



30 JANUARY 2013

PRESS SUMMARY

Cukurova Finance International Limited and Cukurova Holding AS (Appellants) v Alfa Telecom Turkey Ltd (Respondent)

MEMBERS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: Lord Neuberger, Lord Mance, Lord Kerr, Lord Clarke, Lord Sumption

BACKGROUND TO THE CASE

Prior to September 2005, Cukurova Holding AS (“CH”) owned 52.91% of Turkcell Holding AS (“TCH”). The remaining shares in TCH were held by a company now called Telia Sonera Finland OYJ (“Sonera”). TCH held 51 of the 100 issued shares in a company called Turkcell Iletisim Hizmetleri AS (“Turkcell”). During 2005, with a view to alleviating cash flow pressures, representatives of the Cukurova Group held discussions with representatives of the Alfa Group. While those discussions were proceeding, Sonera alleged that CH was obliged to transfer its shares in TCH to Sonera. With a view to defeating Sonera’s claim to CH’s shares in TCH, CH transferred those shares to a newly incorporated British Virgin Islands company, Cukurova Telecom Holdings Limited (“CTH”), which was itself wholly owned by another newly incorporated British Virgin Islands company, Cukurova Finance International Ltd (“CFI”), whose two shares were owned by CH [3]-[6].

The discussions between the Cukurova Group and the Alfa Group led to various agreements. These included a facility agreement, under which Alfa Telecom Turkey Limited (“ATT”) agreed to lend CFI US\$1.352 billion (“the loan”), secured on CFI’s 51% shareholding in CTH, and on CH’s 100% shareholding in CFI. The agreement identified events of default, on the occurrence of which (at ATT’s election), all or part of the loan, together with accrued interest, would become immediately due and payable. As security for CFI’s repayment of the loan, CH and CFI granted ATT charges by way of equitable mortgage over CH’s 100% holding in CFI, and CFI’s 51% holding in CTH (together “the charged shares”). Meanwhile, arbitration proceedings in Geneva commenced by Sonera against CH resulted in an award (“the award”) which concluded that there was a binding obligation on CH to transfer its 52.91% holding in TCH to Sonera for \$3.1 million, and ordered specific performance of that obligation [7]-[22].

In April 2007, ATT’s solicitors sent to CFI a letter identifying alleged events of default under the facility agreement, and demanding immediate repayment of the loan. In addition, ATT formally requested to be registered as the owners of the charged shares, and soon after gave notice to CH and CFI that it had appropriated the charged shares. In May 2007, CFI gave ATT formal notice that it intended to repay the loan, together with interest, and the whole of that sum was formally tendered to ATT eight days later. ATT refused to accept the tender, on the ground that it was made too late, and that ATT had already appropriated the charged shares. Several proceedings were commenced in the British Virgin Islands. In the proceedings relevant to this case, the High Court held that there had been no event of default which justified acceleration of the loan and the subsequent appropriation of the charged shares. On appeal, the Court of Appeal held that three events of default had been established and that ATT had properly accelerated the loan and appropriated the charged shares. CH and CFI appeal to the Privy Council. They argue that there had been no event of default, but if there had been, then ATT’s acceleration of the loan and/or its appropriation of the charged shares was vitiated by bad faith or improper purpose, and, if that argument fails, that CH and CFI should be accorded relief from forfeiture [23]-[41].

ADVICE

The Judicial Committee considers that there was an event of default, which entitled ATT to accelerate the loan and to appropriate - or forfeit - the charged shares, but that relief against forfeiture should be available to CH and CFI on appropriate conditions. The Committee is further of the view that it has insufficient information or submissions to determine the final question arising on this appeal, namely the precise terms upon which relief from forfeiture should be accorded to CH and CFI. Accordingly, the Committee has identified in a note to the parties the points on which it requires further submissions in relation to the basis and terms of such relief. After receiving and considering such submissions, the Committee will give a further decision, which will deal with the terms upon which relief from forfeiture will be accorded to CH and CFI.

REASONS FOR THE ADVICE

ATT was entitled to accelerate the loan, because the award constituted an event of default [63]. The award was an event or circumstance which in the honest and rational opinion of ATT had or was reasonably likely to have a material adverse effect on the financial condition, assets or business of CFI [43], [45], [62]. The award implied a virtual certainty of an order for damages against CH likely to exceed \$155m, and quite possibly as much as \$950m [46], [53]. The event of default therefore gave ATT a contractual right to accelerate repayment of the loan [74]. Whilst ATT alleged other events of default, it is unnecessary to consider them [63]-[67].

In order to satisfy the outstanding debt, ATT was entitled to appropriate the shares at their fair price and retain the shares as their own property [74]-[76]. The fact that appropriation of the shares enabled ATT to obtain control over CFI and CTH and indirectly of Turkcell did not mean that ATT's right of appropriation was exercised in bad faith. The acquisition of control was a necessary incident of a permitted mode of satisfying the debt [77]. No alternative mode of satisfying the debt was available [79]. If a chargee enforces his security for the proper purpose of satisfying the debt, the mere fact that he may have additional purposes which are collateral to that object, cannot vitiate his enforcement of the security, however significant those purposes are. [78].

Whilst ATT was entitled to accelerate the loan, and appropriate the charged shares, CFI and CH are entitled to relief in equity from forfeiture of the shares [126]. The Judicial Committee has jurisdiction to grant such relief [97]. There are no legislative provisions precluding the availability of such relief in this case [113]-[115]. Such relief is available in principle where what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, regardless of the type of property concerned [94]. The mere fact that the transaction is commercial in nature does not preclude the jurisdiction to grant such relief [95]. This was a conventional case of borrowing on security [118]. The primary object of the bargain was to secure the repayment of the loan together with contractual interest. The forfeiture provision, namely the power to appropriate, was added in order to secure that result [91]. Repayment to ATT of the loan was secured by equitable mortgages over the charged shares [86]. This is a case where the primary object of the bargain was to secure a stated result which can be effectively attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result [90]. This is a classic case for the exercise of the jurisdiction to grant relief from forfeiture [92]. ATT was primarily concerned with the shares not as security, but for the control over Turkcell that they would supply. The event of default constituted by the award never really threatened or prejudiced ATT's financial position. It was ATT's aim to forestall CFI from refinancing its borrowing from ATT, and to convert its charges into ownership of the shares, giving it control of Turkcell. Consistently with its overall aim to control Turkcell, ATT rejected CFI's tender of what would have been valid prepayment, which monies were thereafter kept for three years in an interest earning escrow account. In light of this combination of unusual features, the Judicial Committee does not consider that the grant of relief in this instance will lead to uncertainty in other cases, because a combination of such features is most unlikely to be repeated [125].

NOTE

This summary is provided to assist in understanding the Judicial Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Judicial Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.gov.uk/decided-cases/index.html.