BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 072 OF 2007

BETWEEN:

ALFA TELECOM TURKEY LIMITED

Claimant

AND

(1) CUKUROVA FINANCE INTERNATIONAL LIMITED
(2) CUKUROVA HOLDING A.S.

Defendant

CLAIM NO. 119 OF 2007

BETWEEN:

(1) CUKUROVA HOLDING A.S.
(2) CUKUROVA FINANCE INTERNATIONAL LIMITED

Claimant

AND

ALFA TELECOM TURKEY LIMITED

Defendant

Appearances:

Mr. Stephen Smith Q.C., Mr. Robert Levy, Mr. Oliver Clifton and Ms. Annabel Gillham of Walkers for Alfa

Mr. Kenneth MacLean Q.C., Ms. Arabella di Iorio and Mr. James Nadin of Maples and Calder for the Cukurova Entities

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2007: September 25th,
October 5th, 9th, November 16th

JUDGMENT

[Commercial law- Conflict of laws – equitable mortgagee having right in English law to appropriate charged shares in BVI companies – right granted by charge and the UK Financial Collateral Arrangements (No. 2) Regulations 2003 – lender purporting to exercise right by merely sending letters to the collateral provider stating that it had appropriated the shares – collateral provider still registered as legal owner of the shares – whether right validly exercised.

Conflict of Laws- experts on foreign law not agreed on what amounts to a valid exercise of the right of appropriation under the UK Financial Collateral Arrangements (No. 2) Regulations 2003 – if legal title outstanding has right been validly exercised - how court is to go about resolving the conflict]

[1] Joseph-Olivetti, J.: "Fools rush in where angels fear to tread." In this trial of preliminary issues this court is called upon to decide a question of English law which concerns whether an equitable mortgagee has effectively or validly appropriate charged shares in accordance with the right of appropriation granted by its charge and by the Financial Collateral Arrangements (No. 2) Regulations 2003 of England, a novel point I am told on which we have no guidance from the English courts. What is more, the Regulations is a United Kingdom's legislative measure implementing a European Community Directive. Fortunately, we have had the benefit of the evidence of two eminent experts on English Law and so we are not left, like Gray's ploughman, to plod our weary way home in darkness.

The Agreed Facts

[2] The parties were eventually able to agree on the facts for the purposes of this trial, some will say, against all odds having regard to their earlier deadly skirmishes. For this we commend them and recognize the efforts of the lawyers to cooperate in keeping with the spirit and express mandates of CPR 2000. The agreed facts are set out hereunder in full.

The Parties

1. Alfa Telecom Turkey Limited ("Alfa") is a private company incorporated in the British Virgin Islands (BVI). It is a wholly owned subsidiary of the Alfa Group, which is a conglomerate based in Russia.
2. Cukurova Finance International Limited ("CFI") is a private company incorporated in the BVI. It is a wholly owned subsidiary of Cukurova Holdings AS ("CH"), a private company incorporated in Turkey. Both companies are part of the Cukurova group of companies, which is an industrial group based in Turkey.
3. Cukurova Telecoms Holdings Limited ("CTH") is a private company incorporated in the BVI.
4. CFI is registered as the shareholder of 51% of the shares of CTH and Alfa is registered as the shareholder of 49% of the shares of CTH.

5. Shares in CFI or CTH are not listed on any exchange or market or publicly traded.

6. CTH holds a 52.91% shareholding in Turkcell Holding AS ("Turkcell Holding"), a company incorporated in Turkey.

7. Turkcell Holding's main asset is a 51% shareholding interest in Turkcell Iletisim Hizmetleri AS ("Turkcell"), the largest mobile telecommunications company in Turkey. Turkcell's shares are quoted on the Istanbul and New York Stock Exchanges.

8. Shares in CTH are of particular value as a result of CTH's substantial indirect shareholding in Turkcell.

The Agreements

9. Alfa, CFI and CH executed a Facility Agreement dated 28th September 2005 ("the Secured Facility") pursuant to which Alfa, as lender, agreed to provide to CFI, as borrower, a secured dollar term loan facility in the sum of US$1,352,000,000.

10. Repayment of the Secured Facility was secured by four Deeds of Charge ("the Share Charges") in respect of certain shares ("the Charged Shares"):

    (1) two share charges governed by BVI law ("the BVI Share Charges") dated 25 November 2005 pursuant to which:

        (a) CFI charged in favour of Alfa all present and future shares in CTH then or in the future owned by CFI or in which CFI then or in the future had an interest.

        (b) CH charged in favour of Alfa all present and future shares in CFI then or in the future owned by CH or in which CH then or in the future had an interest.

    (2) Two share charges governed by English law ('the English Share Charges") dated 28 September 2005 and 25 November 2005 pursuant to which (respectively):

(a) CFI charged in favour of Alfa all present and future shares in CTH then or in the future owned by CFI or in which CFI then or in the future had an interest;

(b) CH charged in favour of Alfa all present and future shares in CFI then or in the future owned by CH or in which CH then or in the future had an interest.

11. The terms of the two English Share Charges are identical in all material respects. Clause 9.3 of each of them provides as follows:-

"Financial Collateral Arrangement"

(a) To the extent that this Deed constitutes a "financial collateral arrangement" (as defined in the Financial Collateral Arrangements (no 2) Regulations 2003 (the "Regulations") the Lender shall have the right (at any time after the Charges become enforceable to appropriate any Charged Asset which constitutes "financial collateral" (as defined in the Regulations) ("Financial Collateral") in or towards satisfaction of the Liabilities in accordance with the Regulations.

(b) Financial Collateral shall be valued at its Fair Price"

12. Full drawdown by CFI under the Secured Facility of US$1.352 billion took place on 25 November 2005.

13. On 25 November 2005, pursuant to the Share Charges, as security, CH and CFI delivered to Alfa's solicitors the share certificates in respect of the Charged Shares and share transfer forms executed in blank.

14. On 25 November 2005, the definition of Fair Price in the English share charge over CFI's shares in CTH was varied by written agreement of CFI and Alfa.

15. Alfa's security interest in the Charged Shares under the Share Charges is noted in the share registers of CFI and CTH respectively with express reference being made to the English Share Charges and the BVI Share Charges.

16. The Articles of Association of CFI and CTH provide respectively as follows:-

    (1) As to CFI (Article 6.2) "The transfer of a share is effective when the name of the transferee is entered in the register of members";

    (2) As to CTH (Article 6.11) "The transfer of a share is effective when the name of the transferee is entered in the register of members".

