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

JUDGMENT

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

From the Court of Appeal of the British Virgin Islands

before

Lord Walker
Lord Mance
Lord Sumption

JUDGMENT DELIVERED BY LORD MANCE ON

23 May 2012

Heard on 8 May 2012

Appellant
Kenneth Maclean QC
James Nadin

(Instructed by White & Case LLP)

Respondent
Stephen Smith QC
Robert Levy QC

(Instructed by Hogan Lovells International Ltd)

LORD MANCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

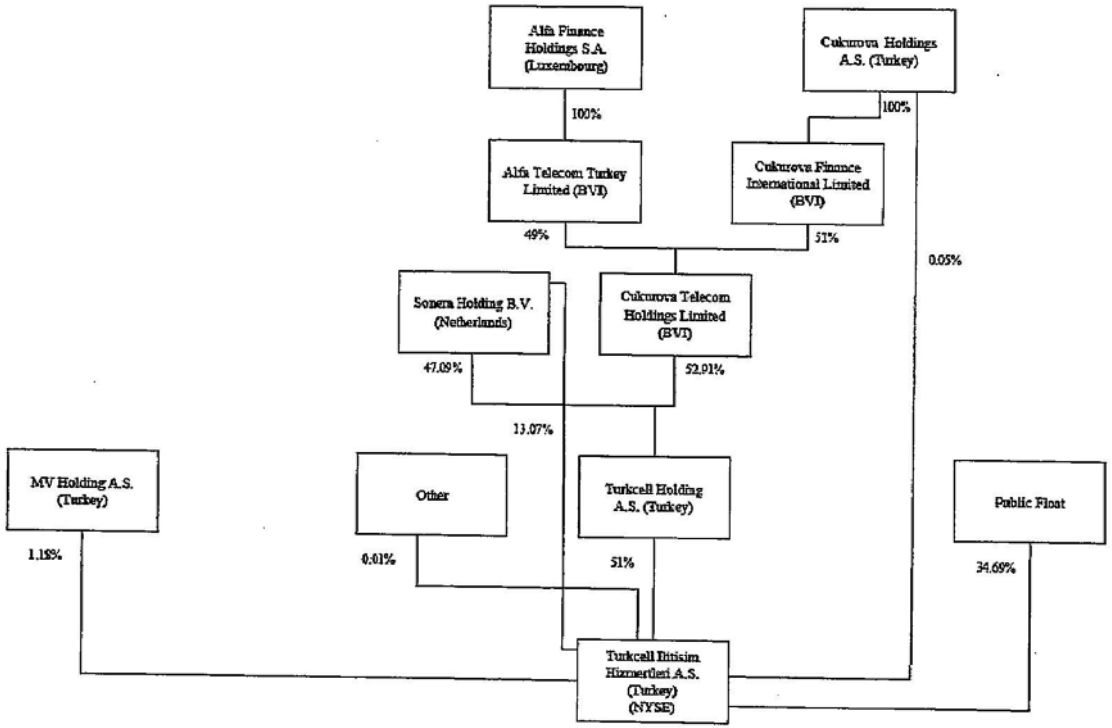
24. Finally, Mr Smith relied upon evidence submitted very late in the form of Mr Mustafa Kiral's witness statement dated 3 May 2012, asserting that Alfa's current inability to control TIHAS meant that a real risk exists that TIHAS may fail to comply with the amended corporate governance rules, first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

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

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

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

TURKCELL STRUCTURE CHART AS AT 27 APRIL 2007[1]



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