, until 1875, the two types of relief had to be sought in different courts, but the effect of the Judicature Act 1873 is that they can be sought in the same action, and that "the rules of equity are now to prevail". Given that the mortgagor in this case is seeking to invoke its equitable right to redeem thereby effectively cancelling the effect of ATT's exercise of its right to appropriate, it seems to me that both parties must now be thrown back onto their legal rights under the contract.

106. Eighthly, while, as I have mentioned, there are dangers in relying on cases relating to relief from forfeiture of leases, especially for reasons other than non-payment of money, I consider that assistance can be gained from the basic principles

adopted in such cases, given the similarity of the two jurisdictions. In my view, the basic purpose and effect of granting relief from forfeiture was well expressed by Chadwick LJ in *Bland v Ingrams Estates Ltd (No 2)* [2002] Ch 177, paras 14-15. Having said that "the object of the court when granting relief [from forfeiture] is to put the lessor (as well as the lessee) back in the position in which he would have been if there had been no forfeiture", he went on to explain that it followed that, as there would have been a review of the rent which could have been implemented by the lessor during the period that the lease was forfeited, relief from forfeiture was only to be granted on terms that "[t]he lessor is not to be denied the benefit of any increased rent which would have resulted from the operation of the rent review provisions during the period prior to the grant of relief from forfeiture".

107. Ninthly, it seems to me that the analysis advanced by CH and CFI runs into severe difficulties where the mortgagee appropriates or forecloses on the charged property on the mortgagor's failure to pay an instalment of capital or interest under an instalment mortgage. Given that the correct analysis is that, where the mortgagor successfully invokes the equity of redemption, the court has merely extended time for payment of the instalment, it seems to me that when the instalment is eventually paid, the mortgage will still be in force, and future instalments of capital and interest fall due in accordance with its terms. But, on the analysis advanced by CH and CFI, the liabilities under the mortgage will all have been treated as satisfied by the appropriation or foreclosure, so, if the mortgagor subsequently successfully invokes the equity of redemption, there is no further contractual liability under the mortgage. If it is said that the mortgage is revived in such a case, then I find it hard to understand why that would not be so here.

108. Tenthly, there is the contrast, referred to in paras 89-90 above, between the historic need to create a new lease where relief from forfeiture was granted in equity, and the absence of any need to create a new mortgage when the right to redeem is invoked after default, or even after foreclosure. That, it seems to me, is only sensibly explicable by the fact that the mortgage contract has always been treated by the Court of Chancery as surviving notwithstanding the default and foreclosure by the mortgagee (or, if the contract does not survive, as being revived) if the equitable right to redeem is enforced after default, followed by the mortgagee appropriating or foreclosing. On the other hand, if the proper analysis is that, just as a forfeiture of a lease destroys the lease, the appropriation put an end to the terms of the mortgage, it seems to me to follow that the grant to CH and CFI of relief from forfeiture must mean that the mortgage terms are revived, just as the lease is revived when the lessee gets relief from forfeiture. Indeed, given that, in the case of a lease, the courts sometimes had to take the extra step of granting a new lease, it seems to me that this must be *a fortiori*.

109. Finally, I note that, when the Court of Chancery granted a lessee relief from forfeiture in equity by ordering the grant of a new lease, that new lease was "on the

same terms as before" - per *Mark Wonnacott*, *The History of the Law of Landlord and Tenant* (2012), p 267, citing *J Lilly*, *The Practical Register,* 2nd ed (1735). That supports the unsurprising notion that relief from forfeiture, when granted in equity (as opposed to under a statute), involves the creation of a new lease on the same terms as were contained in the forfeited lease. I note that in *Taylor v Knight* (1725) 4 Vin Abr 406, pl 31, King CJ appears to have imposed a more onerous new lease on a lessee seeking relief from forfeiture (in that it included a repairing covenant apparently not included in the original lease). In human terms that may be explicable by the fact that he said that he did "not like giving relief here in these cases after a judgment in law, but the cases are too strong for me". So far as principle is concerned, I can readily accept that there could be circumstances where it might seem just to impose more onerous terms than before on a person (whether lessee or mortgagor) seeking equitable relief. However, I find it very hard to conceive of circumstances where it could possibly be appropriate to impose less onerous terms than before on such a person. Not only would that involve the lessee or mortgagor profiting from its own wrong, but it would mean that the court could impose terms on the lessor or mortgagee as a condition of granting relief to the lessee or mortgagor, and that cannot possibly be right.

110. For these reasons, I conclude that, where a mortgagor invokes its equitable right to redeem the secured property, the court should grant relief on terms which are based on the assumption that the terms of the original bargain between the mortgagor and mortgagee continued, despite the security having been foreclosed on or appropriated by the mortgagee, and that those terms will continue to apply until all the mortgagor's liabilities under the contract have been satisfied.

The contrary view of the Board

111. The majority of the Board takes the view that, while the approach I have attempted to summarise is generally correct, it can be departed from in exceptional circumstances. Apart from being, in my respectful view, inconsistent with principle, this conclusion risks leaving the law in a state of uncertainty. Furthermore, while the Board's approach is said to be justified by the facts of this case, I do not consider it is. For reasons I shall try and explain when dealing with the second main issue, application of the principled approach (as I see it) or the normal approach (as the Board sees it) in this case can produce a fair and commercially sensible result. Having said that, there are one or two points I should make at this stage about the Board's reasoning.

112. I respectfully take issue with the description of the above analysis as being an "assumption of unremitting default from the appropriation to the time when relief takes effect under court order" – see para 14 above. While the mortgagor enjoys the benefit of the right to redeem, it is treated as continuing to borrow from the mortgagee

under the terms of the mortgage. As the mortgagor still has the mortgagee's money, it must continue to pay interest on the stipulated terms. If the mortgagor remains in default and the stipulated terms include a default rate, then the default rate must be paid. However, if the mortgagor ceases to be in default then the default rate will, *ex hypothesi,* no longer apply. As explained in paras 162-163 below, that is the effect in this case: once the mortgage debt was tendered and wrongly refused, CH and CFI are no longer to be treated as being in default.

113. The reference to a "parallel equitable world", mentioned by the Board in para 12 is in point, but does not support the Board's analysis. Until 1875, there were indeed parallel worlds, namely that of common law and that of equity. In virtually every case discussed in paras 11-21, in the eyes of the common law the land had vested in the mortgagee absolutely, whereas in the eyes of equity the mortgage continued along with the mortgagor's equity of redemption. "Once a mortgage always a mortgage", so, even after the common law right to redeem had been lost and the land had vested in the mortgagee in common law, the mortgagor's equitable right to redeem arose and continued, as did its obligations under the mortgage. These parallel worlds were unified in 1875, when the world of equity prevailed. Accordingly, I do not agree with the majority's view in para 12, that the appropriation discharged the debt if that is meant to imply a discharge for good, at least in the eyes of equity: if it had done so, that would have been the end of the right to redeem.

114. Nothing in the authorities and books cited by the majority in paras 18-20 or 23-25 calls this conclusion into question. The books and articles nowhere support the notion that terms can be imposed, when the mortgagor exercises its equity to redeem which are less favourable to the mortgagee than those contained in the mortgage (unless of course the mortgagee has acted wrongly as a matter of law).

115. Quite apart from the fact that they were concerned with a statutory code for relief from forfeiture for lessees for breaches for which equity would have been unlikely to accord relief, in neither *Hyman v Rose* nor *Associated British Ports v Bailey* did the House of Lords suggest that relief could be granted on terms which involved the lessee having less onerous obligations than it had accepted under the original lease. In the former case, there were some very general words as to the width of the court's discretion; in the latter, all that was indicated was that a provision in the lease would not be enforced by specific performance during the currency of the lease (which was the position adopted by the Chancery courts in any event).

116. Nor do the cases cited in paras 31-34 above assist the majority conclusion. Most of them relate to the situation where a mortgagee refuses to accept a tender of the monies due under the mortgage at a time when the mortgagor is entitled to redeem in equity. In such a situation, the law is now clear, as explained in paras 130, 131 and 136, below: because it retains the use of the mortgagee's money, the mortgagor

remains liable for interest, unless it sets aside the sum due, in which case it must account for the interest earned (less any expenses).

117. *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171 does not take matters further. The essential point the Court of Appeal decided was that "a contractual right of one party … to have the costs … could not override the discretion as to costs given to the court" by the rules, but "the discretion should ordinarily be exercised so as to reflect the contractual right" – see at 193H-194A, as confirmed at 193C-D in points (iv) and (v) quoted in para 41 of the Board's judgment. The Court of Appeal's observation at (iii) does relate to the power of a court of equity when permitting a mortgagee to redeem, but it is clearly limited to that power in relation to costs, as no other types of case were cited in the judgment or in argument - see at 174H-177A.

118. The cases where interest did not run after tender all seem to have involved either a mortgagor who kept the money available or a mortgagee who had not merely refused a tender, but who was guilty of "misconduct" or the like. The nearest decision to the contrary is *Manning v Burges* (1663) 1 Cas Ch 29, which is very shortly reported, unreasoned, decided just before Lord Nottingham had developed equity into a regular system, and anyway may well have been a case where the mortgagor had put the money aside. As explained in paras 166-168 below, there is a serious argument for saying that, where a mortgagee has wrongly rejected a tender of the mortgage debt, then, while remaining liable for interest at the contractual rate (unless the money is set aside), the mortgagor should be able to reduce the interest it has to pay if it can show that it could have borrowed the money at a lower rate from another lender.

119. In my judgement, therefore, there is a compelling case for concluding that, at least in the absence of special reasons based on facts and points which I have not so far considered, the application of CH and CFI to have the shares re-vested in them should only be granted on the terms contended for by ATT, namely that interest is paid at the default rate of 11.5% over LIBOR, with annual rests, on the sum of $1,421,254,218.75, from 17 April 2007 until payment.

The effect of the refused tender of 25 May 2007

120. Having determined the basic principles upon which CH and CFI should be granted relief, I now turn to the arguments which they raise to support the contention that, on the particular factors which apply in this case, the terms of relief summarised in the preceding paragraph should be mitigated. There are, I think, four such factors, which I shall consider in the following sections, but only one of them, namely the tender on 25 May 2007, has any real force (although another, ATT's hard-nosed

conduct, is not irrelevant), and I will consider it in more detail after disposing of the other three factors.

