TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/001

BETWEEN:

ALFA TELECOM TURKEY LIMITED

Appellant

and

[1] CUKUROVA FINANCE INTERNATIONAL LIMITED
[2] CUKUROVA HOLDINGS AS

Respondents

Before:

The Hon. Mde. Ola-Mae Edwards	Justice of Appeal
The Hon. Mde. Janice George Creque	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Smith, Q.C. with Mr. Robert Levy and Mr. Oliver Clifton
for the Appellant
Mr. Kenneth MacLean, Q.C with Mr. James Nadin for the Respondents

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2009: March 10;
September 16.

Civil Appeal – Civil Procedure – summary judgment – whether there is a real prospect of success - whether there is a triable issue – Parts 15 and 26 of the Civil Procedure Rules 2000.

The appellant ("Alfa") is a Russian-based conglomerate which controls a diversified range of businesses (including telecommunications companies) and is the registered shareholder of 49% of the issued shares in Cukurova Telecoms Holdings Ltd. ("CTH"). Cukurova Finance International Ltd. ("CFI"), a wholly owned subsidiary of Cukurova Holding AS ("CH"), is the registered holder of 51% of the issued shares in CTH. CTH is a majority shareholder of the Turkcell group of companies which operate the largest mobile telecommunications business in Turkey.

By an agreement between Alfa and the respondents ("the Facility Agreement"), Alfa granted a secured dollar term loan facility in favour of CFI. This included the grant of

equitable mortgages to Alfa over the shares held by CH in CFI and the shares held by CFI in CTH. The first payment owed under the Facility Agreement was duly made. Before the second payment fell due, Alfa alleged defaults under the Facility Agreement and appropriated the shares in CFI and CTH. By claim BVIHCV2007/0072, Alfa sought, among other things, a declaration that it had validly appropriated the shares. By claim BVIHCV2007/0119, the respondents sought an order mandating Alfa to accept the amount proffered (the outstanding principal amount under the Facility Agreement plus interest) and to deliver up the share certificates, transfer forms and signed releases for the charged shares. The respondents alleged, among other things, that there had been no default under the Facility Agreement and that Alfa had not acted in good faith in its purported appropriation of the shares. Alfa applied for summary judgment on BVIHCV2007/0072 and dismissal of BVIHCV2007/0119. These applications were refused, against which decision Alfa appeals.

Held: dismissing the appeal and refusing the application for summary judgment with costs to the respondents in the sum of two thirds of the costs assessed or agreed for the trial of the issue in the court below:

1. In granting or refusing an application for summary judgment the court must consider whether the applicant or respondent has a real prospect of succeeding on the claim or issue as required by Part 15 or the Civil Procedure Rules 2000 (CPR 2000).

2. The decision on a summary judgment application does not involve the judge in conducting a mini trial. The judge should not therefore apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. By the very nature of the proceeding, the testing of evidence is not an option.

3. If the pleaded case of the parties indicates that there is a factual issue to be tried, which if proved in favour of the respondent to the application might result in a decision in that latter's favour, then the preemptive power of the court should not be used. The factual issue raised in the pleadings as to whether Alfa acted in good faith in its purported attempt to appropriate the shares, is such a triable issue. The preemptive power of the court to grant summary judgment should thus not be used.

4. There are many other conflicting facts and in depth issues to be dealt with in this matter. In all the circumstances, there is no reason to disturb the exercise of the trial judge's discretion to refuse the application for summary judgment.

   Swain v Hillman [2001] 1 All ER 91, Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550 and Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513, applied. Bank of Bermuda Ltd. v Pentium British Virgin Islands Civil Appeal No. 14 of 2003, followed.

JUDGMENT

[1] GORDON, J.A. [AG.]: The appellant ("Alfa") has appealed against a decision of the High Court dated 12th January, 2009 refusing:

- The application by Alfa for summary judgment on issues raised in paragraphs 34A to 34O of Alfa's Re-Re-amended Statement of Claim in claim BVIHCV2007/0072;

  and

- The application for dismissal of claim BVIHCV2007/0119 in which the respondents were the claimants.

Leave to appeal was granted by the learned judge on delivery of the judgment.

Dramatis Personae

[2] Alfa (the claimant in claim BVIHCV2007/0072 and the defendant in claim BVIHCV 2007/0119) is a company incorporated in the Territory of the Virgin Islands (BVI). It is a wholly-owned subsidiary of the Alfa group, a Russian-based conglomerate which controls a diversified range of businesses, including telecommunications companies.

[3] Cukurova Finance International Limited (CFI) is a company incorporated in the BVI and a wholly-owned subsidiary of Cukurova Holding AS (CH), a company incorporated in Turkey. Cukurova Telecoms Holdings Limited (CTH), is a company incorporated in the BVI and is the majority shareholder of the Turkcell group of companies (incorporated in Turkey), which operate the largest mobile telecommunications business in Turkey. CFI and Alfa are the registered holders of 51% and 49% of the issued shares, respectively, in CTH.