The Dispute

17. On 16 April 2007 Alfa wrote to CFI alleging that CFI had committed a number of Events of Default (as defined in the Secured Facility), that such Events of Default were incapable of remedy and that, as a result, the loan was being accelerated by Alfa.

18. In its letter of 16 April 2007 Alfa demanded immediate payment of the balance of the loan plus interest. CFI denies that any Events of Default had occurred or that Alfa was entitled to accelerate the loan.

19. On 16 April 2007, Alfa commenced Action 72 in the BVI seeking an order requiring repayment of the Secured Facility and Action 73 seeking orders requiring it to be registered as holder of the Charged Shares.

20. On 16 April 2007, Alfa presented the share certificate and transfer forms for the Charged Shares (completed in Alfa's name) to CFI's and CTH's registered agent in the BVI. Alfa contends that in so doing it was seeking to perfect its security. (Emphasis added.)

21. Alfa was not registered as the shareholder of the Charged Shares in the registers of CFI and CTH. Those shares remain registered in the names of CH and CFI respectively.

22. At 3.50 pm on Friday 27 April 2007, CH and CFI issued Stop Notices before the BVI Court Registry in relation to the Charged Shares. These Stop Notices were addressed to CFI and CTH respectively and directed that they not register any transfer of shares in the company or pay any dividends until the expiry of 14 days after notice having been given to CFI and CH that this was to be done.

23. At shortly after 4 pm on 27 April 2007, Alfa's solicitors' faxed letters dated 27 April 2007 to (a) CFI's registered agent in BVI and (b) CH. Each of these letters stated, amongst other things, as follows:-

"Under clause 9.3 of the abovementioned Share Charge, ATT has the right, at any time after the charges have become enforceable; to appropriate the shares covered by the Share Charge pursuant to the Financial Collateral Arrangements (No 2) Regulations. As a result of the Events of Default referred to above, the charges have become enforceable.

On behalf of ATT, we therefore give you notice that ATT is hereby exercising its right to appropriate the shares referred to in the Share Charge with immediate effect. We are currently undertaking the valuation exercise under clause 9.3 of the Share Charge and will revert to you shortly in that regard…". (Emphasis added.)

24. At approximately 4:30 p.m. on 27 April 2007, CFI and CH commenced an ex parte (but on notice to Alfa) application to the BVI High Court for an injunction to restrain Alfa taking any steps to enforce its security[1].

25. At approximately 6:45 p.m. on 27 April, the BVI High Court granted an injunction against Alfa, without prejudice to Alfa's assertion that it had appropriated the Charged Shares[2]. (Emphasis added.)

Issues for Determination

[3] The issues for determination at this trial were finalized by the court based primarily on the Cukurova entities' submissions and formulation of the issues as the parties had failed, despite being given ample opportunity to do so, to refine and agree on the issues as directed by the court. These are set out hereunder in full.

[1] It is noted from the court file that these proceedings **were filed at 3:20 p.m**. on the 27th April 2007 in Suit 72.with notice to Alpha

[2] Alfa was legally represented and this reservation was made at Alfa's specific request.

1. Does Alfa have a power of appropriation over the Charged Shares pursuant to clause 9.3 of the English Share Charges and the Regulations?"

    (1) What is the scope of the Regulations and are the English Share Charges within it? Specifically:

        (a) Do the Regulations apply to shares in private companies?

        (b) Do the Regulations apply to shares that are not freely tradable on the capital markets (whether in the European Union ("EU") or otherwise?

        (c) Do the Regulations apply in circumstances where none of Alfa, CFI, CH or CTH is incorporated in a Member State of the EU?

        (d) Do the Regulations apply to private off-market transactions?

        (e) Do the Regulations apply where none of the Subscription Agreement, the Shareholders' Agreement, the Facility Agreement or the Share Charges involved the wholesale financial markets of the EU?

    (2) Do the English Share Charges constitute "financial collateral arrangements" within the meaning of the Regulations? Specifically:

        (a) Are the Charged Shares "financial collateral" within the meaning of Regulation 3?

        (b) Are the English Share Charges "security financial collateral arrangements" within the meaning of Regulation 3? In particular, has any "financial collateral" been "delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of" Alfa or a person acting on its behalf?"

    (3) Do the English Share Charges constitute "Legal or equitable mortgages" for the purposes of Regulation 17?

    (4) Does clause 9.3 of the English Share Charges validly incorporate a power of appropriation pursuant to Regulation 17? Specifically:

(a) Does Regulation 17 require the security financial collateral arrangement to specify the terms on which the power to appropriate may be exercised?

(b) If so, does clause 9.3 of the English Share Charges specify such terms in accordance with Regulation 17?

2. If Alfa has a power of appropriation, and if the conditions precedent to the exercise of such power were satisfied, did Alfa effectively exercise the power by sending letters dated 27 April 2007 to CFI and CH respectively, by which Alfa asserts that it appropriated the Charged Shares?" Specifically:

(1) Did Alfa, by its letters of 27 April 2007, effectively appropriate the Charged Shares pursuant to Regulation 17, in particular given that:

(a) Alfa did not thereby become legal owner of the Charged Shares; (Emphasis added here and in para. 2)

(b) Alfa did not carry out the valuation referred to in Regulation 18 and clause 9.3(b) of the English Share Capital before or at the time of the alleged appropriation;

(c) Alfa has not provided any valuation to CFI or CH;

(d) Alfa has not accounted to CFI and/or CH for the amount by which the value of the Charged Shares exceeded the relevant financial obligations owed to Alfa; and

(e) The notices of 27 April by which Alfa asserts that it appropriated the Charged Shares were sent to CH and CFI in the British Virgin Islands and Turkey.

(2) In any event, did Alfa exercise the power to appropriate "in accordance with the terms of the security financial collateral arrangement" as required by Regulation 17?

(3) Is it relevant to Alfa's rights to appropriate under the Regulations and/or the English Charges (and if so in what way) whether it sought to exercise those rights "otherwise than bona fide for the

sole purpose of ensuring repayment of the sums due under the Facility Agreement" (as alleged in paragraph 17.8(5) of the Defence herein)? (Emphasis added.)