The alleged uncommerciality of this conclusion

121. On behalf of CH and CFI, Mr MacLean QC contends that, even viewed relatively objectively, the conclusion that CH and CFI should be liable for interest at 11.5% over LIBOR on the whole of the outstanding principal from 17 April 2007 until payment, is a very unattractive conclusion in commercial terms, and is therefore likely to be wrong. In the light of that submission, it is appropriate to consider the extent to which the conclusion I have so far reached is, on analysis, unattractive.

122. Before doing so, it is right to say that the opinion that a conclusion seems unattractive in the light of the facts of a particular case can be a good reason for carefully reconsidering the reasoning which has led to that conclusion. It can also be a good reason for considering whether there are other reasons which justify departing from, or qualifying, that conclusion. However, if, after considering those questions, a judge concludes that the conclusion is correct as a result of applying established legal principles to the facts of the case, it can be very dangerous to depart from the conclusion simply because it appears to be unsatisfactory. In many cases where the application of established principles lead to arguably unfair results, it is because the facts of the particular case are rather unusual or extreme compared with the common run of cases raising the same sort of issue. To depart from the established principles in order to achieve what appears to be justice in one particular case can often result in injustice in many other cases. It is also liable to cause confusion and uncertainty for many individuals and companies with similar problems, and for those advising them. I refer back to the remarks quoted in paras 97-98 above. Of course, the Board, like the Supreme Court, has a duty to develop the law where appropriate, but that duty must be exercised in a cautious, principled, and coherent way.

123. In the present case, there are, I think, four factors which, particularly when they are combined, render the conclusion I have reached appear arguably unattractive. First, there is the aggressive and calculating behaviour of ATT. Secondly, there is the fact that the contractual rate of interest appears very high. Thirdly, there is the long period for which that interest runs. Lastly, there is the fact that CH and CFI tendered to ATT the sum of $1,446,824,709.42 on 25 May 2007 and, albeit through an associated company, left $1.5bn in the escrow account for three years - see [2013] UKPC 2, paras 27 to 29.

124. I do not consider that, at least on its own, the unattractive behaviour of ATT assists CH and CFI on the present issue any more than it did on the question whether ATT was entitled to appropriate the shares - see [2013] UKPC 2, paras 69 to 79.

Although its motives were less than admirable, ATT was simply insisting on its strict legal rights when appropriating the shares. Similarly, if it was entitled to stand on its strict legal rights when it refused to accept the tender by CH and CFI of the $1,446,824,709.42 on 25 May 2007, and while the money was in the Namrun account, there can be no justification for penalising it for taking that course. Equity, like the law, does not punish people for insisting on their rights, although it is less likely to assist them if they do so ruthlessly.

125. As for the high rate of interest, it is true that 8% over LIBOR does strike me as steep, especially for a secured loan, but a lawyer's assessment, even (or, perhaps, all the more) a judge's assessment, of a particular contractual interest rate is of questionable value. The rate of 8% over LIBOR is the rate which was agreed between the parties, both very large commercial companies, after arm's length negotiations. It is therefore scarcely reasonable for CH and CFI to complain of the rate continuing to apply, unless there is a special factor at work. No special factor has been identified here.

126. While the same points can be made about the default interest rate of 11.5% above LIBOR as about the basic rate of 8% over LIBOR, there could be a question as to whether the extra 3.5% was a penalty, from which relief could be granted. In addition to the equity of redemption and relief from forfeiture, equity developed a jurisdiction to relieve against penalties. While a default interest rate may be a penalty against which equity will relieve (see eg *Stanhope v Manners* (1763) 2 Eden 199), it was not argued that the extra 3.5% per annum in this case could be so treated. It seems to me that this was realistic on the part of Mr MacLean. Particularly in the context of a contractual rate of 8% over LIBOR, the default rate in the present case, which predicates an increased risk due to the very existence of a default, could not, I think, fairly be characterised as penal, at least on its own.

127. As to the length of the period for which this rate of interest is to run, it cannot be doubted that six years between forfeiture and relief is a very long time indeed for a gap between a tender of the mortgage debt and the court upholding the mortgagor's right to redeem. However, most of the delay can fairly be said to be attributable to CH and CFI, albeit not in the sense of any wrong-doing on their part. Omitting less significant facts, the basic history is as follows. ATT having issued these proceedings on 16 April 2007, CH and CFI raised a point which, as mentioned above, they elected to pursue as a preliminary issue, and did so all the way to the Board, who dismissed it in May 2009. Thereafter, the balance of the proceedings were heard, and this involved CH and CFI pursuing all the way to the Board their unsuccessful contention that ATT was not entitled to appropriate the shares, which was only resolved at the end of January 2013 - see [2013] UKPC 2, paras 43-79. Had CH and CFI focussed on the sole point on which they have succeeded, namely their entitlement to seek relief from forfeiture, the length of the period for which interest runs would have been nothing like six years.

128. That leaves the contention that it is inappropriate that CH and CFI should pay interest at the rate of 11.5%, or even 8%, over LIBOR for six years, in the light of the tendering of $1,446,824,709.42 to ATT on 25 May 2007, and CH and CFI subsequently leaving $1.5bn in the Namrun account until 25 May 2010, with the cost consequences described in para 4 above. In my view, that raises a point which is worthy of full consideration, and to which I now turn.

The effect of the tender in May 2007: introductory

129. CH and CFI contend that ATT's refusal of the tender on 25 May 2007 discharges them from having to pay any interest under the contract, or at any rate interest at the penal rate, in respect of any time thereafter. As I see it, that argument gives rise to five issues. The first issue is whether a tender by a mortgagor of what is owing under the mortgage, on or after the time for redemption, which is wrongly refused by the mortgagee, is enough to stop interest running, as CH and CFI contend, or whether, as ATT say, it is thereafter necessary for the mortgagee to put the money aside. The second issue is whether ATT can defeat the tender argument in this case because the amount tendered was insufficient. The third issue is whether ATT can defeat the tender argument on the ground that the Namrun account cannot be relied on by CH and CFI. The fourth issue arises from ATT's contention that, because the tender was made after the shares had been appropriated by ATT, CH and CFI cannot rely on the tender to stop interest running. The fifth issue is whether any interest that is payable in respect of the period after the tender should be at the penal rate of 11.5% over LIBOR rather than 8% over LIBOR.

The effect of a tender by a mortgagor on the running of interest

130. There are a number of decisions and dicta which support the proposition that, if the mortgagee refuses a valid tender of all that is owing, the principal remains outstanding and interest continues to accrue under the mortgage, unless, after the tender, the mortgagor sets what is due aside for the mortgagee. The cases in question are *Lutton* v *Rodd* (1675) 2 Chan Cas 206, *Gyles* v *Hall* (1762) 2 P Wms 377, *Bank of New South Wales* v *O'Connor* (1889) 14 App Cas 273, 283-4, *Kinnaird* v *Trollope* (1889) 42 Ch D 610, 617-618, *Edmondson v Copland* [1911] 2 Ch 301, 310, and *Barratt v Gough-Thomas (No 3)* [1951] 2 All ER 48, 49-50.

131. The proposition is perhaps most authoritatively and clearly laid down in the judgment of the Board given by Lord Macnaghten in *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273, 283-284 in these terms:

> "No doubt it is the duty of the mortgagee, on proper notice, or without notice where notice is not required, to accept a proper tender. … If a

> mortgagee rejects a tender he rejects it at his own risk … . Further, a proper tender will stop the running of interest if the mortgagee keeps the money ready to pay over to the mortgagor: *Gyles v Hall* (1762) 2 P Wms 377. But there is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie."

132. This proposition is challenged by CH and CFI, who cite a number of cases which are said to support a different conclusion, namely that the refusal of a valid tender by the mortgagee will stop interest running, without the mortgagor also having to put the money on one side. The cases on which they rely are *Manning v Burges* (1663) 1 Ch Cas 293, *Hunter v Daniel* (1845) 4 Hare 420, *Lord Midleton v Eliot* (1847) 15 Sim 531, *Thornton v Court* (1853) 3 de G M & G.293, *James v Rumsey* (1879) 11 Ch D 398, *Webb* v *Crosse* [1912] 1 Ch 323, and *Chalikani Venkataryanim v Zamindar of Tuni* (1922) 50 LR Ind App 41. In my view, none of those cases call the proposition that the mortgagor must also put the money on one side into question, a view which is supported by the careful analysis by the New Zealand Court of Appeal in *Devon Nominees v Hampstead Holdings Ltd* [1981] 1 NZLR 477, 482-485.

133. *Manning* is of no assistance to CH and CFI: it is apparent from the very short report that the mortgagor had the money available, as he offered it to the mortgagee. In *Midleton*, in *Thornton* and in *James*, the mortgagor had what amounted to a counterclaim due to the mortgagee's loss of the title deeds, and they take the issue no further: in each case the mortgagor was compensated by not having to pay interest due to the "wilful" or negligent breach by the mortgagee of its duty. I also note that in *Midleton* it was expressly conceded that the mortgagor had the money available, and that may have been the position in the other two cases as well.

134. *Hunter* was not concerned with the issue which arises here, as is clear from the summary of the argument and cases cited at 4 Hare 420, 427. The only point relevant to the issue of tender is Wigram V-C's statement that a mortgagor need not "make a formal tender where … it appears that the tender would have been a mere form and the party to whom it was made would have refused to accept the money". But that does not go to the question of whether the money should be kept available.

135. In *Chalikani*, the issue was whether the mortgagor could justify dispensing with a tender, and, as it could not, the issue of the money not being available was irrelevant. In *Webb*, the issue was whether the conditional tender could be relied on, and it could not, at least without time being given to the mortgagee, so, once again, the issue of the money not being available was irrelevant. The most that can be said about these two cases in favour of the argument advanced by CH and CFI is that it appears that the mortgagee did not take the point that, even if a tender could be dispensed with or was effective, the money was not kept available by the mortgagor. But that is of no great weight, especially as the mortgagee did not need to take the point, because it

succeeded in each case anyway. It may be worth observing in passing that the Board in *Chalikani* approved the dictum in *Hunter* quoted in para 134 above, on the basis that the mortgagee could, expressly or impliedly, give "a release to the mortgagor from his obligation of making a tender of the money".