Factual and Procedural Background to the Appeal

[3] By an agreement dated 28th September 2005, ("the Facility Agreement") between Alfa and the respondents, Alfa agreed to lend to CFI a secured dollar term loan facility in the sum of US$1.352 billion, which sum was advanced on 25th November

2005. Four charges were created as security for the loan under the Facility Agreement. This included the grant of equitable mortgages to Alfa over the shares held by CH in CFI and the shares held by CFI in CTH.

[4] The first payment of interest under the Facility Agreement in the sum of US$574,386,450 was due and paid to Alfa on behalf of CFI on 24th November 2006. The next payment was due on 26th November 2007.

[5] By letter of 16th April 2007, Alfa alleged that the respondents had committed a number of defaults under the Facility Agreement and demanded immediate payment of the balance of the loan, plus interest. On that date, it also issued claim BVIHCV2007/0072 seeking such remedy.

[6] By letter of 16th April 2007, Alfa also wrote to CFI and CTH indicating that it (Alfa) was entitled to be registered as legal owner of the charged shares and requesting rectification of the share registers to reflect its ownership; and enclosed the completed blank share transfer forms with its name inserted as transferee. On that date, Alfa also issued claim BVIHCV2007/0073 seeking declarations that it was entitled to be so registered and for rectification of the register accordingly.

[7] CFI, by letter of 17th April 2007, denied that any events of default had occurred or that Alfa was entitled to accelerate the loan. By exchange of letters on that date, the parties agreed that Alfa would not pursue any enforcement steps in respect of the charged shares without giving CFI at least 2 working days' prior notice. Such notice was effectively given on 25th April 2007. By exchange of letters on 26th and 27th April 2007, the parties sought, but failed, to reach agreement on the way forward.

[8] On 27th April 2007, the respondents applied for and obtained stop notices in respect of the charged shares, and applied for and received an ex parte injunction preventing Alfa from taking any enforcement steps in relation to the charged shares or from registering the transfer of the shares.

[9] Before the hearing of the ex parte injunction, Alfa wrote to the respondents to indicate that it (Alfa) was entitled to appropriate the charged shares because of the alleged events of default stated in the letter of 16th April 2007, and purported to appropriate the shares. Alfa amended its claim form in BVIHCV2007/0072 by adding a claim for a declaration that it had validly appropriated the shares in CFI and CTH.

[10] On 17th May 2007, CFI wrote to Alfa indicating that it intended to pay the outstanding principal amount under the Facility Agreement with interest. Alfa stated in reply that it was too late for CFI to tender a prepayment and further, that the equity of redemption in the loan was extinguished on 27th April 2007, by the exercise of Alfa's right to appropriate the charged shares. On 25th May 2007, CFI tendered payment to Alfa in the sum of US$1,446,814,709.42, which payment was refused.

[11] On 25th May 2007, the respondents issued claim BVIHCV2007/0119 seeking an order that Alfa be forced to accept the payment of the $1.446 billion and deliver up the share certificates and transfer forms in respect of the charged shares and provide them with signed releases for the charged shares.

[12] On 7th June 2007, the respondents issued an application for the trial of preliminary issues in BVIHCV2007/0119 concerning Alfa's purported appropriation. On 22nd June 2007 the High Court ordered a trial of the preliminary issues and consolidated BVIHCV2007/0119 and BVIHCV2007/0072.

[13] Trial of the preliminary issues took place on the agreed basis that it had to be assumed that at least one event of default as alleged by Alfa had occurred and that the issues of fact concerning Alfa's bona fides would await trial. Olivetti J gave judgment in favour of the respondents on the preliminary issues.

[14] On 6th December 2007, Alfa applied for summary judgment and for the consolidated action to be stayed pending its appeal to the Court of Appeal against

the judgment on the preliminary issues. The summary judgment applications were removed from the list and the actions were stayed.

[15] The Court of Appeal allowed Alfa's appeal by judgment delivered on 22nd April 2008, on the ground that the judge was wrong to hold that Alfa did not validly appropriate the charged shares by sending the letters of 27th April 2007. The respondents in that case, the respondents in this appeal appealed to the Privy Council. It is to be remembered that there was an agreement by the parties that the decision was to be predicated on the assumption that there had been at least one event of default of those recited in the April 16, 2007, letter from Alfa committed by the respondents.

[16] The Privy Council handed down its decision on 5th May 2009.[1] As their Lordships expressed it at paragraph 2 of their judgment:

> "The appeal now before the Board is concerned with preliminary issues directed to be heard in two sets of proceedings which have been consolidated, that is a claim by ATT for (among other things) a declaration that the English share charges have been enforced by a valid appropriation, and a claim by CFI and CTH for the redemption of all the share charges (both BVI and English). It is the novel remedy of appropriation, introduced by the Directive, which lies at the heart of this appeal."

[17] Their Lordships concluded at paragraphs 34 and 35 as follows:

> "Their Lordships do not agree with the whole of Barrow JA's reasoning (in particular, they do not agree with his observation, in para 37, that only the beneficial interest in the collateral was charged). Nevertheless they consider that Barrow JA was right in adopting what he called a pragmatic interpretation, and in concluding that it was not necessary, for a valid appropriation, for the collateral-taker to become registered holder of the shares. In many cases, where the registrars of charged shares had no reason to make difficulties about registration, it would be easy (and no doubt convenient) for the collateral-taker to become the registered owner either just before or soon after exercising its power of appropriation. But it is not necessary, for the reasons that Lord Millett gave in the course of his expert evidence. Any other interpretation of the Regulations would mean that the collateral-taker did not have the means of "rapid and non-formalistic enforcement" which the Directive calls for.