The Substantive Relief Claimed in the Actions

[4] Before the Court considers the issues it is pertinent to refer to the substantive claims to put the issues in their proper context. As already indicated, Alfa filed two suits. In Action 72, Alfa seeks a declaration that there have been Events of Default under the Secured Facility and that the loan secured thereby has become immediately due and payable. Additionally, Alfa seeks relief on the basis that it has validly appropriated the Charged Shares[3]. The defence in essence is that no events of default have occurred and that Alpha does not have a right of appropriation and that even if it did it has not validly exercised it.

[5] In Action 73 (with which we are not here concerned) Alfa seeks orders against: (1) CFI, (2) CTH, (3) CH and (4) HWR Services Ltd, (the registered agent of CFI and CTH) requiring it to be registered as holder of the Charged Shares in its capacity as mortgagee to perfect its security. This action was stayed pending the determination of this trial. The time limited for filing a defence had not expired at the date of the order granting the stay.

[6] In Action 119 CH and CFI seek, inter alia, declarations that the tender which they made was valid tender of a sum equal to or greater than its liabilities to Alfa and that Alfa was obliged to accept it. The time limited for filing a defence had not expired at the date of the order granting the consolidation and temporary stay pending this trial.

[7] Actions 72 and 119 were consolidated when the order for this trial of the preliminary issues was made on the 22nd June 2007 and further proceedings were stayed pending the trial. Suit 73 was also stayed pending this trial.

The Evidence

[8] As this was a dispute principally on questions of English Law the parties relied on expert evidence only. Alfa called Lord Millet and the Cukurova entities, as I have and will henceforth refer to CFI and CH, Professor Cranston. Both experts produced written

[3] This claim was amended on the 15th June 2007 to add this relief.

reports and a joint report identifying issues on which they were not agreed and the reasons therefor and they were cross-examined at the trial. It is interesting that Lord Millet's area of expertise is in equity, although because of his lengthy experience both at the Bar and the Bench where he served in our highest court as Lord of Appeal in Ordinary 1998 – 2004 (he is now retired from that Bench) he is well versed in commercial law, and Professor Cranston's, commercial law. Professor Cranston's principal office is that of Centennial Professor of Law at the prestigious London School of Economics. Needless to say both experts enjoy the highest qualifications in their fields.

[9] Surprisingly, as this was contrary to all initial expectations, the experts agreed on all the issues raised save for questions 2(1)(a) although they did not traverse exactly the same path to get there. Thus, this court's task which at first appeared rather daunting was considerably reduced and the court thanks both experts for their professionalism and candor. It was indeed a privilege to listen to such in-depth analyses from such founts of knowledge in some areas of law with which we can readily confess to having little or no familiarity.

[10] There is no dispute on the majority of the issues but the court has been invited by Alfa to answer them nonetheless as they have not been formally conceded. Dicey & Morris - The Conflict of Laws 13th Edn. para.9-016 is instructive on this –

"If the evidence of the expert as to the effect of the sources quoted by him is uncontradicted, "it has been repeatedly said that the courts should be reluctant to reject it" and it has been held that that where each party's expert witness agrees on the meaning and effect of the foreign law the court is not entitled to reject such agreed evidence, at least on the basis of its own research into foreign law. But while the court will normally accept such evidence it will not do so if it is "obviously false", "obscure", "extravagant" or "patently absurd" or if "he never applied his mind, 'to the real point of law'", or if "the matters stated by the expert did not support his conclusion according to any stated or implied process of reasoning," or "if the relevant foreign court would not employ the reasoning of the expert even if it agreed with his conclusions". In such a case the court may reject the evidence and examine the foreign sources to form its own conclusion as to their effect. Similarly, the court may reject an expert's opinion as to the meaning of a foreign statute if it is inconsistent with the text or the English translation and is not justified

by reference to any special rule of construction of the foreign law. It should however be noted that quite simple words may well be terms of art in a foreign statute.

[11] None of the exceptions mentioned above apply, the conclusions are not patently absurd and accord with the reasoning of both experts and therefore the court will confirm the answers given by the experts whose testimony on these undisputed matters the court accepts. And now to issue 2(1)(a) which is stated in full at para. 3.

Court's Analysis

[12] It is readily apparent from the agreed facts that this case is concerned with the appropriation of shares in BVI companies so one may well ask why English law plays such an important role here. The answer is provided by the English Share Charges and the BVI Business Companies Act 2004, as amended.

[13] Clause 21.1 of the English Share Charges provides that they are to be governed by English law. And, sections 66(4) and 161 of the BVI Business Companies Act 2004[4] enjoin this court to honour the choice of law in instruments creating charges over shares in BVI companies in that the governing law shall apply in all matters save that the rights between the mortgagor or the mortgagee as a member of the company and the company shall be governed by the company's memorandum and articles of association and the BVI Business Companies Act.

[14] Without doing violence to the learned discourse and testimony of the experts, in essence, Lord Millett answered the question positively as in his opinion Alfa by the letters became entitled to exercise all the absolute equitable rights of ownership in the Charged Shares and that was sufficient.

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[4] "Section 161(1) - Subject to its memorandum and articles, a company may, by an instrument in writing, create a charge over its property.
(2) The governing law of a charge created by a company may be the law of such jurisdiction that may be agreed between the company and the chargee and the charge shall be binding on the company to the extent, and in accordance with, the requirements of the governing law.
Section 66(4) - Where the governing law of a mortgage or charge of shares in a company is not the law of the Virgin Islands
(a) the mortgage or charge shall be in compliance with the requirements of its governing law and the instrument creating the mortgage or charge save that the rights between the mortgagor or mortgagee as a member of the company and the company shall continue to be governed by the memorandum and the articles of the company and this Act.

[15] Professor Cranston, on the other hand, was of the view that as Alfa on the exercise of the right did not become legal owner of the Charged Shares, Alfa could not be said to have appropriated them as a valid appropriation must result in Alfa becoming the legal owner, that is, the registered owner of the Charged Shares. The reasons for these differing views were fully explored in the reports and in the respective cross-examination and I will refer to them in brief as I deem necessary.

[16] The experts have agreed that under English law Alfa has a right of appropriation under the English Share Charges if, which has been assumed for the purposes of this trial, the conditions precedent to the exercise of this power have been met as provided for in the English Share Charges, that is if Events of Default have occurred. And, the question of whether Alfa has validly exercised that right by the letters must be determined in accordance with English Law as that right has been given by the English Share Charges which are governed by English law and the Regulations which are English legislation.