136. The notion that the money has to be set aside if the tender is to stop interest running appears to me to accord with principle and with commercial fairness, as explained by Joyce J in *Edmondson* [1911] 2 Ch 301, 310, in these terms:

> "I think it clear that, even after tender improperly refused, it would be unreasonable that the mortgagor should have and make full use of the mortgagee's money without paying any interest. On the whole I think that, in order to avoid payment of interest after tender improperly refused, the mortgagor must either pay the money into Court, if there be any proceedings in which that could be done, or keep the money ready, and either make no profit, or, if he make profit - eg if he get interest by placing the money on deposit - he must account for such profit to the mortgagee."

137. In the present case, of course, the tender was made after ATT had appropriated the shares. Nonetheless, it appears to me that there is a powerful argument along the following lines (the quotes coming from *O'Connor*):

i. The grant of the relief which CH and CFI are seeking is, as explained above, predicated on the proposition that the terms of the contract are continuing in force, or at least are to be treated as continuing in force, so far as the loan of $1.35bn, and any interest payable thereon are concerned;

ii. Accordingly, CH and CFI say that they tendered the total sum due under the contract on 25 May 2007, after giving five business days notice in accordance with the contract, and that it was ATT's "duty … to accept [such] a proper tender";

iii. Given the tender of 25 May 2007 and the fact that $1.5bn was "[kept] ready to pay over to the mortgagee" in the Namrun account until 25 May 2010, CH and CFI say that they "stop[ped] the running of interest" for that three year period.

138. There is obvious attraction in the argument that, if ATT can rely on the point that the terms of the contract run from 27 April 2007 to today, so as to be able to rely on the contractual interest provisions, CH and CFI should be able to rely on the same point, in order to validate their tender and keeping ready the money, so as to avoid having to pay interest in accordance with those provisions. However, ATT has, as I have mentioned in para 129 above, three counter-arguments.

ATT's contention that the amount tendered was too little

139. ATT's first argument is that the amount tendered by CH and CFI on 25 May 2007 was in fact not quite enough. It is common ground that there was a shortfall owing to two factors, (i) an accidental omission of one day's interest when calculating the tendered sum as explained by the majority at para 54, and (ii) the fact that the tender did not include any sum to compensate ATT for its costs. The shortfall was not an inherently tiny figure, but it was an almost vanishingly small proportion of the total sum due. Tempting though it is to do so, however, one cannot properly characterise, and then dismiss, that figure as *de minimis*.

140. However, at the time that the sum of $1,446,824,709.42 was tendered, not only CH and CFI, but also ATT believed that it was the right sum. Indeed, they have subsequently conducted this litigation over the past six years on that common assumption, as recorded for instance in Bannister J's judgment of 22 July 2010, and in ATT's own statement of case to the Board. It was not until the exchange of written submissions following the judgment of the Board on 30 January 2013, that ATT apparently first realised that the amount tendered fell short of what was in fact due, and that the tender did not include anything by way of ATT's costs.

141. If that common assumption had not been made, and ATT had been aware of the correct sum at the time of the tender, ATT would, I think, have been bound to point out the position to CH and CFI, following which it is very likely indeed that CH and CFI would have promptly corrected any mistake by tendering the correct amount. In any event, I consider that, as both parties have conducted their affairs, and in particular these proceedings, for nearly six years on this common assumption, it would be wrong for ATT now to be permitted to resile from it. It is unnecessary to decide whether this conclusion could be based on estoppel by convention, because, even assuming that CH and CFI cannot invoke an estoppel, I consider that, as a matter of discretion, it is simply too late to permit ATT now to take the point.

142. In *Ketteman v Hansel Properties Ltd* [1987] AC 189, the House of Lords upheld a decision to refuse a defendant's application to amend a defence to raise a limitation defence during closing speeches at trial simply on the ground that it was too late. ATT's attempt to raise the argument that the tender was for too small a sum (i) is made even later than the limitation argument in *Ketteman*, namely after the main hearing of a second and final appeal, (ii) does not simply involve raising a new point, as in *Ketteman*, but involves ATT resiling from what has hitherto been express common ground between the parties, and (iii) involves a point which could have been raised not only in its statement of case in these proceedings, as in *Ketteman*, but at the moment the tender was made.

143. Quite apart from that argument, within a short time of the tender, ATT was aware that money had been set aside by or on behalf of CH and CFI in the Namrun account on the same day as the tender was made. That money was available for ATT to accept at any time for the purpose of repaying what was owing under the contract, and it had been set aside for that purpose by or on behalf of CH and CFI between 25 May 2007 and 25 May 2010.

ATT's contention that the money in the Namrun account was not put aside

144. ATT contends that the money left in the Namrun account did not satisfy the requirements of the passage cited in para 131 above from *O'Connor.* This point appears to be largely reliant on the fact that the account was that of Namrun, not CH or CFI, and that Namrun was not in any way controlled by either of them. I am unimpressed by that argument. All three companies were members of the Cukurova group, and it is clear on the evidence that the account was opened and maintained to enable ATT to be repaid what was owing under the contract.

145. Nor does the fact that interest earned on the money in the account was taken by Namrun undermine the ability of CH and CFI to contend that the money had been put aside. I would accept that, if CH and CFI succeed in avoiding having to pay interest while the Namrun account was in funds, then, subject to any relevant set-offs or other arguments, ATT would be entitled to receive that interest – see the observation of Joyce J quoted in para 136 above.

146. The only point which can be validly made by ATT on the particular facts relating to the Namrun account is that the money ceased to be in that account from 25 May 2010. In the light of that fact, it would seem to me (and I understood it to be conceded by CH and CFI) that it would follow that if contractual interest stopped running on 25 May 2007, because of the tender and the opening of the account on that day, it would start running again from 25 May 2010.

Was the tender ineffective because ATT had appropriated the shares?

147. The next argument which ATT runs is that it is unfair and wrong in principle to penalise it for refusing a tender at a time when it was entitled to do so. As was made clear in the passage cited in para 131 above from *O'Connor*, the principle relied on by CH and CFI is based on the proposition that the mortgagee is under a duty of some sort to accept an offer of repayment. However, at the time of the tender made by CH and CFI and the keeping of the money in the Namrun account, it is contended that there was no such right in CH and CFI, because ATT had lawfully appropriated the shares and was entitled to refuse to redeem them, and therefore entitled to refuse the tender. On this basis, ATT's case is that any obligation to accept the tender only arose

when this court decided that CH and CFI were entitled to claim relief – or even only when the terms imposed on CH and CFI are complied with.

148. I have reached the conclusion that, if CH and CFI are granted the relief which they seek, then, unless a condition is imposed to negative this result, the tender on 25 May 2007 and the subsequent holding of the money in the Namrun account would be effective to stop interest running in favour of ATT from 25 May 2007 to 25 May 2010, pursuant to the principle stated in *O'Connor*, notwithstanding the fact that the shares had been validly appropriated on 27 April 2007. There are two possible bases on which this conclusion can be justified as a matter of principle.

149. The first basis is that the effect of our decision at [2013] UKPC 2 is that equity has at all times since their default regarded CH and CFI as having had the right to redeem notwithstanding the appropriation of the shares. Accordingly, it would logically follow that, in the eyes of equity, CH and CFI were entitled to tender what was owing under the contract, even after ATT's appropriation of the shares, and that ATT were accordingly obliged to accept the tender made on 25 May 2007.

150. The argument to the contrary is founded on the proposition that, so long as the court had not accorded CH and CFI the relief they seek, ATT had an inalienable right in law to retain the shares and was therefore entitled to refuse the tender. However, that argument seems to me comprehensively to overlook the basis upon which equity, which of course prevails over the common law, has long approached mortgages and the rights of mortgagors. Until statute intervened in 1925, the common form of mortgage conveyed the land to the mortgagee subject only to a proviso for redemption within a specified period (normally six months). That date, the legal redemption date, would almost always pass (and was normally intended by the parties to pass) without repayment, so that the land would then belong absolutely to the mortgagee as a matter of common law (see *Cheshire and Burn*, *op cit*, p 799). Even so, as explained in paras 71-81 above despite the land having become the absolute property of the mortgagee in the eyes of common law, the Court of Chancery invariably recognised the mortgagor's right to redeem, which carried with it the consequences described in *O'Connor*. Accordingly, the notion that the principle enunciated in *O'Connor* cannot apply where the secured property has become the inalienable property of the mortgagee in the eyes of the common law is, on analysis, inconsistent with the whole basis upon which equity has treated mortgages and mortgagor's rights.

151. The second basis for my conclusion is that the effect of granting CH and CFI the relief they seek is that the contractual rights of the parties, so far as repayment of principal and payment of interest are concerned, are to be treated as if they had been continuing since 25 May 2007. (It matters not for this purpose whether they are treated as (i) never having been discharged or (ii) having been discharged and

retrospectively revived). As already mentioned, ATT relies on this proposition to justify its claim for interest at the contractual rate, and it seems unattractive, indeed illogical, for ATT to argue that this is the position so far as the running of interest is concerned, but it is not the position so far as a tender of the interest (or the principal) is concerned. If interest is to be calculated on the assumption that the $1.35bn was due from the mortgagor on 25 May 2007, it is hard to see as a matter of consistency how it can be said that a purported tender of the $1.35bn and interest by the mortgagor on that day was ineffective.

152. In my view, this conclusion is consistent not only with the approach of equity and the logic of ATT's correct argument on interest, but also with practical reality. If a mortgagor is going to be held by the court to be entitled to redeem on certain terms, it seems consistent with commercial sense that the law should encourage the mortgagor to offer, and the mortgagee to accept, the very terms which the court would impose, without the cost and delay of court proceedings. Further, the principle described in *O'Connor* and *Edmondson* is presumably based on the premise that it is wrong that a mortgagee should be able to force a mortgagor, who has the money put aside, to carry on paying contractual interest after it has made a valid tender of all that is due. It may, at least in many cases, be equally wrong for a mortgagee, who has appropriated the security, to be able to force a mortgagor, who has tendered the sum which would be ordered by the court and has then put that sum aside, to carry on paying interest at the contractual rate, while pursuing its claim for relief through the courts.