[1] [2009] UKPC 19, [2009] 3 All ER 849

> Their Lordships do not however accept Barrow JA's view (at para 41) that the collateral-taker can exercise a power of appropriation merely by taking thought (that is without any overt act at all). Lord Millett had regarded this as a "moot point". Commercial practicalities require that there should be an overt act evincing the intention to exercise a power of appropriation, communicated to the collateral-provider. That is not inconsistent with Article 4.4(a) of the Directive, which refers to *prior* notice. In this case ATT's letter of 27th April 2007, was, as Barrow JA concluded, an effective exercise of ATT's power of appropriation (subject always to the dispute about an event of default, which is not part of the preliminary issues)."

[18] The judgment of the Privy Council was of narrow compass and did not assist in the resolution of the particular issue now before this court. This court is concerned to determine whether in the circumstances of the pleadings it would be a proper exercise of the court's discretion to grant the application for summary judgment and to dismiss the claim by the respondents.

[19] The application for summary judgment was made pursuant to Parts 15.2 and 26.3 of the Civil Procedure Rules 2000 (CPR). Part 15.2 reads as follows:

> "The court may give summary judgment on the claim or on a particular issue if it considers that the –
>
> (a) claimant has no real prospect of succeeding on the claim or the issue; or
> (b) defendant has no real prospect of successfully defending the claim or the issue.
>
> Rule 26.3 gives the court power to strike out the whole or part of a statement of case if it discloses no reasonable ground for bringing or defending the claim."

[20] There have been a number of decided cases dealing with the criteria for granting or refusing an application for summary judgment. Leading among them are the cases of Swain v Hillman[2] and Royal Brompton Hospital NHS Trust v Hammond No. 5[3]. In the former case the view was expressed that the decision on an application under Part 15 (or Part 26.3) of CPR does not involve the judge in conducting a mini trial. I am of the view that if the pleaded case of the parties

[2] [2001] 1 All E.R. 91
[3] [2001] EWCA Civ 550

indicates that there is a factual issue to be tried, which if proved in favour of the respondent to the application might result in a decision in that latter's favour, then the preemptive power of the court should not be used. As was expressed in Hammond, when deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. Indeed, by the very nature of the proceeding, the testing of evidence is not an option. Lord Hope's dicta in Three Rivers District Council v Bank of England (No. 3)[4] provides further elucidation and has been helpfully summarized thus[5]:

> "The rule '… is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.'"

[21] Having said the above, however, the court is mindful of the overriding objective. In Bank of Bermuda Ltd v Pentium[6] Saunders CJ [Ag.] put it this way:

> "A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely so say in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

[22] In claim No. BVIHCV2007/0119 (which it will be recalled was consolidated with claim No. BVIHCV2007/0072 by order of the court) the respondents (who were the claimants in the former claim) pleaded, inter alia that the "purported attempt to appropriate was not made in good faith for the sole purpose of securing repayment for the secured facility. It was made for the purpose of securing to Alfa a

[4] [2001]2 All E.R. 513
[5] The Caribbean Civil Court Practice (2008), Note 12.1 at page 135
[6] Civil Appeal No 14 of 2003 BVI judgment delivered 20 September 2003 at para. 18

controlling interest in CTH". I am of the view that the issue raised in this pleading is a triable issue. At paragraph 123 of the judgment by the learned trial judge she stated as follows:

> "What is interesting and distinctive about the present case is that the defendants are, in a nutshell, of the view that Alfa, from the inception of the Facility Agreement, had a motive to eventually take the controlling stake in Turkcell and that, during its relationship with them, it has exercised several strategies in bad faith, to fulfill that purpose rather than to fulfill the purpose of having the debt owed to them repaid by them. In my opinion, this alleged ongoing 'strategy' by Alfa goes beyond the mere purpose or motive Alfa had at the time it purported to appropriate the shares."

[23] As the learned trial judge further found at paragraph 99:

> "It seems to me that there is no basis on which I can find that Alfa was entitled to appropriate the Charged Shares when the defendants have categorically disputed each and every alleged event of default. The Court of Appeal decision that Alfa has the right to appropriate was based on the assumption that there was at least one event of default. If there is no event of default, then the appropriation would be unlawful and unreasonable. In addition, Alfa cannot now rely on the recent event of default to justify appropriating the Charged Shares in April 2007. In my opinion, this is a triable issue."

[24] The learned trial judge concluded that there were "many conflicting facts and in depth issues to be dealt with in this matter" a sentiment with which I wholeheartedly agree. I can find no reasons to disturb the exercise of the trial judge's discretion in refusing the application of the appellant and so dismiss this appeal. As to costs I would award costs to the respondents in an amount of two-thirds of the costs assessed or agreed for the trial of the issue in the court below.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal