**9 July 2013**

**PRESS SUMMARY**

**Cukurova Finance International Limited (Appellant) v Alfa Telecom Turkey Limited (Respondent) [2013] UKPC 20**

**JUSTICES:** Lord Neuberger, Lord Mance, Lord Kerr, Lord Clarke, Lord Sumption

**BACKGROUND TO THE APPEAL**: On 28 September 2005, Alfa Telecom Turkey Limited ("ATT") agreed to lend US$1.352 billion to Cukurova Finance International Limited ("CFI"). The loan was secured on CFI's 51% shareholding in Cukurova Telecom Holdings Limited and on Cukurova Holding AS's 100% shareholding in CFI ("the shares"). The shares gave control of Turkcell, Turkey's largest mobile telephone company. Interest on the loan was payable at an annual rate of 8% over LIBOR, with provision for a default rate of 11.5% over LIBOR. On 16 April 2007, ATT declared that there had been a number of events of default and that the whole outstanding loan was immediately repayable. On 27 April 2007, in default of repayment, ATT appropriated the shares, by entering itself as the transferee on blank share transfers which had been executed by CH and CFI, although CH and CFI obtained a court order restraining their registration. On 25 May 2007, CFI tendered a sum which both parties at that time took as equating with the total sum which would then have been owing apart from the appropriation ("the tender"), but ATT refused to accept it. Nevertheless, until 25 May 2010, CFI kept US$1.5 billion in an interest earning escrow account ("the Namrun account").

This is a sequel to the Board's advice of 30 January 2013 (see [2013] UKPC 2), where the Board decided that ATT had been entitled to appropriate the shares, but that CH and CFI were entitled to relief from forfeiture, i.e. that they were entitled to recover the shares from ATT, albeit on terms to be decided by the Board. Subsequently, the Board heard submissions as to the basis and terms upon which CH and CFI should be permitted to recover the shares. CH and CFI argue that once the shares were lawfully appropriated by ATT, the provisions of the contract ceased to apply, and the terms on which they may recover the shares are a matter for the Board's discretion. ATT argues that the provisions of the contract continue to apply, and that interest is to be calculated pursuant to the contractual terms.

**ADVICE**: The Board humbly and unanimously advises Her Majesty that CH and CFI are permitted to recover the shares on the condition that they pay US$1,564,719,492.62 to ATT within 60 days, plus further interest accruing between the date of this judgment and the date of payment. The tender and the maintenance of the Namrun account prevent interest running from 25 May 2007 to 25 May 2010. In addition, but not as a condition of recovery of the shares, CH and CFI should pay ATT's further costs on the standard basis, to be assessed if not agreed **[61]**. The Board arrive at this conclusion for different reasons. The majority (Lord Mance giving the judgment, with which Lord Kerr and Lord Clarke agree) consider that the tender is relevant to the conditions on which, in exceptional circumstances, relief in equity is appropriate. The minority (Lord Neuberger and Lord Sumption) treat the tender as having been valid and as having, once relief is given and the loan fully revived, eliminated any right to interest during the period when the Namrun account was kept open. The end result on either analysis is however the same.

**REASONS FOR THE ADVICE**

(a) *The majority's reasoning*

Where, as here, the loan has been discharged at law by appropriation, it would be remarkable if the principles of equity were so inflexible that a court was unable to take account of circumstances which would make it inequitable or unconscionable to insist on redemption taking place on a basis which

treats the loan as if it had remained continuously outstanding **[15]-[16]**. The analogy of forfeiture of a lease supports a conclusion that, when equity grants relief after an appropriation has discharged a debt, it does so by setting conditions, which will take close account of the terms of the original loan, but may also 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 **[21]**. A number of cases 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 **[30]-[35]**. 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. 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 **[42]**. The importance of certainty extends to equitable contexts **[43]**, and there is no suggestion that equity recognises any general or open-ended discretion **[44]**.

This case is exceptional, and it would be both inequitable and unconscionable to ignore the unusual facts of this case, which are probably unlikely to be repeated **[44]-[46]**. Since ATT was only interested in the ownership of the shares and control of Turkcell, ATT rejected the tender, leading CH and CFI to incur the very large expense of maintaining the Namrun account for the next three years **[47]**. The tender and the maintenance of the Namrun account should prevent interest running from 25 May 2007 to 25 May 2010, because the essential reason the loan remained unpaid after 25 May 2007 can be identified as ATT's rejection of the full repayment then tendered **[48]**. Thereafter, ATT should 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 **[48]**. The fact that the tender in this case was of a sum slightly less than what was actually due cannot be relied on by ATT, as all parties had assumed that the tender was of the appropriate sum until after the earlier decision of the Board: it is too late for ATT to raise the argument now **[54]-[55]**.

*(b) The minority's reasoning*

By exercising its equitable power to permit CH and CFI to recover the shares, the court is simply extending the time for paying what is due from them to ATT under the contract, and accordingly the mortgage remains in being until the money due has been tendered and accepted **[71]-[83]**. Given the nature of the equitable power, therefore, 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 **[95]-[98]**. It would be incongruous if CH and CFI could have the benefit of the appropriation being reversible, without the consequence of the reversal reviving their contractual liability to repay the principal and to pay interest at the agreed rate **[101]**. Further, 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 **[102]**.

Where a mortgagor invokes its equitable right to redeem 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 continue, 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 **[110]**. The majority's departure from this principle on the basis of exceptional circumstances risks leaving the law in a state of uncertainty **[111],[176],[187]**.