153. The fact that the principle described in *O'Connor* applies is not, however, the end of the matter. As I see it, it is open to ATT to contend that, as a term of granting to CH and CFI the relief which they seek, a condition should be imposed that the principle should not apply. I see the issue this way because equity would not give effect to an equitable right if it was inequitable to do so: accordingly, where it would be inequitable simply to give effect to an equitable right, equity would either refuse to accord the relief, or would only do so on terms. Thus, relief from forfeiture would not be accorded to a lessee if it unfairly prejudiced the lessor, unless the lessee accepted terms which removed that prejudice. It was this principle which dictated the Court of Appeal's decision in *Bland* [2002] Ch 177 that relief from forfeiture should be granted to the lessee but only on terms that he accepted that the lessor was entitled to a rent review which he had not operated during the time that the lease was forfeited.

154. In effect, therefore, ATT's contention is that CH and CFI should only be entitled to redeem on terms that the tender on 25 May 2007, and the subsequent holding of the money in the Namrun account, cannot be invoked against ATT as a reason for concluding that no interest need be paid in respect of the three years from 25 May 2007.

155. In my view, that contention should be rejected. I start with the proposition (which is the foundation of my acceptance of ATT's case for saying that it is entitled to interest at the contractual rate) that the effect of granting CH and CFI the relief they seek simply involves confirming, and giving effect to, their equitable right to redeem, and treating the $1.35bn as if it was owing at all times since 27 April 2007. It does not seem to me that it would be just in all the circumstances to impose a term on CH and CFI that they should only be entitled to benefit from that right on terms that the effectiveness, for the purposes described in *O'Connor*, of the tender and keeping of the money in the Namrun account for three years, is negatived. It would not, in other words, be unjust to require ATT to take the consequences, in the form of validation of the tender and the keeping of the money in the Namrun account, of the grant to CH and CFI of the relief that they seek.

156. As already explained, I do not accept that, from the point of view of equity, at the time that it refused the tender, ATT was entitled to refuse to permit CH and CFI to redeem the shares by paying what they owed. However, I readily accept that the refusal was more understandable than if ATT had not appropriated the shares. Nonetheless, given the case-law discussed at [2013] UKPC 2, paras 87 and 93-4, and at paras 71-81 above, it should have been obvious to ATT that it was very likely that CH and CFI would be held by the court to be entitled to redeem. Accordingly, there was always a real possibility that the tender would turn out to have been valid and effective. Furthermore, given that it is ATT's case that its contractual right to interest should be treated as running over the six years between April 2007 and the present, there is obvious justice in (i) the tender made in that period to ATT, and (ii) the $1.5bn in the Namrun account during that period, being treated as effective.

157. Further, the tender of all that was due to ATT was made by CH and CFI only very shortly after ATT appropriated the shares (namely on 25 May 2007), and CH and CFI began proceedings in court based on the tender very promptly (also on 25 May 2007). It is true that CFI and CH only formally sought relief from forfeiture in May 2008, but, by issuing the tender proceedings on 25 May 2007, and by thereafter pursuing those proceedings (as well as by maintaining the $1.5bn in the Namrun account), CH and CFI made it clear beyond doubt to ATT that they were intending to redeem the shares if they could do so. In other words, ATT refused to accord to CH and CFI the relief which they were plainly and (at least initially) speedily seeking, and to which it knew or should have known that the court would be very likely to conclude that they were entitled.

158. The only reason ATT refused the tender, and resisted the redemption claim, was because of its determination to retain the shares if it possibly could do so, in accordance with its consistent approach, as described at [2013] UKPC 2, paras 19-20. Indeed, ATT played a far from passive part in this connection, and its unattractive behaviour in that connection is described at [2013] UKPC 2, paras 23-26 and 71-72.

159. CH and CFI then promptly applied for a determination that the tender was effective (and, a year later they extended and clarified their case by adding a claim for relief from forfeiture). They also sought to protect themselves by paying $1.5bn into the Namrun account. The only logical purpose for this was to protect themselves against interest running at the default rate under the contract on the sum owed to ATT. In taking that course, CH and CFI were taking a risk, namely that the expensive exercise of raising and maintaining in an account the $1.5bn would be ineffective to invoke the principle identified in *O'Connor*. However, by refusing the tender and letting the money languish in the account, without taking up the opportunity of accepting it, ATT was also taking a risk, namely, that the court would grant CH and CFI the relief they were seeking, with the possible consequence that ATT's right to interest under the contract would be lost.

160. It is only fair to ATT to say that its solicitors at one point wrote to the solicitors acting for CH and CFI, enquiring whether they might discuss an alternative to the $1.5bn remaining in the Namrun account, and that this approach was brusquely rejected. I do not consider that this helps ATT's case much, as it was not suggesting that the shares might be redeemed, merely that a less expensive alternative to keeping the money in the Namrun account might be agreed. The losers in not taking up the proposal may well have been CH and CFI: had they been more receptive, (i) a less expensive alternative to maintaining the Namrun account may well have been found, thereby saving them money up to 25 May 2010, and (ii) they may have been able to maintain that alternative beyond 25 May 2010, thereby enabling them to avoid paying interest in respect of the period after that date. Whether that is right or wrong, in relation to the issue which we have to decide, the point goes nowhere.

161. In my view, therefore, ATT's attitude and behaviour was such that equity should not assist it by imposing a term on CH and CFI preventing them from relying on the principle enunciated in *O'Connor*. It is not merely because those who live by the sword cannot complain if they die by the sword. In the light of the history of this case, as briefly summarised in paras 64-68 above, it would be more unjust for CH and CFI to have to pay two tranches of interest (one on the $1.5bn, the other under the contract) for the three years that the Namrun account was open, than it would be to deprive ATT of interest under the contract for that period.

The rate of interest from 25 May 2010

162. The final issue raised by CH and CFI is that the interest payable from 25 May 2010 should not be at the rate of 11.5% over LIBOR, but 8% over LIBOR. ATT's argument that the higher, default, rate is appropriate because, once the payment which fell due in 2007 was not made, CH and CFI were in default and remained in default thereafter notwithstanding the tender, has a certain logical coherence. However, it appears to me that, once the whole amount owing was tendered in

circumstances in which it should have been accepted by ATT, it would be wrong, both as a matter of ordinary language and as a matter of commercial reality, to treat CH and CFI as being in default under the terms of the contract, at least unless some subsequent fresh act of default occurred. To put the point another way, once ATT had wrongly rejected the tender of what was due under the contract, I consider that the causative reason that the $1.5bn was not repaid was ATT's rejection of the tender not the anterior failure of CH and CFI to repay on the due date. Accordingly, it does not seem to me that, once it had rejected the tender, ATT was thereafter entitled to treat CH and CFI as being in default.

163. I reach this conclusion simply as a matter of interpretation of the contract. As explained above, the contract, as implemented in accordance with equitable principles, entitled CH and CFI to redeem after the contractual date for repayment has passed. That does not mean that they are not to be treated as being in default for the purpose of the penal rate of interest being triggered once the contractual date for payment has passed (see *Raineri v Miles* [1981] AC 1050, 1092G, per Lord Fraser of Tullybelton). However, I cannot accept that this means that the default must be treated as continuing after the whole amount due has been tendered and wrongly refused. Default provisions must be interpreted narrowly, and clear words would be required before the contract had such a harsh effect.

The commercial realities

164. Before concluding, it is convenient to explain the commercial fairness of the approach which I favour adopting in this case.

165. So far as the facts are concerned, the position is that, for some six years, CH and CFI have owed around $1.5bn to ATT, which has had security in the form of the shares. It is true that ATT had appropriated the shares, but it was unable to do much with them, not least because of an interlocutory order obtained by CH and CFI. It is also true that CH and CFI were claiming to redeem the shares, but, if the value of the shares had plummeted, no doubt that claim would have been abandoned. Given that ATT's position over those six years has been very similar to its position under the contract when it was agreed, namely a creditor of CH and CFI with the security of the shares, it seems scarcely uncommercial that the interest payable should be that agreed under the contract. Indeed, given that CH and CFI had undoubtedly defaulted, it could be said to be scarcely uncommercial if interest was payable at the default rate agreed under the contract.

166. Of course, if CH and CFI had produced evidence to show that they could have borrowed $1.5bn from a third party during that period at a rate significantly lower than 8% above LIBOR that argument would have less force. However, no such

evidence was produced at any stage of these proceedings – not even after the judgment of the Board earlier this year, before the hearing giving rise to this judgment. In the absence of such evidence, the presumption of continuity suggests that the contractual rate they agreed to pay ATT is still the appropriate market rate.

167. If CH and CFI had shown that they had been able to borrow at a significantly better rate than 8% above LIBOR, say 3% above LIBOR, in the period 2007-2013 (or 2010-2013), then it may very well be that the correct conclusion would be that they should only be obliged to pay interest at 3% above LIBOR to ATT, rather than 8% above LIBOR. This would, I think, give rise to an unresolved point of law. As already explained, the principle embodied in *O'Connor* means that, at least from 25 May 2010, CH and CFI are liable for interest at the contractual rate. However, it appears to be an unresolved question whether they could contend that they had a counterclaim in equity for the loss they suffered from not being able to refinance the loan at a better interest rate due to ATT's wrongful refusal to accept the tender in May 2007. If this argument was right, then the counterclaim would have the effect of abating the interest payable to ATT from 8% above LIBOR to 3% above LIBOR.

168. I do not propose to discuss this point further, as it does not arise on the facts, and was not developed before the Board in any detail. However, in the light of the cases referred to in paras 130 and 132 above, it is a point which is clearly well arguable either way and it has obvious commercial attraction. It may be that it would be met, on the facts of this case, by the contention that the delay since May 2010 has been attributable to the fact that CH and CFI were taking bad points in these proceedings, and therefore they should not be entitled to what amounts to an abatement in the interest payable.

Conclusion

169. In these circumstances, I conclude that:

i. ATT is right in its contention that, subject to conclusion (ii), the terms on which CH and CFI should be entitled to redeem must involve interest being payable on the $1,421,254,218.75 although, save for the period between 17 April and 25 May 2007, it should not be at the default rate of 11.5% above LIBOR as sought by ATT, but at the contractual rate of 8% above LIBOR until payment, but
ii. CH and CFI are right in their contention that they should be treated as having made a valid tender and kept what was due as free money, so that interest was stopped running between 25 May 2007 and 25 May 2010, so that

iii. CH and CFI should be entitled to redeem the shares on terms that they pay to ATT the sum of $1,421,254,218.75 together with (a) interest on that sum at the default rate of 11.5% over LIBOR from 17 April to 25 May 2007, and (b) interest on that sum at the basic contractual rate of 8% over LIBOR, with annual rests, from 25 May 2010 until payment, but (c) with no interest in respect of the period between 25 May 2007 and 25 May 2010.

170. It seems to me that these conclusions not only accord with principle, but they are also commercially sensible. As to conclusion (i), I have already explained at paras 162-163 why it seems right that CH and CFI should pay interest at the contractual rate to ATT. There should be no question of a default rate after the sum due was tendered to ATT and rejected, as it is unreal to treat CH and CFI as having been in default after that date. It can be said with force that, if anyone was in default after 25 May 2007, it was ATT.

171. As to conclusion (ii), the notion that a mortgagee can refuse to accept a valid tender of the amount due under the mortgage and then demand not only repayment of the capital, but interest for the period following refusal is understandable, as the mortgagor continues to borrow and enjoy the use of the mortgagee's money. If, however, after tendering the money owed, the mortgagor places it into a bank account, one can well see why its liability for interest should cease. It either has had to borrow that money (in which case it should not have to pay interest twice) or the money is the mortgagor's (in which case it is foregoing using the money). The mortgagee only has itself to blame if it does not take the money.

172. It would seem to follow, however, that, as Joyce J said in *Edmondson* [1911] 2 Ch 301, 310, if the mortgagor earns interest on the money in the account, the mortgagee would be entitled to that interest, subject to set-offs and other arguments which might arise on the facts of the case. However, that aspect was not the subject of any submissions, and it may well be because ATT accept that no such entitlement could arise here, because, setting up and maintaining the Namrun account for three years was a very expensive exercise.

173. In this case, it is true that the tender and the maintaining of the money in the Namrun account took place after ATT had appropriated the shares. However, as explained in paras 153-158 above, it is not unjust on the facts of this case for the tender and the maintaining of the money in the account to have the effect described in *O'Connor*.

174. As to conclusion (iii), it follows from conclusions (i) and (ii). It is commercially sensible given that CH and CFI had the use of the money which ATT

had advanced to them at the contractually agreed rate of 8% above LIBOR secured on certain shares, and there is no reason on the evidence to doubt that this did not remain an appropriate rate for the borrowing to continue by CH and CFI with the same security. No evidence was produced to show that this was an inappropriately low, or indeed an inappropriately high, rate of interest.

175. Finally, I should add that I have read in draft the judgment of Lord Sumption, and I agree with his views, which, while more trenchant in expression and more focussed in content, appear to me to be at one with my own.

LORD SUMPTION

176. In this case, the Board has unanimously held that the borrower is entitled to relief from forfeiture, and is agreed about the financial consequence which should follow in this case. But they have arrived at their views about the financial consequence by different legal routes. One might think that a theoretical difference with no practical impact on the result in this case was hardly worth note of dissent. But the issue is of some general importance, because the majority's analysis is capable of producing results in other cases which would be both unjust and contrary to principle. I therefore propose to explain, albeit briefly, why I agree with the analysis of Lord Neuberger.

177. It is convenient to begin by identifying the exact points on which the Board's members are agreed and those on which they are divided. The Board is agreed that on 27 April 2007, a number of events of default had occurred and the entire loan had become payable under an acceleration clause. The Board is also agreed that the lender was entirely within its legal rights in appropriating the security to discharge the loan on that date. Finally, the Board is agreed that interest should run at the standard contractual rate of 8% over LIBOR (not the default rate of 11.5% over LIBOR).

178. The underlying difference of principle can be shortly stated. The majority believe that when the shares were appropriated to the payment of the debt on 27 April 2007 the debt was irrevocably discharged and all the contract terms relating to it came to an end. They will not be revived upon relief from forfeiture being granted. It follows, in the majority's view, that the question what the borrower must pay to get relief from forfeiture cannot depend only on the contract. The terms of relief are at large, and the contract is merely one factor in the exercise of a broad forensic discretion, albeit a weighty and usually conclusive one. It is on the basis of this discretion that the majority have held that interest should not run during the three-year period when the money was on deposit in the Namrun account.

179. The minority consider that it is fundamental to the equitable jurisdiction to relieve from forfeiture that equity relieves on the ground (i) that the forfeiture of the borrower's property for what may be a trivial and rectifiable breach is penal, (ii) that the true intention of the parties is that the property should stand as a security only, and (iii) that the borrower is in principle entitled to redeem the charge over his property even after the security has been enforced. What equity does not do, in the minority's opinion, is relieve from the other terms of the contract which are not penal. It follows that those terms of the contract determine what the debtor must do if he is to be relieved from the forfeiture. No one suggests that the terms fixing the rate of interest or the other obligations of the debtor are penal. Therefore equity has no discretion to modify their operation. The reason why, in the minority's view, the payment of interest was suspended during the period when the money was on deposit at the disposal of the lender is nothing to do with the exercise of any discretion as to the terms on which the borrower should be relieved from the forfeiture. It is that by rejecting the tender the lender was refusing to allow the borrower to redeem. That refusal was unjustifiable because it was always likely that the borrowers would be held by the court entitled to redeem, albeit late, as indeed it has now done. The principle is the same as the one which at common law would suspend the running of interest after a valid tender of an outstanding debt, followed by the setting aside of the money in a segregated fund.

180. This theoretical difference matters, because if it is accepted that the terms on which the debtor is required to repay the loan as a condition of being relieved depend on the discretion of the court and not on the mere terms of the contract, then it must follow that the court could grant relief from forfeiture without requiring the debtor to pay the full amount of the outstanding principal or contractual interest, or perform his other contractual obligations. This is not a power which I regard the court as possessing. Lord Neuberger has already fully analysed the principles engaged and the authorities supporting them. I gratefully adopt that analysis, without repeating it, and merely identify here the main factors which seem to me to be decisive in its favour.

181. First, the analysis of the majority means that a borrower can in principle be relieved from the forfeiture of his security and allowed to redeem it, without rectifying the breach of contract which justified the forfeiture at law. This is completely contrary to the fundamental principles on which equity acts in these cases. The whole basis of the jurisdiction to relieve from forfeiture is that the charge is no more than a security for the payment of the contractual debt. Equity relieves from the penal consequences of the strict enforcement of time limits, provided that the borrower satisfies the purpose of the security by paying the contractual debt, albeit late. For this purpose, contractual interest is as much part of the contractual debt as the principal.

182. Second, no one is suggesting that modern principles of equity require that after the debt was discharged by the appropriation of the security it should continue to exist in some "parallel equitable world". Either the effect of relief from forfeiture is

retrospectively to revive the debt; or the court proceeds by analogy with the situation as it would have been if the debt had always been outstanding. For my part, I have no doubt that the former is the correct analysis. Relief from forfeiture necessarily operates to undo retrospectively something which has been lawfully done. If equity retrospectively sets aside the appropriation of the security to the debt, which it plainly does, then it necessarily follows that the discharge of the debt is also set aside. This follows because the appropriation was what had previously discharged the debt and that has now been retrospectively reversed. I am not impressed by the rather technical argument that the payment of the debt precedes the setting aside of the appropriation, because the former is a precondition to the latter. The reality is that the entire contractual debt is paid in exchange for the setting aside of the appropriation, as a condition of the borrower getting the relief. You cannot have one without the other. The exact sequence is a matter of procedural mechanics, and not of principle. For these reasons, what the borrower must do to get relief is pay the contractual debt (including contractual interest) and perform all the other intervening enforceable obligations. He cannot be allowed to offer some substitute performance devised as a matter of discretion by a judge. This is not simply what courts of equity have generally insisted on. It is what they have always insisted on, because the principle which they are applying can justify no other course.

183. Third, in spite of the copious citation of authority in the judgment of Lord Mance, no one has been able to find a single case which either justifies or illustrates the principle that the majority has adopted in this case. On the contrary, all the relevant statements of principle are against it and have to be explained away. As to the material said to be consistent with their approach, I comment briefly as follows:

(1) No assistance is to be gained from the fact that before 1730 the court, when relieving a tenant from the forfeiture of a lease of land, ordered the grant of a new lease on the terms of the old. The law was changed by section 4 of the Landlord and Tenant Act 1730 (now section 212 of the Common Law Procedure Act 1852), which provided that upon relief from forfeiture being granted the old lease should be treated as subsisting. But this does not mean that in cases not involving the forfeiture of leases the underlying obligation is irrevocably extinguished upon the forfeiture. The special treatment of leases before 1730 was due to the technicality that the landlord's re-entry upon the leased land extinguished the tenant's legal estate by uniting it with the superior title. A court of equity was thought to have no power to reverse the extinction of a legal estate. With a mortgage, the position is different. All that the court needed to do was to revive the equity of redemption, which, being a creation of equity, it was able to do without a statute. The Act of 1730 merely assimilated the position in cases involving leases to the position which obtained generally when the court relieved from forfeiture.

