[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
Kenneth MacLean QC
Arabella di Iorio
James Nadin
David Caplan
(Instructed by White & Case LLP)

Respondent
Iain Milligan QC
Thomas Raphael

(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 second 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;

[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.