



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 disintitiled 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].

NOTE

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