[17] Ordinarily, this might not have posed any real problem as our law on the interpretation of national legislation and documents accords with English law and English law is never really regarded as foreign law in these courts. However as a European Community Directive is indirectly involved, the parties quite properly engaged the services of the English law experts to assist with this aspect of English law as strictly speaking this is a matter of foreign law as it entails the construction of English legislation. The need for expert evidence on foreign law is clear. See Dicey & Morris – op.cit para.9-013:-

> "*Expert evidence* - It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness, since without his assistance the court cannot evaluate or interpret them."

[18] The issue in a nutshell is whether Alfa, according to English law, appropriated the Charged Shares by the simple device of sending the letters[5], declaring that it had done so without

[5] The letters can be seen in full at Bundle 3 Part I, page 42.

having become the registered owner of the shares. The Cukurova entities to date remain the registered owners.

[19] As the experts differ it is proper to consider at the outset what the court's task is when it is faced with differing opinions of experts on issues of foreign law. Again, Dicey and Morris op. cit. para. 9-016 already referred to and para 9-017 are instructive:-

> "If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony".

[20] The right of appropriation, as both experts agreed, is conferred by Clause 9.3 of the English Share Charges. This gives Alfa the power of appropriation under Regulation 17 of the Regulations which itself confers that power only where the charge bestows it. In gist, the clause gives Alfa the right to appropriate the Charged Shares at any time after the charges become enforceable to the extent that the English Share Charges constitute a financial collateral arrangement under the Regulations and the charged shares amount to financial collateral under the Regulation. Both experts agree that the English Share Charges constitute a security financial collateral arrangement under the Regulations and that the Charged Shares are financial collateral. They also agree that the English Share Charges constitute Alfa an equitable mortgagee of the shares as under the Regulation only a legal or equitable mortgagee has the right of appropriation. Clause 9.3 is set out in full in the Agreed Facts No. 11.

[21] And, Regulation 17 provides:-

> "Where a legal or equitable mortgage is the security interest created or arising under a security financial collateral arrangement on terms that include a power for the collateral-taker to appropriate the collateral, the collateral-taker may exercise that power in accordance with the terms of the security financial collateral arrangement, without any order for foreclosure from the courts." (Emphasis added.)

[22] By Regulation 18 the collateral taker is obliged to value the security in accordance with the terms of the arrangement but any event in a commercially reasonable manner, when he exercises the right. He must account for and pay the amount by which the value exceeds the financial obligations to the collateral provider and the collateral provider remains liable for any amount by which the collateral is less than the financial obligations.

[23] Surprisingly, as, according to the experts, appropriation is a new remedy introduced into English law by the Regulations, the Regulations do not define this concept and neither it nor the English Share Charges give any express guidelines as to what is intended or is to be achieved by it. One must therefore, as the starting point, determine what the concept of 'appropriation' means in Regulation 17 to determine whether Alfa validly exercised that right in the manner in which it purported to have done so.

[24] However, as already noted, the Regulations is not an ordinary English legislative measure. The Regulations, as Professor Cranston explained fully, was introduced by the United Kingdom ("the U.K.") to meet their obligations under the EC Treaty which established the European Union and to specifically give effect to the European Community Directive – Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. The Regulations were made by HM Treasury under section 2 (2) of the European Communities Act 1972 and apply to the U.K. – England, Wales, Scotland and Northern Ireland[6].

[25] As such, recognizing their EC derivation, the English courts have developed special principles for the interpretation of instruments like the Regulations- both experts testified to that effect. Thus, I accept that the ordinary rules of statutory construction normally employed by the English Courts, and as a matter of fact, our courts, (as our law on this subject is identical with English law) do not apply.

[26] Lord Millett referred to those concepts in his report though not by their established names and Professor Cranston did so at some length. However, for the avoidance of any doubt, Lord Millett in cross-examination readily accepted the scope of those principles as explained in extenso by Professor Cranston in his report.

[6] Apparently, the Regulations replaced 2003 S.I. 2003 No. 3112 which were revoked by Regulation 2 before they were due to come into force. This revocation was due to a drafting error.

[27] There are three concepts or governing principles which have evolved as I understand it. These derive from the jurisprudence of the European Court of Justice ("the ECJ") on matters of European Community law and the English Courts accept the rulings of the ECJ as authoritative on matters of European Community law including how Directives and the law based on them are to be interpreted.

[28] The first concept is that of 'autonomous meaning', which is that terms in legislation implementing European Union/Community directives can have a meaning different from the meaning of those terms in national law[7]. In other words, phrases and concepts will be interpreted in a way which may not be consistent with how they may be interpreted in national law; the courts will give them a meaning which can be applied uniformly in all member states.

[29] There is no doubt that English Courts have accepted this notion of autonomous meaning. See Director General of Fair Trading v First National Bank PLC. In that case the High Court was considering the Unfair Terms in Consumer Contracts Regulations 1994 which implemented in the UK the Council Directive 93/13/EEC on unfair terms in consumer contracts and in construing those regulations considered that directive. Lord Steyn observed:-

> "32. The Directive is not an altogether harmonious text. It reflects the pragmatic compromises which were necessary to arrive at practical solutions between member states with divergent legal systems. But, despite some inelegance and untidiness in the text, the general principle that the construction must be adopted which promotes the effectiveness and practical value of the system ought to overcome difficulties. And the concepts of the Directive must be given autonomous meanings so that there will be uniform application of the Directive so far as is possible."

[7] This is not surprising given that the EC comprises 27 member states with different legal regimes.

[30] As a corollary to this English Courts interpret UK legislation in the light of the relevant EC Directive. See Lord Bingham of Cornhill – Director General of Fair Trading v. First National Bank[8]:-

> "The provisions of the regulations directly at issue in these proceedings must be considered in more detail below. It should however be noted that the regulations were made to give effect in the United Kingdom to Council Directive 93/13/EEC(OJ 1993, L95, p.29) on unfair terms in consumer contracts ("the directive"). It is common ground that the regulations should be construed so as to give effect to the directive, to which resort may properly be made for purposes of construction." (Emphasis added.)

[31] The second is what is referred to as the 'Marleasing principle[9] according to which the courts of Member States of the EU must interpret their national law so far as possible in the light of the wording and purpose of the EC instrument in question. The principle was expressed by the ECJ recently in cases C-397/01; C-403/01, Pfeiffer v. Deutsches Rotes Kruez [2004] ECR 1-8835:-

> "Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive."

[32] This principle has been accepted and applied by the English Courts. See for example, Revenue and Customs Commissions v. IDT Card Services Ireland Ltd.[10] cited by both experts.