(2) *Hyman v Rose* [1911] 2 KB 234 and [1912] AC 623 was a case about the forfeiture of a lease for breach of a repairing covenant, in which the question arose whether the tenant should be required as a condition of relief to reinstate certain alterations which had been made to the premises. They offered to set aside a fund to pay for all the reinstatement works. The House of Lords ultimately made the performance of that offer a condition of relief because, although it held that there was in fact no contractual obligation to carry out the works in question, there were other admitted breaches of the covenant which did need to be put right: see [1912] AC 623, 632 (Lord Loreburn LC). Both Cozens-Hardy MR in the Court of Appeal and Lord Loreburn in the House of Lords referred to the wide discretion of the court to impose terms *on the tenant*. The same is true of all the other judicial observations about the breadth of the court's discretion upon relief from forfeiture. However, equity has never purported to impose terms on the landlord or a mortgage lender who has forfeited the lease or the security in accordance with his legal rights.

(3) In *Associated British Ports v C H Bailey plc* [1990] 2 AC 703, Lord Templeman (with whom the rest of the House agreed) accepted that it would be open to a judge granting relief from the forfeiture of a lease not to require the tenant to make good dilapidations at a cost of £600,000, when the premises were at the end of their useful life and the damage occasioned to the reversion by the dilapidations was only £3,500. But the House was not suggesting that the court could relieve the tenant from the repairing covenant, even in part. It was merely recognising that the repairing covenant was not a specifically enforceable obligation and that on the assumed facts the breach of it would be fully compensated by a payment of damages.

(4) *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171 is a case about the relationship between the court's statutory discretion on costs and a contractual provision dealing with the same matter. It has nothing to do with the issue on which the Board is divided.

184. Fourth, it is sometimes said that when fixing the terms of relief from forfeiture the court will generally endeavour, so far as it can, to put the parties back in the position that they would have been in had the forfeiture not occurred. Thus, where equity relieves from the forfeiture of a lease, the tenant must not only pay the arrears of rent but the additional rent which would have accrued had a rent review occurred in the intervening period: see *Bland v Ingrams Estates Ltd (No 2)* Ch 199 at paras 14-15. It is, however, important to appreciate what the court is doing in these cases. It is simply treating the parties on the footing that the debt is now being paid late. It therefore replicates retrospectively the contractual situation which they would have been in had the parties' rights and obligations subsisted throughout the intervening

period. What the court cannot do is treat the lender's obligations as abrogated, and then reinstate them only in part so as to compensate the borrower for the fact that the forfeiture has deprived it of the opportunity to repay the debt earlier. It cannot do that for two reasons. One is that forfeiture was not a wrong calling for compensation but an entirely lawful act. The other is that on the footing that the discharge of the debt has been retrospectively reversed by setting aside the appropriation, the lender has been out of its money throughout the intervening period.

185. Fifth, although the majority regard the minority's view as being founded on an "assumption of unremitting default from the appropriation to the time when relief takes effect under court order", the reality is that it is not an assumption but a fact. The lender in this case is being required to surrender the shares taken as security in lieu of payment of the debt. The lender is therefore being put in a position where he has not been paid any part of an undischarged contractual debt for six years. He will accordingly have borne for six years the credit risk for which under the contract he was entitled to the benefit of all the borrower's covenants. Not only were the contractual covenants the agreed price of the financial accommodation, but they are the only evidence before this court of the real value of that accommodation to the Cukurova group. That is because one must assume that if the group had been creditworthy enough to be capable of borrowing on more clement terms it would have done so. It is right to add that in addition to running a credit risk, the lender has run a significant equity risk. The borrower can be expected to seek relief from forfeiture only because the shares are worth more than the debt which it will have to repay as a condition of the relief. But if the value of the shares had fallen below the amount of the debt, the borrower would have been entitled to abandon its claim for relief from forfeiture and walk away, leaving the lender with its loss.

186. Sixth, none of these points takes account of the tender made on 25 May 2007 and the deposit maintained for three years after that. But that is an important consideration, for the lender cannot in these circumstances expect to receive interest in respect of that period. This is not by virtue of any discretion enjoyed by a court of equity to fix the terms of relief from forfeiture. It is due to the combination of (i) the borrower's continuing equitable right, notwithstanding the appropriation, to redeem the security, and (ii) the ordinary operation of the common law rule that a good tender stops the running of interest on a debt. Once relief from forfeiture is granted, the security must be treated as never having been appropriated and therefore the debt as never having been discharged by that appropriation. It follows that an earlier tender by way of discharge of the debt may be treated as a good tender, unless the court imposes a term on the borrower preventing him from relying on that fact. By refusing to allow the borrower to redeem the security on the ground that the debt had already been discharged by appropriation, the lender took the risk that the court might subsequently set aside the appropriation. That risk has now materialised. True, it might perhaps be said that the running of interest should be stopped not just for the three years when the money was set aside, but indefinitely, on the ground that if the lender had accepted the tender in May 2007 no interest would have accrued at any time thereafter. The reason

why the common law does not contemplate that result is the long-standing principle that to stop the running of interest, the money must not just be tendered but held available thereafter if it is rejected. The borrower is not expected to pay interest to the lender at a time when it is also bearing the cost of financing the fund which the lender has declined to accept. For these reasons it is quite unnecessary to assert a jurisdiction to remake the parties' agreement about interest at the discretion of the court, in order to do justice in this case. The common law rules about tender and the correct analysis of the effect of relief from forfeiture achieve substantial justice without going to the extreme of rewriting the relevant principles in a way which undermines the certainty of the law and the enforceability of contracts. As this case demonstrates.

187. Finally, it cannot be assumed that so radical a break with basic principle will be accepted in other common law jurisdictions. The consistency of these principles among the jurisdictions which apply them is of great value to all of them, and calls for a degree of caution in the way that the law is developed.

[2013] UKPC 25
Privy Council Appeal No 0023 of 2012; No 0024 of 2012

JUDGMENT

(1) Cukurova Finance International Limited (2) Cukurova Holdings A.S. (Appellants) *v* Alfa Telecom Turkey Limited (Respondents)

From the Court of Appeal of the British Virgin Islands

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT DELIVERED ON

29 July 2013

Heard on 23 July 2013

Appellant	*Respondent*
Kenneth MacLean QC	Iain Milligan QC
Arabella di Iorio	Thomas Raphael
James Nadin	
David Caplan	
(Instructed by White & Case LLP)	(Instructed by Hogan Lovells International LLP)

JUDGMENT OF THE BOARD:

1. This is the fifth judgment of the Board in a long-running legal battle, which started as long ago as 2007, over the control of Turkey's largest mobile telephone company. It is concerned with an application to vary the terms on which relief from forfeiture was recently accorded.

The facts

2. The relevant factual background is set out in paragraphs 15-31 of the Board's first judgment ([2009] 3 All ER 849), paragraphs 3-42 of the Board's third judgment ([2013] UKPC 2), and paragraphs 2-5 of the Board's fourth judgment ([2013] UKPC 20).

3. The essential facts for present purposes may be very shortly stated. In September 2005, Alfa Telecom Turkey Limited ("ATT") agreed to lend US$1.352 billion to Cukurova Finance International Limited ("CFI"), at interest of 8% p.a. over LIBOR, and a default rate of 11.5% p.a. over LIBOR. The loan was secured on CFI's 51% holding in Cukurova Telecom Holdings Limited ("CTH") and on the 100% holding in CFI of Cukurova Holding AS ("CH"). CTH was a newly formed BVI company which owned 52.91% of Turkcell Holding AS ("TCH"), which had previously been majority owned by CH. TCH in turn owned 51% of the shares in Turkcell Iletisim Hizmetleri AS ("Turkcell"). 13.07% of the shares in Turkcell were owned indirectly by Sonera Holdings BV ("Sonera") and the bulk of the remaining shares in Turkcell are publicly owned.

4. As found by Bannister J in the High Court of the BVI ("the BVI Court") after a trial which lasted many weeks (and ultimately led to the third and fourth judgments of the Board), from the inception of its relationship with CH and CFI, ATT's aim has been, and indeed has remained, to do anything it can to obtain outright beneficial ownership of the 51% shareholding in CTH and the 100% shareholding in CFI ("the shares") for itself. Thus, ATT was quick to identify an event of default and to accelerate the loan in 2007, when it knew that CFI was about to arrange refinancing; and when CFI failed to complete the refinancing before the time for repayment of the accelerated loan, ATT exercised its right to appropriate the shares; and thereafter it has done what it can to prevent CH and CFI from getting the shares back.

5. The first judgment was concerned with the question whether the appropriation was effective in principle: upholding the decisions of the BVI courts, the Board held

that it was. The second judgment concerned an interlocutory issue as to who should manage the affairs of Turkcell pending the Board's final adjudication. The third judgment concerned the question whether the appropriation was effective on the facts of this case, and, if it was, whether CFI and CH could obtain relief from forfeiture. The Board held that the appropriation was effective, but that it was open to CFI and CH to seek relief from forfeiture (or to exercise their equitable right to redeem). The fourth judgment concerned the terms on which such relief should be granted to CFI and CH.

6. As a result of the fourth judgment, the parties agreed a form of order, which was approved by Her Majesty The Queen on 10 July 2013 ("the Order in Council"). So far as relevant, the Order in Council included the following terms (taking the paragraph numbering from the schedule to the Order):

> "3. CFI and CH should be granted relief from forfeiture to enable them to redeem the Shares by payment of the Redemption Sum on or before 9 September 2013.
>
> 4. The Redemption Sum was US$1,564,719,492.62, together with interest at 8% p.a. over LIBOR from the date of the order.
>
> 6. The parties should meet at a time nominated by CFI and CH at the London branch of Deutsche Bank AG ("DBAG"), ATT's bank, to enable ATT to receive the money owing under paragraph 4.
>
> 8. At that meeting, ATT would have the "Release Documents" (as defined) and the bank financing CFI and CH would effect payment of the Redemption Sum into ATT's bank account.
>
> 12. If the Redemption Sum was not received into DBAG by 9 September 2013, the appropriation would remain valid and ATT would be "the absolute beneficial owner of the Shares".
>
> 13. Both parties were given liberty to apply."

7. As explained in the Board's third judgment, Sonera had begun arbitration proceedings in Geneva seeking specific performance of an alleged obligation on CH to transfer its 52.91% shareholding in TCH to Sonera. In September 2011, Sonera obtained a final award ("the award"), albeit for damages, rather than specific performance, in the sum of US$932 million against CH. Although its validity is still

challenged by CH, the award has been held to be valid in proceedings in Switzerland, the BVI and New York, so it is right to proceed for present purposes on the assumption that it is valid. (Given that CH has been granted conditional leave to appeal to the Board against the Eastern Caribbean Court of Appeal's decision on validity, this assumption should not be taken in any way to prejudice any eventual appeal).

8. In October 2011, pursuant to a Joint Venture Agreement dated 11 November 2009, Sonera granted Altimo Holdings & Investments Ltd, an associate company of ATT (which may be elided with ATT for present purposes) power of attorney to pursue the award, on the basis that any recovery would be shared between ATT and Sonera in agreed proportions[1]. Whilst ATT has sought to enforce the award in several jurisdictions, the centrally relevant proceedings were in the US District Court for the Southern District of New York ("the NY Court"), where ATT caused Sonera to file a motion in December 2011. Initially, these proceedings ("the NY proceedings") were focused on confirming and enforcing the award, including the identification and preservation of assets to meet it. Over CH's objection, the NY Court entered judgment confirming the award in a decision of 21 September 2012 and thereafter various procedural steps were taken to seek full disclosure of CH's assets.

9. After the Board's third judgment on 30 January 2013, CH and CFI say that they started to make arrangements with banks to raise the necessary finance to redeem the shares, but the arrangements could not be finalised until the precise terms of relief were known (ie until the Board's fourth judgment). Meanwhile, Sonera obtained an *ex parte* injunction in the BVI Court prohibiting CH and CFI granting security over the shares, but that particular injunction was discharged following an *inter partes* hearing on 27 March 2013, in a decision which was upheld by the Eastern Caribbean Court of Appeal on 11 July 2013 (though the Court of Appeal re-imposed a limited injunction restraining CH, after it redeems its shares in CFI, from disposing of any of its assets in the BVI, including such shares in CFI).

10. Sonera then applied to the NY Court by motion dated 8 April 2013 in the NY proceedings for similar relief to that which had been refused *inter partes* in the BVI. This was granted on 8 April 2013 by United States District Judge Robert Sweet by order to show cause, which included a temporary restraining order ("TRO"). After an *inter partes* hearing, United States District Judge Denise Cote granted an injunction on 18 April 2013, which restrained CH and CFI "and any financial institutions" from charging the shares.[2] Sonera also successfully asked the NY Court to issue subpoenas, which were served on some twenty banks, requiring them to provide information about any financing attempts which CH and CFI had made, and requiring the banks not to inform CH and CFI about them.

[1] The Joint Venture Agreement is said by ATT to have expired in May 2012, leaving only certain terms that remain in force, including apparently the power of attorney.
[2] This injunction was served on at least one bank.

11. On 16 May 2013, the BVI Court refused CH's application for an anti-suit injunction to require Sonera and ATT to end the TRO and injunction granted by the NY Court, at least in part because the application should have been made to the Board rather than the BVI Court. However, one day earlier, on 15 May 2013, Sonera, at the instigation of ATT, had persuaded the NY Court to grant an anti-anti-suit injunction requiring CH to discontinue its anti-suit injunction proceedings in the BVI and prohibiting CH from applying for such relief before the Board or in any other jurisdiction.

12. On 12 July 2013, pursuant to an application issued by Sonera the day before, the NY Court granted a TRO prohibiting DBAG from accepting any payment in connection with the attempt by CH and CFI to redeem the shares (and forbidding DBAG from disclosing the order to CH or CFI). This order was then served on DBAG and had a return date of 30 July 2013. Sonera's application was made in terms as a result of the Board's judgment on 9 July 2013 and the Order in Council dated 10 July 2013, and included a request that the order should remain sealed with no notice being given to CH or CFI, even after its grant, since DBAG "will be served and will be able to raise any relevant defenses or issues".[3]

13. CH and CFI have appealed the NY Court's decisions of 21 September 2012, 8 and 18 April, and 15 May 2013 to the US Court of Appeals for the Second Circuit ("the US Court of Appeals"), which, on 21 May 2013, agreed to consolidate and expedite the appeals, which are due to be heard on 22 August 2013.

The relief sought on this application

14. CH and CFI contend that, as a result of Sonera's successful motions in the NY Court, orchestrated by ATT, it will be impossible for CH and CFI to comply with the terms for relief from forfeiture contained in the Order in Council. This is because the TRO and injunction granted by the NY Court make it impossible for CH and CFI to grant security over the shares, which they would need to do in order to raise the sum identified in paragraph 4 of the Order in Council.

15. CH and CFI accordingly now apply to the Board for a variation of the Order in Council along the following lines:

> "(i) an extension of time beyond 9 September 2013 in order to comply with the requirement to pay the Redemption Sum in paragraph 3;

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[3] In the event, however, District Judge Cote ordered that the order remain sealed only until 9.00 a.m. on 17 July, after which it should also be served on CH.

(ii) a determination in relation to the sum identified in paragraph 4 as to whether interest is payable during that period, and if so at what rate;

(iii) a variation of the terms in paragraphs 6, 8 and 12, so as to avoid any problem arising from the injunctions granted by the NY Court."

16. There is no doubt that the Board has jurisdiction to grant this relief. Quite apart from the fact that the Order in Council expressly gives the parties liberty to apply, it is inherent in any order in which the court grants relief from forfeiture that the terms can be extended or otherwise varied. The authorities in point include *Chandless-Chandless v Nicholson* [1942] 2 KB 321 and *Starside Properties Ltd v Mustapha* [1974] 1 WLR 816, as well as the cases which establish the Court of Chancery's attitude to the right to redeem cited in the majority and minority opinions in the fourth judgment of the Board.[4]

17. There is also no difficulty in the present circumstances in the Board making the order sought itself, as opposed to taking the usual course and humbly advising Her Majesty that such an order should be made. In *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize (Practice Note)* [2003] UKPC 63, [2003] 1 WLR 2839, para 33, Lord Walker of Gestingthorpe, delivering the judgment of the Board, said that the Board has jurisdiction to grant interim relief "in order to ensure that any order which it makes on the eventual hearing of the appeal should not be rendered nugatory". He recognised the power to grant such relief to be an "inherent power, but that is not to say that its origins are devoid of statutory foundation", citing the Judicial Committee Acts of 1833 (3 & 4 Will 4, c 41) and 1843 (6 & 7 Vict c 38) as clear signs that Parliament "must be taken to have intended to confer on the Board all the powers necessary for the proper exercise of its appellate jurisdiction". So here.

18. However, Mr Milligan QC, on behalf of ATT, has made a number of submissions as to why the Board should refuse the grant of the relief sought by CH and CFI.

19. First, he says that, as a matter of principle, relief from forfeiture should not be granted (and equally the terms upon which relief is granted should not be extended) unless there is a real prospect of compliance with the terms the court is proposing to impose. In this case, he contends that there is no prospect of CH and CFI complying with any new terms for relief. Secondly, he says that the application should not be granted as it would cause unfair prejudice to ATT, Sonera, and the shareholders in

[4] The test applied in deciding whether to grant an extension of time (or otherwise vary the terms) is whether it would be just and equitable to do so: *Chandless-Chandless*, p.323 per Lord Greene MR, and, to similar effect, *Starside Properties*, p.824B-C per Edmund Davies LJ.

Turkcell. Thirdly, he says that CH and CFI have been guilty of unreasonable delay in applying for the relief they now seek. Finally, Mr Milligan submits that CH and CFI have been guilty of behaviour which disqualifies them from being granted the relief they now seek.

Discussion: relief in principle

20. It seems clear that ATT's determination to do all that it can to ensure that it obtains beneficial ownership of the shares remains as strong as it has been from the inception of its relationship with CH and CFI. In particular, ever since the Board decided that CH and CFI are entitled to redeem the shares subject to meeting certain conditions, ATT has done its best to thwart any attempts by CH and CFI to do so.

21. While Sonera and ATT are, of course, entitled to enter into whatever lawful arrangements they wish, there can be no real doubt on the evidence that the dominant reason why ATT has since April 2013 taken the steps it has taken in the NY Court (in the name of Sonera) is in pursuance of its quest to prevent CH and CFI from redeeming the shares. These steps are said to be justified by the benefits which will flow to Sonera from preventing CH and CFI from redeeming or disposing of the right of redemption, and before the Board, Mr Milligan supported the suggestion that Sonera seriously envisages taking over the right of redemption. The injunctive relief in force in NY does not, he submits, undermine the Order in Council, rather it treats it as effective and of value. But, if it were Sonera's real purpose to take over and exercise the right of redemption, then it too would have to be taking further legal and financial steps to enable it to do so, and there is no suggestion that it has been doing so. Further, it is obvious on the evidence that the steps currently taken in New York in Sonera's name are likely to have a precisely opposite effect – that of ensuring that the right of redemption is not exercised and that the shares remain with ATT, as ATT wants.

22. When it was put to Mr Milligan that the logic of a stance according to which Sonera wishes to take over the shares was that the Board should grant CH and CFI further time to redeem, he was quick to disclaim any wish for further time. He was of course representing ATT, and not Sonera, before the Board, but it is unrealistic to think that ATT would be pursuing before the Board an objective which is inconsistent with one which it has, through Sonera, been pursuing in the NY proceedings. Any prospect that CH and CFI might be able (under the pressure of the "leverage" imposed by the steps taken in Sonera's name) to raise sufficient monies both to pay off Sonera and then to redeem the shares within the 60 day limit seems even less realistic. It is certainly not consistent with ATT's case before the Board that, quite apart from its indebtedness to Sonera, the Cukurova group's financial difficulties are so serious that it does not even have a prospect worth preserving of raising monies to redeem the shares.

23. Standing back, the position is that Sonera has a claim for a substantial sum against CH and one would have thought that its interest was best served by CH and CFI redeeming the shares, rather than by preventing redemption. This is because, even without taking into account any added value attributable to the fact that they represent a controlling interest in CTH, the shares are worth considerably more than the amount owing by CH and CFI to ATT. This is so, even on the valuations of the shares put forward by ATT. That valuation is, however, based on stock exchange prices for standard quoted parcels of shares. Their value is likely to be much greater given that they represent a controlling interest, and would probably be greater still[5] but for the adverse effect of the current dispute between ATT and CH and CFI, which is at present being prolonged by ATT's attempt to obstruct the exercise of a right which this Board has held that CH and CFI have. If CH were able to redeem its appropriated shares in CFI, but still failed to pay its outstanding indebtedness to Sonera, their excess value would in the ordinary course be available as security and be realisable subject to the prior charge and the first two words of the adage "redeem up, foreclose down": see e.g. Cheshire and Burn's Modern Law of Real Property (18th ed) p.858; Fisher and Lightwood's Law of Mortgage (13th ed), chap.21, esp. paras 21.8 to 21.9 and Megarry & Wade, The Law of Real Property (8th ed), paras. 25-110 to 25-113.

24. The application which ATT has caused Sonera to make in New York for a TRO restraining DBAG from receiving the redemption money is particularly striking. It is not only intended to thwart the exercise of CH's (and CFI's) right to redeem the shares, but it prevents CH from operating the procedure which ATT had itself a matter of days before agreed should be part of the order made by this Board. This is particularly regrettable given the duty of ATT, CH and CFI to cooperate in enabling the redemption monies to be paid in accordance with paragraphs 6 to 10 in particular of the Schedule to the Order in Council.

25. Mr Milligan further contends that Sonera would benefit from the shares remaining with ATT, because a balancing payment of US$165 million (on a look-through basis taking Istanbul stock market prices) which is said to be due from ATT to CH and CFI as a result of the appropriation would be available for Sonera to execute against. This point does not appear to have been mentioned in the New York proceedings in and after April 2013 as a possible justification or motive for the steps being taken by Sonera. This is unsurprising, as the financial benefit to CH and CFI if they redeem the shares, as described in para 23 above, appears to be far more than US$165 million.

26. In the BVI proceedings described in paragraph 9 above Sonera appears to have placed limited reliance on the US$165 million and such reliance as was placed does

[5] As indeed Mr Hardman of ATT's solicitors in paragraph 119 of his witness statement dated 17 July 2013 is asserting.

not appear to have impressed either the BVI Court or the Eastern Caribbean Court of Appeal.[6]

27. The Board is therefore unconvinced by the suggestion that those steps the NY proceedings directed to preventing the redemption were or are motivated to any significant extent, or could reasonably have been motivated, by the aim of seeking to enable Sonera to execute against the US$165 million which would be payable by ATT to CH if the appropriation of the shares were to become final. Rather, the Board is persuaded that the overriding aim of those steps in those proceedings, which, as ATT's written case before the Board puts it, are being "pursued by [ATT] in the name of Sonera", has been and is simply to thwart redemption in ATT's own interests.

28. As for the ability of CH and CFI to raise the necessary funds to redeem the shares, it is impossible to say that there would be no real prospect of redemption if they were not being thwarted by the NY Court orders. In circumstances where any immediate attempts to raise sufficient monies are being very effectively hampered by the steps taken in the NY proceedings, the Board is satisfied that Mr Karamehmet's affidavits show for present purposes that there is a real prospect that sufficient assets may be made available as security to enable redemption[7]. CH is not complying with the NY Court orders in relation to disclosure of assets, but the very suggestion from ATT that assets are being salted away by Mr Karamehmet, who controls the Cukurova

[6] Sonera's case as presented orally in the BVI was that, without injunctive relief or some special order, it would get nothing on redemption, save what it suggested (but the Board does not accept) would be an effectively unrealisable second charge. CH's response was that Sonera's claim for injunctive relief was intended to prevent redemption, in particular because, if ATT's appropriation of the shares were to become final Sonera would receive US$185 million under a provision in the 2009 Joint Venture Agreement. Sonera successfully countered this by pointing out that that Agreement had largely expired. Only in reply did Sonera's counsel (in an apparent switch of direction) refer to an affidavit of Mr Hardman suggesting that Sonera could benefit by being able to enforce against the US$165 million balancing payment due to be made by ATT following a successful appropriation; Cukurova's counsel said in response that, since after final appropriation, CFI would belong to ATT not CH, any payment would have to be made to CH which was not a BVI company (although the Board notes that it would be made by ATT which is). In the light of the course of these submissions before him, it is unsurprising that Bannister J. did not mention the US$165 million in his judgment. Sonera's notice of appeal to and skeleton argument before the Eastern Caribbean Court of Appeal make no mention of the US$165 million point and focus on the wish for injunctive relief preventing the charging of the shares to fund their redemption. On the contrary, the skeleton positively relies upon the fact that Bannister J rejected as "unfounded … a serious allegation" that [Sonera] stood to gain financially if the injunction was granted (which was in fact based incorrectly upon an agreement which had already expired). This reference to the US$185 million point is scarcely consistent with any reliance being placed before the Court of Appeal on potential financial gain, in the form of the US$165 million, as a motive or justification for injunctive relief, even if that were to prevent redemption. The Board is therefore unconvinced by the suggestion in paragraph 105 of Mr Hardman's witness statement that the Court of Appeal "seems to have overlooked that US$165 million balancing payment that would become payable from a BVI company – ATT – in the event that redemption did not happen".

[7] Again the case advanced by Sonera in the BVI proceedings is worth noting, when considering ATT's case before the Board that CH and CFI will not be able to provide sufficient security to redeem, even if they are able to use the shares as part of the necessary security. Before the Eastern Caribbean Court of Appeal, Sonera's notice of appeal asserted "a likelihood that, even on the available evidence, [CH] has alternative means of redeeming the Shares without granting first ranking security over them".

group, could be said to provide some support for the notion that there may well be assets, in addition to the shares themselves, which could be used as security for any loan raised to effect redemption.

29. It is unrealistic, as Mr Milligan fairly accepts, to treat the present application as an ordinary claim for an extension of time by mortgagors seeking to redeem. In this case, the mortgagors are being intentionally and very seriously hampered by the mortgagee itself in their attempts to raise money to pay off the mortgage debt. Any court should be very slow indeed to condemn the mortgagors as being unlikely to be able to redeem where their ability to do so has been so comprehensively, persistently and (it must be said) thus far effectively undermined by the mortgagee. In the present case, while it is clear that there are companies in the Cukurova group which appear to be in difficulties, the Board considers that there would be a real prospect of redemption being achieved if, for instance, the NY appeals succeeded and the orders made by the NY Court were set aside.[8] The Board accepts, however, that, at least on the basis of the current evidence, CH and CFI would be very likely to face severe difficulties if the NY Court orders were upheld.

30. The Board is also unimpressed with the contention that to extend the current terms for relief would cause unfair prejudice. Prejudice to Sonera is irrelevant, as it is not a party to these proceedings and has not sought to be represented before the Board. Anyway, as already mentioned, the notion that, as a creditor of CH, it would be prejudiced by CH (and CFI) redeeming the shares is hard to understand. The notion that shareholders in Turkcell would be prejudiced by the terms for redemption being extended is also of little if any relevance, and is similarly hard to understand.

31. As for prejudice to ATT, such an argument would only have potential force if the value of the shares was less than, or little more than, the outstanding debt secured on them. As mentioned in para 23 above, the evidence indicates that the shares are worth significantly more than the debt.

32. The other two points made by Mr Milligan cannot carry the day for ATT. It may have been better if CH and CFI had raised the present problem with the Board before the Order in Council was drawn up. However, in practice, it would have made little, if any, difference to how matters would have proceeded, and there is no suggestion of any prejudice to ATT as a result of the failure to do so.

33. The Board is unimpressed with the suggestion that CH and CFI should be denied the relief they seek because of unconscionable conduct. The allegations of

[8] That is also consistent with the conclusions reached by both the BVI Court and the Eastern Caribbean Court of Appeal when refusing to grant Sonera the injunctive relief as described in para 9 above.

CH's disposal and non-disclosure of assets to avoid paying Sonera appear on the face of it to be made out, but that is *res inter alios acta*.

Discussion: terms for relief

34. As explained above, there are three issues.

35. The first is the extension of time itself under para 4 of the Order in Council. The Board considers that justice would be best served by time being extended generally without a cut-off date, on terms that both parties have liberty to apply. This would be on the basis that an application could be made either on a change of circumstances or at any time after 1 December 2013. Extending the time from 9 September 2013 to another, later, specific date would risk leading to uncertainty and urgent applications. A more open-ended order provided it has a cut-off date after which either party can make an application to extend, vary or discharge the order that the Board proposes now to make, seems a more satisfactory way to proceed.

36. The second issue concerns the amount payable in order to redeem. In the Board's view, the running of interest at the rate of 8% p.a. over LIBOR should be suspended as from the end of 29 July 2013 (that is, 19 days after the Order in Council) on the ground that CH and CFI are currently being prevented from redeeming within the 60 day period envisaged by the Order in Council due to the positive actions of ATT, or taken by ATT in the name of Sonera and in its own interests. This is not a case where the mortgagee is simply wrongly refusing repayment; it is a case where the mortgagee is doing its level best to thwart repayment of a debt owed to it, for collateral reasons of its own. If the NY Court orders which have the effect of preventing repayment are reversed, then interest at 8% p.a. over LIBOR will start to become payable (subject to any other date that the parties may agree or the Board may order) after the end of a further 19 days.

37. Finally, there is the potential need to change the machinery in paras 6, 8 and 12 of the Order in Council, because of the orders obtained from the NY Court against the banks, and in particular against DBAG. Mr Milligan indicated that his clients would, at least if all other problems were dealt with, not cause problems over this. He recognised, in particular, that the complaint issued against DBAG dated 11 July 2013 was "in reality …. contingent on the outcome of the United States appeals", and referred in this connection to the explanation given in paragraph 36 of the complaint itself; and he also recognised that, if any problem did persist, it would "of course" be open to CH and CFI to come back before the Board. If the Board were to conclude on such an application that ATT was continuing to take steps to thwart genuine steps being taken towards redemption, such an application would be likely to be sympathetically received. Because of that, and also because the precise nature of any

order, if that indication does not come to fruition, is difficult to formulate at this stage, the Board will simply give liberty to apply as to machinery.

Conclusion

38. In these circumstances, the Board grants this application, and makes the order set out in the schedule hereto.