If the whole amount due under the mortgage is tendered and refused and then put aside in an account by the mortgagor, the mortgagee is not entitled to interest at the contractual rate while it is in the account, although it can recover the interest actually earned on the amount in the account (less any expenses). In this case, (i) although the money tendered on 25 May 2007 fell just short of the sum due to ATT under the mortgage, the minority agree with the majority that the point has been raised far too late to assist ATT, and (ii) it appears that the costs of setting up and maintaining the Namrun account exceeded the interest earned on the $1.5 billion in that account **[129]-[160]**.

**29 July 2013**
**PRESS SUMMARY**

**Cukurova Finance International Limited (Appellant) v Alfa Telecom Turkey Limited (Respondent) [2013] UKPC 25**

**JUSTICES:** Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath

**BACKGROUND TO THE APPEAL**
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 ("the loan"). The loan was secured on CFI's 51% shareholding in Cukurova Telecom Holdings Limited ("CTH") and on the 100% holding in CFI of Cukurova Holding AS ("CH") ("the shares"). CTH was a newly formed British Virgin Islands ("BVI") company which, through its holding in Turkcell Holding AS ("TCH"), owned 51% of the shares in Turkcell Iletisim Hizmetleri AS ("Turkcell"), Turkey's largest mobile telephone company. 13.07% of the shares in Turkcell were owned by Sonera Holdings BV ("Sonera").

From the inception, ATT's aim has been to do anything to obtain outright beneficial ownership of the shares and thereby to gain control of Turkcell. In 2007, when it knew that CFI was about to arrange refinancing of the loan, ATT identified an event of default and accelerated the loan. When CFI failed to complete the refinancing before the time for repayment of the accelerated loan, ATT exercised its right to appropriate the shares. Since then, ATT has done what it can to prevent CH and CFI from getting the shares back.

On 30 January 2013, the Board decided that ATT had been entitled to appropriate the shares, but that CH and CFI were entitled to relief from forfeiture, i.e. that they were entitled to recover the shares from ATT, albeit on terms to be decided by the Board (see [2013] UKPC 2). On 9 July 2013, the Board decided that CH and CFI were permitted to recover the shares on the condition that they pay US$1,564,689,492.62 to ATT within 60 days, plus further interest at 8% p.a. over LIBOR accruing between that date and the date of payment (see [2013] UKPC 20). On 10 July 2013, Her Majesty approved an order ("the Order in Council"), which included terms that CFI and CH have until 9 September 2013 to make these payments to ATT, otherwise the appropriation would remain valid and ATT would be the absolute beneficial owner of the shares.

Meanwhile, in June 2005, Sonera had commenced arbitration proceedings in Geneva seeking specific performance of CH's alleged obligation to transfer its shares in TCH to Sonera. In September 2011, Sonera obtained a final award for damages of US$932 million against CH ("the award"). Meanwhile, Sonera granted 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. ATT sought to enforce the award in the US District Court for the Southern District of New York ("the NY Court") by causing Sonera to file a motion, and, in September 2012, the NY Court entered judgment confirming the award.

The NY Court has granted injunctive relief making it impossible for CH and CFI to grant security over the shares, which they would need to do in order to raise the required funds to comply with the terms on which relief from forfeiture has been granted by the Board. CH and CFI have appealed the NY Court's decisions to the US Court of Appeals for the Second Circuit ("the Second Circuit appeals"), which are due to be heard on 22 August 2013.

CH and CFI contend that, because the successful motions raised by Sonera in the NY Court, orchestrated by ATT, render it impossible for CH and CFI to comply with the terms for relief from forfeiture contained in the Order in Council, the Board should grant CH and CFI an extension of time beyond 9 September 2013 to recover the shares and make a determination on interest.

**JUDGMENT**

The Board (i) grants CH and CFI an extension of time without a cut-off date to recover the shares (although it allows for an application to fix a cut-off date to be made by the parties either on a change of circumstances or at any time after 1 December 2013), (ii) suspends the running of interest at the rate of 8% p.a. over LIBOR 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 actions of ATT (or taken by ATT in the name of Sonera) in the NY Court, (iii) orders that, 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 (to take account of the 19 days after the Order in Council for which interest has accrued).

**REASONS FOR THE JUDGMENT**

There can be no real doubt on the evidence that the dominant reason why ATT has taken the steps it has taken in the NY Court (in the name of Sonera) is in pursuit of its quest to prevent CH and CFI from redeeming the shares **[21]**. 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, because the shares are worth considerably more than the amount owing by CH and CFI to ATT **[22]-[23]**. The overriding aim of the steps in the New York procedings is simply to thwart redemption in ATT's own interests **[24]-[27]**. It is therefore unrealistic to treat the application as an ordinary claim for an extension of time by mortgagors seeking to redeem. CH and CFI are being intentionally and very seriously hampered by ATT in their attempts to raise money **[29]**.

It is impossible to say that there would be no real prospect of redemption if CH and CFI were not being thwarted by the NY Court orders from raising the necessary funds to redeem the shares **[28]**. If the Second Circuit appeals were to succeed, there would be a real prospect of redemption being achieved by CH and CFI **[29]**. To extend the current terms for relief would not cause unfair prejudice to ATT **[30]-[31]**. 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, is a more satisfactory way to proceed **[35]**.

There is no doubt that the Board has jurisdiction to grant the relief sought, because it is inherent in any order in which the court grants relief from forfeiture that the terms can be extended or otherwise varied **[16]**, and the Board has all the powers necessary for the proper exercise of its appellate jurisdiction **[17]**.