[33] The third deals with the material which can be used as an aid to interpretation of such legislation. As Professor Cranston testified, 'The English Court refer to materials such as

[8] [2001] UKHL 52 [2002] 1 A.C. 481
[9] The Marleasing principle derives its name from Case C-106/89 **Marleasing SA v. La Commercial Internacional de Alimentacion SA**[9].
[10] [2006] EWCA Civ. 29

the Commissioners' White paper, the Commission's proposal, the opinion of the Economic and Social Parliament, the Council's Common Position and the decision of the European Parliament. These are termed "the travaux preparatories". See Crane v Sky In House Service Ltd. [2007] EWHC 66, Three Rivers District Council v. Bank of England (No. 2) [1996] 2 All E.R. 363 as referred to by Lord Millet and A. v. National Blood Authority [2001] 3 All E.R. 289.

[34] For the sake of completeness I mention that issue was taken by Professor Cranston with whether or not the Regulations were ultra vires the European Communities Act 1972. However, the court ruled that it was not open to the Cukurova entities to take this issue now or in the future in these proceedings having regard to the specific issues raised by the preliminary issues and to the manner in which they had conducted their case which was tantamount to an implied acceptance that the Regulations were valid and to the general principles which restrain a court from pronouncing on the validity of laws of a foreign nation as encapsulated in The James Sagor Case [1921] 3 KB 532[11].

[35] These various interpretative techniques and principles suggest without doubt that where there is a dispute as to the meaning of provisions in legislation implementing an EC directive that the English Court must interpret the legislation in conformity with the Directive and that this must entail that the court examine the Directive to determine its scope and objectives in order to properly construe the implementing legislation. That the English Court must always have regard to the Directive in any event whether they do it at the outset or at the end to ensure that their interpretation accords with the EU measures the national legislation is seeking to implement fin my view flows inexorably from the Marleasing principle.

[36] The issue is directly governed by the Regulations but, as already remarked, the concept of 'appropriation' is not defined in the Regulations and so we must look to the Directive to see what was envisaged to assist in ascribing the proper meaning to the concept. However, the Directive does not define the term either and it is noted that neither it nor the Regulations prescribe the manner in which the power may be exercised although they both speak to removing any formal restrictions on the exercise of the power. One must

[11] I may however comment, having regard to the arguments advanced by Alfa, that the novelty of a point or an idea does not signify that it is without merit otherwise what do we say to great inventions which at their conceptions were strange and novel.

therefore seek to determine its purpose and scope as an aid to its construction and in so doing one may having regard to the Directive as a whole including its preambles and the travaux preparatoires.

[37] I find, as testified to by Lord Millet and supported by Professor Cranston, that the Directive is aimed at the arrangements concerning collateral provided by banks and other institutions operating in the wholesale financial markets. It does not concern arrangements like the present where 'a non bank' or 'non financial institution' has secured the repayment of a loan.

[38] However, we note that the Directive, by clause 2(2) of its preamble, creates a minimum regime and that as Lord Millet explained, this means that member states can go further if they so wish and that this is what the UK did in the Regulations by making the Regulations applicable to non-bank and non-financial institutions and to shares in private companies whether traded on the financial markets or not. Both experts therefore agree that the Regulations exceed the minimum requirements stipulated for by the Directive and that this is acceptable subject to Professor Cranston's reservation as to the vires of the Regulations having regard to the fact that the Regulations were brought in as subsidiary legislation under the European Communities Act and not as primary legislation which is what Professor Cranston contends it should have been as it exceeded the requirements of the Directive but the court is not concerned with this issue.

[39] The aim of the Directive having regard to its preamble was to improve the liquidity of certain financial collateral arrangements in Europe by having Member States harmonize their relevant laws. The Directive is part of the EU drive to create a single market in financial services whereby EU banks and financial institutions can freely establish themselves in, and provide services in, the territory of EU Member States other than the ones in which they are established.

[40] Both experts agree that the English Share Charges are 'security financial collateral arrangements' within the meaning of the Directive and the Regulations. The definition of 'security financial collateral arrangements' in Article 2 of the Directive is instructive:-

> "'security financial collateral arrangement' means an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral

> remains with the collateral provider when the security right is established." (Emphasis added.)

[41] This speaks to "the full ownership" of the collateral, here, the Charged Shares, remaining with the collateral provider, here, the Cukurova entities. This definition is to be contrasted with that of the "title transfer financial collateral arrangement" whereby the collateral provider transfers 'full ownership' of financial collateral to a collateral taker for the purpose of securing its financial obligations. Therefore, the idea here is one of "full ownership" not equitable ownership as that concept is known to English law and therefore the right of appropriation under the Directive and the Regulations must be in considered that light.

[42] The definition of "security financial collateral arrangement" under the Regulations is to be compared. This speaks to this type of arrangement creating a "security interest' only in the collateral and the collateral being put into the control or possession of the collateral-taker. (It must be remarked that both the regulations and the directive are concerned with situations where the collateral is cash or "financial instruments" as defined not real property.

[43] And, the Regulations define "security interest" thus:-

> "security interest" means any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security and goes on to list what is included such as a pledge, a mortgage, a fixed charge and a floating charge.

[44] The other kind of financial collateral arrangement dealt with in both the Directive and the Regulations is "title transfer financial arrangement". Under this definition in the Regulations the collateral-provider, "transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral-provider;"

[45] Again, the difference in the two types of financial collateral arrangements under the Regulations is clear and the definitions accords with those in the Directive except in so far

as the Regulations exceed the minimum requirements. Under the security financial collateral arrangement the collateral taker gets a **security interest** only and under a title transfer he or she or it gets **legal and equitable title** to the security, subject to the equity of redemption, in other words "full ownership" as envisaged by the Directive subject only as aforesaid.

[46] Article 4 of the Directive provides, for appropriation. This Article states that Member States shall ensure that the collateral-taker shall on the occurrence of an enforcement event have the right to realize any financial collateral provided in respect of financial instruments (the Charged Shares fall within this definition as well as that definition under s. 3 of the Regulation[12]) by appropriation.

[47] The precise words are:-

> "Article 4.1(a) - Member States shall ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise in the following manners, any financial collateral provided under, and subject to the terms agreed in, **a security financial collateral arrangement**:
>
> (a) **financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations."** (Emphasis added.)

[48] Article 4(2) provides that appropriation is possible only if it is agreed on by the parties to the transaction and the parties have agreed on the valuation of the financial instruments.

[49] It is noted that Article 4 (3) expressly provides that Member States which do not allow appropriation on 27 June 2002 are not obliged to recognize it and if they exercise this option to use it then they should inform the Commission. Both experts agreed that there was no such relief in the UK as at that date and that the UK opted to include that right in the Regulations as it was entitled to do.

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[12] See Article 1 para e: 'financial instruments' means shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give rise to a subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of nay of the foregoing."

[50] Article 4(4) expressly provides as follows:-

> "The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the security financial collateral arrangement, be without any requirements to the effect that:-
>
> (a) prior notice of the intention to realize must have been given;
>
> (b) the terms of the realisation be approved by any court, public officer or other person;
>
> (c) the realisation be conducted by public auction or in any other prescribed manner; or
>
> (d) any additional time period must have elapsed.

[51] And to my mind article 4(6) is also pertinent. It reads:-

> "This Article and Articles 5, 6 and 7 shall be without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner." (Emphasis added.)

[52] Two other provisions which I view as relevant are Regulation 3 and Article 2(g) of the Directives which are substantially the same. Article 2(g) reads:-

> "Book entry securities collateral" means financial collateral provided under a financial collateral arrangement which consists of financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary." (Emphasis added.)

[53] The Charged Shares fall within that definition under the Regulations as shares are both financial instruments as defined and book entry securities.

[54] Article 9 is also instructive. This provides:-

> "1. Any question with respect to any of the matters specified in paragraph 2 arising in relation to book entry securities collateral shall be governed by the law of the country in which the relevant account is maintained. The reference to the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country. (Emphasis added.)

[55] Some of the matters referred to in paragraph 1 are "the legal nature and proprietary effects of book entry securities collateral" and "the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event." (Emphasis added.)"

[56] These provisions are reflected in the Regulations in Regulation 19 in particular 19(4)(a) and (e) which are identical to Article 9(a) and Article 9(d).

[57] What is clear from my perusal of these provisions in the Directive and the Regulations is that appropriation is a method of enforcing or realizing the security and that it is to be exercised without any of the usual safeguards such as notice to the collateral provider or the ultimate safeguard – an order of the court.

[58] The two methods envisaged by both the Directive and the Regulations for the realisation of financial collateral, here the Charged Shares, is by way of sale or appropriation. What can be inferred from that is that they are like remedies and that on sale or appropriation the collateral taker gets to deal with the financial instrument as his property. In both methods the value of the financial collateral must be set off against or applied in discharge of the collateral provider's financial obligations.

[59] Nothing is said in either instrument about the precise manner in which the right is to be exercised except that the security should be valued, under the Regulations in accordance with the terms of the arrangements and in any event in a "commercially reasonable manner" whilst under the Directive not only the valuation of the security but the realisation and the calculation of the financial obligation must be conducted in a commercially reasonable manner in accordance with national law.

[60] The concept of appropriation in the Regulations must be given a meaning to promote the aim of the Directive or in other words a purposive meaning and such meaning must be autonomous, that is, one that can be applied uniformly to all the Member States. Thus, as

the Regulations are implementing the Directive, a like meaning must be given to the concept in the Regulations, so we cannot give it a meaning which makes sense only with reference to English principles of property law.

[61] Both experts agree that the concept is most analogous to the English remedy of foreclosure available to a mortgagee. However, Professor Cranston readily admitted in cross-examination that he, not being versed in the law of property as Lord Millet, got that concept partially wrong in that he originally stated that before a mortgagee can exercise his right to foreclosure he must first get in the legal title, and accepted wholly Lord Millet's explanation of the remedy.

[62] More pertinently, both experts agreed on what the concept of appropriation entails. Professor Cranston at para 86, p. 40 of his report quoted a "non-legal definition" suggested by the European Commission in its Evaluation study of the Financial Collateral Directive:-

> "Appropriation essentially means that the collateral taker in an enforcement event may – under certain conditions – keep the assets as its own property instead of selling them."

[63] Lord Millett accepted that definition on cross-examination, although he, when taxed about not giving a definition in his report said that he did not do so as the meaning was as plain as a pikestaff although he frankly this that one had to rack one's brains as to how to do to exercise that right. This of course is the dilemna Alpha was faced with here.

[64] Professor Cranston was of the opinion that appropriation is a self- help remedy exercisable subject to conditions. He observes:-

> "As a result of appropriation the collateral taker may retain the collateral as its own property in satisfaction of the underlying obligation. Appropriation is in line with one of the aims of the Directive, expressed in Article 4(4), which is to offer a speedy and non-formalistic method of enforcing a security agreement relating to financial collateral."

[65] The remedy of appropriation was not in the original draft Directive but was introduced as a result of the opinion of the European Central Bank as stated by Professor Cranston (para. 90) and not simply added by the European Parliament as indicated by Lord Millet. See para. 26 p. 128 FN 48 of Report. See also Professor Cranston's report at para. 107.

[66] I accept Professor Cranston's opinion that appropriation must be given an autonomous meaning, one that could be applied uniformly throughout the E.C. which it must not be overlooked comprise countries which are predominantly governed by the civil law and that a significant factor in arriving at a definition in the context of the case is that the English common law recognizes equitable interests but the civil law does not.

[67] I also accept as both experts agreed that some assistance can be gleaned by comparing appropriation with the English remedy of foreclosure as Regulation 17 provides that appropriation can be exercised without an order of foreclosure from the courts. However I do not think that the analogy takes us very far with the issue before us as in foreclosure the order of the court is decisive in barring or extinguishing the right of redemption and here the parties a cannot resort to a court order.

[68] What however is of the utmost significance to my mind is that both Lord Millet and Professor Cranston agree that on appropriation the collateral owner must become the absolute owner of the Charged Shares and the equity of redemption extinguished. Professor Cranston suggests that this means that appropriation must result in Alfa becoming the registered owner of the Charged Shares as registration in the share register alone can confer absolute rights of ownership on Alfa that is both legal and equitable and that the letters did not achieve that result.

[69] Strictly speaking the law governing the ownership and transfer of the Charged Shares is BVI law as Lord Millet expressly recognised and therefore Professor Cranston not being an expert on BVI law cannot say authoritatively how legal ownership of shares in a BVI company is acquired. And, both the Directive (Article 12) and the Regulations (Regulation 19) recognize that as they provide that such matters fall to be governed by the domestic law in which the registers are kept. However, again as Lord Millet expressly observed, (as and, he being a former member of Her Majesty's Privy Council would be regarded as an

expert on BVI law[13] even though he graciously refrained from making any such claim) that the law of the BVI on this issue is the same as English law. There is no doubt that under BVI law legal ownership in shares in a BVI company can only be obtained by registration in the company's register. See Section 78 of the BVI Business Companies Act.

[70] Lord Millet however is of the opinion that registration is not necessary as once Alfa determines to appropriate the Charged Shares then the equity of redemption is extinguished and it becomes entitled to direct how the rights attached to them are to be exercised and thus is entitled to the 'absolute beneficial ownership' in the Charged Shares. If we follow this to its logical conclusion it must mean that the letter would be taken to have had the effect of extinguishing the equity of redemption. In his view therefore it is not necessary that Alfa becomes registered owner. And here it is to be remembered that Alfa as equitable mortgagee holds the share certificates and signed share transfers and is entitled to perfect its security by obtaining registration.

[71] Mr. Smith, Q.C. learned counsel for Alfa with consummate artistry sought to show that Professor Cranston's reasoning and conclusion in his report is flawed as it was based substantially on his analogy with foreclosure and on his mistaken view, which he retracted on reading Lord Millet's report and expressly conceded in cross-examination, that a mortgagee must obtain legal title in order to exercise its remedy of foreclosure. See para. 118 of his report which Professor Cranston agreed was mistaken and that the paragraph should be deleted in its entirety.

[72] However, to my mind this concession does not seriously undermine Professor Cranston's conclusion as the analogy with foreclosure was only part of the basis for arriving at his conclusion. As I see it, the fundamental basis for his conclusion has not been affected which is that one must have regard to the objectives of the Directive and interpret the Regulations to give effect to it having regard to the special principles developed by English law for construing UK legislation implementing EC directives and the need to give an autonomous meaning to it.

[73] Both experts agree that appropriation as envisaged by the Directive and the Regulations is akin to sale and foreclosure and that on appropriation the rights of the collateral provider

[13] It seems that the same principle applies to the Judicial Committee of the Privy Council. In these cases, the foreign law, which was a matter of fact in the courts below, becomes a matter of law on appeal.

are extinguished and the collateral taker is entitled to keep and treat the security as its own and this must mean that he must attain absolute ownership by the exercise of the right. As the civil law countries of the EU have no concept of equitable ownership this must mean that appropriation must entail the collateral owner becoming absolute owner of the security on the exercise of the right not just equitable owner.

[74] On Lord Millet's analysis, Alfa attained all the equitable rights by sending the letters and extinguished the equity of redemption and so obtained absolute equitable title as the legal title which is outstanding is just a shell so to speak. Accordingly, Alfa is not required to be registered as the holder of the Charged Shares and so become the legal owner as in equity it has full beneficial ownership and the Cukurova entities are bare trustees. However, he conceded that some of the rights attached to the Charged Shares like voting rights will have to be exercised by giving the requisite directions to the Cukurova entities. Thus, the Cukurova entities will always be in the picture so to speak until Alfa obtains registration or Alpha disposes of the shares. On this scenario can Alfa be said to have validly appropriated the shares and obtained full ownership if the legal title is outstanding?

[75] Under our law which English law recognizes as the governing law for determining the ownership of the shares Alfa only has equitable ownership and all rights which it claims to have on appropriation to treat the shares as its absolute property in this scenario must be exercised through the medium of the Cukurova entities. It must follow then that its rights will depend on the compliance of Cukurova. Is this what is envisaged by appropriation in the Directive and the Regulations, that is that on appropriation the collateral-taker may not have acquired full ownership?

[76] It strikes me as unacceptable that in the world of global commerce, a collateral- provider or lender could appropriate a security by just determining to do so which really amounts to an inner thought process, which is not required to be translated into any overt action. Such a state of affairs would not be commercially reasonable, acceptable or commercially effective especially when one recalls that under the Regulations a collateral taker is not required to give notice. How then will a collateral taker know that its shares have been appropriated if it gets no notice and if no change on the register is effected? It will simply be left to monitor the actions of the collateral-taker and how can it do so if a mere mental

process of the collateral-taker is sufficient to both destroy the equity of redemption and simultaneously vest the full ownership of the shares in it?

[77] Lord Millet sought to explain that once a lender determines to appropriate then this will usually be reflected in its balance sheet. Here, there is no evidence that Alfa has done that but even if there was such evidence in my view that would not assist as normally a collateral- provider will have no access to such records. In my view one must have some overt, unequivocal action by a lender which has the effect of both destroying the equity of redemption and of vesting all the legal and equitable rights in the security in him for the right of appropriation to be validly exercised. This Alfa cannot do merely by sending a letter sin these terms set out in the agreed facts.

[78] This construction of the right of appropriation as given by the Regulations in my judgment accords with the objectives of the Directive as it is a concept which can be applied uniformly in all Member States. And, I am not persuaded that to require registration would be that cumbersome to be said to defeat the purpose of the Regulations and the Directive as Alpha advanced. To my mind it will lend certainty to a situation as has arisen here. Accordingly, Alfa did not validly appropriate the Charged Shares by sending these letters as the legal title to the Charged Shares remain vested in the Cukurova entities.

[79] In closing I feel compelled to make one observation. Lord Millet made reference to Alfa rejecting late tenders of payment of the balance of the loan which, although it did not form part of the agreed facts, was certainly disclosed in the exchange of correspondence between the parties which form part of the documents before the court. He stated at para. 63 of his report:-

> "Once the power of appropriation has been exercised, the right to redeem was extinguished, and it was too late for CFI and CH to redeem (unless Alfa agreed to accept the money which it was not bound to do.)"

[80] I am relieved that this point has been made, that is, that even though Alfa thought that it had validly exercised its right to appropriate it still nonetheless could have released the security and accepted the late tender as there was no **legal barrier** to it doing so. After all, appropriation is simply a means of obtaining payment of a secured debt. This court at the

risk of sounding naïve had often wondered why this 'marathon litigation'[14] was continued after the tender as I ventured to think that there was no impediment in law to Alfa accepting the late tender even though it had claimed to have appropriated and was only interested in repayment. The fact is that the appropriation was always challenged and in any event Alfa even if it had validly appropriated still had to account and pay to Cukurova the balance by which the value of the Charged Shares exceeded the debt. But, perhaps the stakes are higher than it appears and a bird in the hand is not worth two in the bush as I have been taught and this expensive litigation is worth it.

Costs

[81] The issue of costs remains. Both parties in their lengthy written submissions chose not to address the issue of costs and there was no order made at case management that costs should await judgment on the substantive issues which in any event is a course to be frowned upon as it is incumbent on the parties to raise all issues on which there is a dispute in their submissions to be considered at the time of the hearing of the matter not afterwards as this amounts to poor case management and improper use of the courts' resources.

[82] However, in his oral submissions at the close of the case, Mr. Smith urged that if Alfa succeeds on all points then it should recover all its costs on 'the appropriate basis' except that it should recover costs on the indemnity basis in relation to the preliminary issues which were not conceded and in addition that Alfa should have the costs on its ultra vires application.

[83] Counsel could not assist the court in what he considered to be 'the appropriate basis' not being overly familiar with CPR 2000 neither could he assist with the court's query that costs on an indemnity basis was not allowed under CPR 2000.

[84] The court accordingly directed that submissions on costs be filed and exchanged on or before 5th October 2007. This was duly done and Alfa also filed a reply on 9th October. However, through no fault of the parties the submissions reached the court very late in the day and for this the Court Office must be held responsible.

[14] I refrain from using the label employed by the Cukurova entities during the initial assaults as this has been bitterly objected to by Alfa.

[85] In his submissions Mr. Smith for Alfa submitted that if Alfa succeeds on all the preliminary issues it should recover its costs on an indemnity basis as these costs were incurred in the enforcement of its rights under the Finance Documents. However should the Cukurova entities succeed on the preliminary issues they should pay Alfa 15/16th of its costs as the Cukurova entities only won on one issue of 16. In the event that the court is of the view that Alfa should not have its costs on an indemnity basis then costs should be determined under CPR 65.12. Counsel relied among others on WB Nominees Ltd v The Company, Collio SA et al, a case from the BVI.

[86] On the ultra vires issue Mr. Smith contended that the Cukurova entities raised the ultra vires issue in its expert's report and Alfa had to prepare for it therefore Alfa should recover its costs on an indemnity basis.

[87] Counsel further submitted under the heading on 'other costs' referring to the orders of 22nd June and 3rd September that if Alfa succeeds in this trial the Cukurova entities should pay its costs on an indemnity basis based on the order of June 22 and that it would be unjust for the order made on September 3 to stand and that the court had jurisdiction to permanently stay that order. He relied on Shanks J in Arthur and Renee Shemwell et al v Nail Bay Community Association Ltd et or.

[88] Mr. MacLean Q.C. learned counsel for the Cukurova entities submitted that even though the evidence may not have supported some of the arguments put forward by Cukurova if question 2 is answered in its favour it has succeeded in respect of the preliminary issues and as such is entitled to its costs in respect of all the issues and that costs fall to be assessed under CPR 65.12 and that if Alfa succeeds the same basis will apply.

[89] On the ultra vires issue Counsel argued that the Cukurova entities accept that Alfa was the successful party and is entitled to recover its costs limited to a proportion because the issue was before the court due to the conduct of Alfa.

[90] He further submitted on the 'other costs' aspect that the Cukurova entities is entitled to all its costs in establishing directions in respect of factual evidence.

[91] I have considered the submissions of both Counsel. In relation to the court's jurisdiction to order costs on an indemnity basis Alfa sough to persuade this court that it ought to make such an order by relying on the English case of Parker Tweedale v Dunbar Bank plc [1991] Ch 26, WB Nominees Ltd and an extract from Fisher and Lightwood's Law of

Mortgage, 12th Edition to the effect that a mortgagee is entitled to an indemnity for its costs and on Clause 12.2 of the Facility Agreement similar provisions in the English Share Charges.

[92] Clause 12.2 provides:- "The Borrower [CFI] shall, within three Business Days of demand, pay to the Lender the amount of all costs and expenses (including legal fees) incurred by the Lender [Alfa] in connection with enforcement or, or the preservation of any rights under, any Finance Document."

[93] To my mind Clause 12.2 must be construed to mean all legal costs reasonably and properly incurred by a lender in the enforcement or preservation of the security otherwise this could be seen as carte blanche for a lender to recover costs needlessly incurred and open to abuse. In these circumstances, having lost the substantial issue Alfa cannot claim to have incurred reasonable legal costs of these proceedings and therefore cannot rely on that clause. This interpretation is borne out by the passage in Fisher and Lightwood's Law of Mortgage relied on as it speaks to all costs etc "reasonably and properly incurred" and so too does the dicta relied on of Nourse LJ in Parker Tweedale v Dunbar Bank Plc.

[94] CPR 2000 sets out the regime on costs and therefore costs are to be determined in accordance with the relevant provisions. WB Nominees is a High Court decision and while worthy of consideration it is not binding precedent and with all due respect to the Learned Trial Judge in my judgment costs on an indemnity basis is not permitted by CPR 2000 which only speaks to budgeted costs, fixed costs, prescribed costs. Having regard to order 65, I am in accord with Mr. MacLean that the applicable basis is assessment under CPR R.65.12.

[95] The normal rule is that costs follow the event. However the court is given a discretion to vary that rule as it sees fit taking into account the factors set out in Rule 64.6 (6). Here the Cukurova entities as the successful litigant on the substantial issue is entitled to its costs but the court will not award it all its costs as costs were expended on experts' reports on other issues on which the Cukurova entities had to concede. Accordingly, I deem it just that the Cukurova entities should only recover half of the costs of its expert's report and that it should pay to Alfa half the costs of Lord Millet's report. I do not agree with the 15/16th calculation as many of the matters considered in both reports would have had to be

considered in relation to the issue of the validity of exercise of the right of appropriation by Alfa.

[96] In relation to the 'other costs' issue I will not vary the orders for costs in favour of the Cukurova entities as at those hearings they did not have the benefit of their experts' report. I reiterate that all costs are to be assessed under CPR 65.12 if not agreed. In the event that agreement is not reached applications for assessment and submissions of applicants must be filed and served within 21 days of the dated hereof, and replies by the opposing parties if any are to be filed and served 14 days after service of the submissions.

Conclusion

[97] In summary, for the foregoing reasons, the substantive issue as reflected in Issue 2 is decided in favour of the Cukurova entities and the costs orders are as set out in paras. 93 to 95 hereof.

[98] Finally, the court expresses its appreciation to Counsel for the invaluable assistance rendered.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands