TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/018
HCVAP 2010/024

BETWEEN:

ALFA TELECOM TURKEY LIMITED

Appellant

and

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

Respondents

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]
The Hon. Mr. Albert Redhead — Justice of Appeal [Ag.]
The Hon. Mr. Ian Kawaley — Justice of Appeal [Ag.]

Appearances:

Stephen Smith, QC, with Robert Levy, QC, and Oliver Clifton
for the Appellant
Kenneth MacLean, QC, with James Nadin and Arabella Luisa di Iorio
for the Respondents

2010: December 13;
2011: July 20.

Commercial appeal – Agreement for credit to be extended to respondents – Grant of equitable mortgages to the appellant over shares held by the respondents to secure loan – Whether the trial judge erred in finding that no events of default had occurred under the loan agreement – Whether the appellant had acted in bad faith in attempting to realise its security under the loan agreement

This appeal involved a loan arrangement between the appellant, Alfa Telecom Turkey Limited ("Alfa" or "ATT") and the respondents, Cukurova Finance International Limited ("CFI") and Cukurova Holdings AS ("CH"). The money was loaned to the respondents by Alfa against the security of shares held by both CFI and CH. In particular, an English share charge which was executed between the parties, included the right for Alfa to appropriate the shares used as security for the loan in the event of default by the respondents. The agreement expressly stated specific events which would constitute "Events of Default" on the part of the borrower, and also included the

provision that should any one of these events occur, Alfa would be entitled to call in the balance of the loan. If payment was not forthcoming, then Alfa would then be entitled to appropriate the shares being held as security. The main issues which arose on appeal were whether in actual fact any Events of Default had occurred under the agreement such as to justify the appropriation of the shares held as surety for the loan, and also whether there was any bad faith on the part of Alfa in the way it proceeded after taking the decision that at least one Event of Default had occurred. In the court below, the trial judge held that no Events of Default had occurred under the loan agreement and ordered delivery up of the charged shares to the respondents. It was this decision which gave rise to the present appeal.

Held: allowing the appeal and setting aside the judgment and order of the learned trial judge, granting the relief sought by the appellant in Claim No.: BVIHC (COM) 2007/072, dismissing the respondent's claim in Claim No.: BVIHC (COM) 2007/119, and therefore dismissing the cross-appeal set out in the respondents' counter-notice advancing additional grounds for supporting the judgment, that:

1. The respondents, in failing to do what the appellants required them to do to perfect the security and then actively seeking to prevent the perfection of the security by Claim No. 119 of 2007, committed an act of default.

2. Based on the learning in the Privy Council decision in Cukurova Finance International Limited et al v Alfa Telecom Turkey Limited [2009] UKPC 19, as well as on the finding that an act of default had taken place on 27th April 2007, the English share charges were enforced by a valid appropriation of shares, referred to in the letter from the appellant's solicitors dated 27th April 2007.

   Cukurova Finance International Limited et al v Alfa Telecom Turkey Limited [2009] UKPC 19 applied.

3. The Geneva arbitral award did constitute an Event of Default. Clause 17.16 of the Facility Agreement provides that it is an Event of Default if any event or circumstance occurs which in the opinion of the appellant, has had or is reasonably likely to have a Material Adverse Effect. Even if, as the trial judge suggested, the controlling mind and will of Alfa (for the purpose of deciding whether an event was likely to have a Material Adverse Effect) was expressed over the signature of the sole de jure director of the appellant company, that in and of itself does not make his signing of the acceleration letter any less valid (per Gordon JA [Ag.]).

4. The Geneva arbitration award was a material adverse effect because, irrespective of the fact that the precise extent of the financial impact remained to be finally determined, it potentially entitled TeliaSonera to an award of damages initially estimated to be in excess of US$150 million. The acceleration letter itself was sufficient evidence that an agent of the appellant, its sole director, had formed the contractually requisite opinion that a material adverse effect had occurred. It was not properly open to the judge to find that the signature of the acceleration letter by the appellant's agent was insufficient evidence that the lender had formed the opinion that a material adverse development had occurred. If, as the trial

judge found, the letter's signatory only acted upon the instructions of other individuals (acting through a company named Altimo) who were the true directing minds of Alfa, then the letter could only have been sent under such individual's instructions (per Kawaley JA [Ag.]).

5. Having found that it was open to the appellant to conclude that a material adverse effect occurred, as the judge clearly did, it was not open to him to find that no opinion to this effect was formed by the lender in the face of the express assertion of this act of default in the acceleration letter. The position might have been otherwise had the letter not been signed by the appellant's sole director with undisputed authority to bind the company.

6. The specific actions of Alfa as set out by the respondents in their counter-notice do not amount to evidence of bad faith on the part of the appellants, as was alleged by the respondents.

7. The appellant was entitled to accelerate the loan pursuant to its letter dated April 16th 2007 in respect of at least one valid act of default, and to subsequently exercise its appropriation rights.

8. The learned judge erred in concluding that the acceleration letter of April 16th 2007 was vitiated because its reliance on invalid acts of default constituted a fundamental breach of contract. Service by a lender of a demand letter relying on acts of default which are disputed by the borrower and subsequently not made out cannot constitute a breach of contract unless there is an express or implied duty to rely on valid acts of default in the relevant lending agreement. While there may have been an implied duty for the appellant to assert acts of default in good faith, there is no justification for construing the Facilities Agreement as containing an implied term that the lender would only assert such acts of default which might, if disputed by the borrower, be either agreed to be valid, or determined by a competent court to be valid.

   Concord Trust v The Law Debenture Corpn plc [2005] 1 W.L.R. 1591 cited.

   The fact that CFI was balance sheet insolvent as at December 2006 did constitute yet another Event of Default on the part of the respondent. The trial judge erred in finding that the respondent was not in fact insolvent, his reason for this being that the US$574m appearing in the CFI's balance sheet in consequence of the funding which it had received on 24th November 2006, if not technically capital, was for all practical purposes to be treated as capital (per Gordon JA [Ag.]).

9. It was open to the trial judge, having regard to the oral evidence he heard and accepted and the factual matrix within which the Facilities Agreement was consummated read with its strict terms, to find in effect that the balance sheet insolvency upon which Alfa relied was wholly technical, easily capable of being remedied by and administrative act, and, accordingly, did not constitute to any material extent of an act of default (per Kawaley JA [Ag.]).

10. The trial judge's costs order of 22nd July 2010 should be set aside as an incident of the result on the main appeal. Unless either party applies by letter to the court within 28 days to be heard on the issue of costs, the judge's order as to costs is set aside and costs are awarded to the claimant below to be taxed if not agreed, and the costs of the appeals are awarded to the appellants in the main appeal, to be taxed if not agreed.

JUDGMENT

[1] GORDON, J.A. [AG.]: This Court delivered a judgment in Civil Appeal No. 1 of 2009 between the same parties as are parties to this appeal. In that judgment the Court set out in reasonably concise form some of the history giving rise to the litigation and some of the history of the litigation itself. I hope I may be forgiven if I repeat that historical perspective as an introduction to this judgment. The numbering of the paragraphs is taken from the judgment of Civil Appeal No. 1 of 2009 with the addition of the letter (a) to distinguish the quoted paragraphs from the paragraphs of this judgment proper.

> "[2a] Alfa [Alfa Telecom Turkey Limited] (the claimant in claim BVIHCV 2007/0072 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.
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> [3a] 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.
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> Factual and Procedural Background to the Appeal
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> [3a] 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.
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> [4a] 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.

[5a] 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.

[6a] 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.

[7a] 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.

[8a] 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.

[9a] 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 BVIHCV 2007/0072 by adding a claim for a declaration that it had validly appropriated the shares in CFI and CTH.

[10a] 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.

[11a] 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.

[12a] 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.

[13a] 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.

[14a] 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.

[15a] 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.

[16a] The Privy Council handed down its decision on 5th May 2009. 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."

[17a] 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."

[2] It will be noted that the preliminary issue was argued and decided on the agreed assumption that an act of default under the facility agreement as alleged by Alfa had occurred (see paragraph 13a above). Thus, at the full trial (a term used in the written submissions of counsel for the appellant to describe the trial which resulted in the judgment from which this appeal derives and which term I adopt) of the issues between the parties, one of the principal issues debated and argued was whether in actual fact an event of default had occurred under the Facility Agreement such as to justify the appropriation of the shares held as surety for the Alfa loans.

[3] The claim No. 2007/072 referred to at paragraph 2a above was a claim by Alfa claiming:

"(1) A Declaration that one or more Events of Default have occurred under the Facility Agreement;

(2) A Declaration that on service of the Notice served by the Claimant on the First Defendant on 16 April 2007, alternatively on service of this Statement of Claim, the loan to the First Defendant became immediately due and payable to the Claimant;

(3) A Declaration that on 16th April 2007 or at the very latest upon the service of these proceedings the First Defendant became obliged to pay the Claimant the sum of US $1,350,000,000 as principal due under the Facility Agreement;

(4) A Declaration that on 16th April 2007 or upon the service of these proceedings the First Defendant became obliged to pay the Claimant interest pursuant to the Facility Agreement in such sum as shall be determined by the Court;

(5) A Declaration that the First Defendant is liable to indemnify the Claimant for the full amount of its costs, including legal costs, of enforcing and preserving the Claimant's rights under the Facility Agreement (to include the cost of these proceedings);

(6) A Declaration that on 27th April 2007, the Claimant validly appropriated the First Defendant's 51 shares in Cukurova Telecom Holdings Limited;

(7) A Declaration that on 27th April 207 [*sic* 2007], the Claimant validly appropriated the Second Defendant's 2 shares in the First Defendant;

(7A) A Declaration that the Claimant is and was at all material times entitled to be registered in the register of members of Cukurova Telecom Holdings Limited as the holder of 51 shares;

(7B) A Declaration that the Claimant is and was at all material times entitled to be registered in the register of members of the First Defendant as the holder of 2 shares;

(7C) An Order that the First Defendant shall take all steps within its power to secure the:

(i) Cancellation of any registration in the register of members of CTH which show the First Defendant as the holder of 51 shares in CTH; and

(ii) Registration of the Claimant in the register of members of CTH as the holder of those 51 shares.

(7D) An Order that the Second Defendant shall take all steps within its power to secure the:

(i) Cancellation of any registration in the register of members of the First Defendant which show the Second Defendant as the holder of 2 shares in the First Defendant; and

(ii) Registration of the Claimant in the register of members of the Second Defendant as the holder of those 2 shares.

(8) An inquiry as to what sums are due from the First Defendant to the Claimant by reason of the events referred to in the Statement of Claim and payment forthwith of all such sums following such enquiry."

[4] The claim in suit No: 2007/119 by the respondents as plaintiffs was in the following terms:

(1) "A declaration that the Tender[1] was a valid tender of a sum equal to or greater than the Claimants' Liabilities under the Equitable Charges and the Deed of Assignment.

[1] On 25th May 2007 CFI tendered to Alfa the sum of US$1,446,824,709.42 in payment or part payment of the loan by Alfa to CFI.

(2) "A declaration that Alfa is obliged to accept a sum equal to the Tender (or such lesser sum as the Court finds is equal to the Claimants' Liabilities under the Equitable Charges and the Deed of Assignment) and allow the Claimants to redeem the Security.

(3) A declaration that Alfa is not entitled to interest on the Outstanding Principal after 24th May 2007.

(4) A declaration that Alfa is not entitled to default interest.

(5) An order that, at the Claimants' request and simultaneously with payment by CFI to Alfa of a sum equal to the Tender (or such lesser sum as the Court finds is equal to the Claimants' Liabilities under the Equitable Charges and the Deed of Assignment), Alfa will deliver up to the Claimants the share certificates and share transfer forms in respect of the Charged Shares, provide to the Claimants signed releases in respect of the Charged Shares in the form attached hereto at Appendix 1 and provide to the Claimants a Deed of Re-Assignment in respect of the Assigned Account in the form attached hereto at Appendix 2.

(6) An order that, if Alfa fails to perform the steps set out in paragraph (5) above within 24 hours of the Claimants' request, the Registrar be authorised and required to execute such documents as are necessary (a) to redeem the Equitable Charges and release the Charged Shares from the security and (b) to re-assign the Assigned Account to the Second Claimant and to release the Assigned Account from the security.

(7) Alternatively, an order setting aside Alfa's appropriation upon the Claimants paying to Alfa such sums by way of principal, interest and costs as the Court shall deem fit and for an order transferring to the Claimants all interests in the shares as the Claimants may then be entitled to."

[5] The learned trial judge dismissed the action of Alfa in suit No. 72 of 2007 and ordered, in respect of claim No. 2007/119 that:

"2. Cukurova Holding AS and Cukurova Finance International Limited are, and have since 25 May 2007 been, entitled to

2.1 delivery up and cancellation of the following security documents:

(a) the share charge in respect of shares in Cukurova Telecom Holdings Limited dated 28 September 2005 and made between Cukurova Finance International Limited of the one part and Alfa Telecom Turkey Limited of the other part;
(b) the BVI share charge in respect of shares in Cukurova Telecom Holdings Limited dated 25 November 2005 and made between Cukurova Finance International Limited of the one part and Alfa Telecom Turkey Limited of the other part;
(c) the share charge in respect of shares in Cukurova Finance International Limited dated 25 November 2005 and made between Cukurova Holding AS of the one part and Alfa Telecom Turkey Limited of the other part; and
(d) the BVI share charge in respect of shares in Cukurova Finance International Limited dated 25 November 2005 and made between Cukurova Holding AS of the one part and Alfa Telecom Turkey Limited of the other part;

2.2 delivery up of the following share certificates:

(a) Certificate Number 1 in respect of 2 shares of no par value in Cukurova Finance International Limited;
(b) Certificate Number 1 in respect of 2 Class "B" shares of no par value in Cukurova Telecom Holdings Limited; and
(c) Certificate Number 2 in respect of 49 Class "B" shares of no par value in Cukurova Telecom Holdings Limited.

2.3 delivery up of the share transfer forms in respect of the above shares executed in blank by Cukurova Finance International Limited and Cukurova Holding AS respectively, and signed by Alfa Telecom Turkey Limited on 16 April 2007 against payment to Alfa Telecom Turkey Limited of such sum by way of principal and interest as is determined in accordance with paragraph 3[2] below."

[6] It is against that order that this appeal has been launched. It is to be noted that the respondent has filed a Counter-Notice as well.

[7] Fundamentally, therefore this appeal is about the interpretation of the Facility Agreement in the context of the factual situation as found by the learned trial judge and whether any events of default did in fact take place as alleged by the appellant. Only then, if events of default did take place, are the allegations of good faith and bad faith relevant.

[8] Events of default were the foundation of the appellant's case because of the Share Charge Agreements dated September 28th 2005 between CFI and Alfa and the Share Charge

[2] Paragraph 3 below ordered a further hearing to determine the amount of principal and interest to be paid by CFI to Alfa.

Agreement dated November 25th 2005 between CH and Alfa, which both contained the following language at clause 9.3 of each agreement respectively:

> "9.3 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."

At the risk of repetition, the charges became enforceable if an event of default took place. Interpretation of the term "appropriate" was the subject of the Privy Council Appeal.[3]

[9] The first ground of appeal was that the learned trial judge, having found that events of default had been established in connection with the appellant's failure to be registered as holder of the charged shares, erred in finding that the real question was not whether an event of default could be identified, but whether the appellant was entitled to rely on any of the facts which happened on or after 16th April 2007. At paragraph 154 of the judgment the trial judge stated "I am therefore satisfied that an Event of Default within the meaning of … the provisions of [at] any rate Clause 4.4 of the CFI English share charge (taken together with clause 17.1(A) of the Facility Agreement) and of clause 16.10(C) of the Facility Agreement arose out of the failure … [of] CFI to take any steps to comply with ATT's request to perfect the security which it had granted" (emphasis added).

[10] Paragraphs 147-150 of the judgment are apposite:

> "Mr. Kenneth MacLean QC raises a number of intricate defences in answer to these claimed defaults. Some of them, taken in isolation from the background facts, are technically good.
>
> "For example, Mr. Kenneth MacLean QC points out that Walkers' letter of 16 April 2006 which Mr. Hardman delivered to CFI asked CFI to enter ATT's name in its register of members. In terms, CFI was being asked to perfect the security granted to ATT by CH. Failure or refusal on the part of CFI to do that could not involve a breach of clause 4.4 of the CFI English share charge, since CFI's only

[3] See paragraph 16a above.

obligation under clause 4.4 of the charge was to perfect the charge which it had granted over its shares in CTH.

"Next, he says that Walkers' request to CTH was in terms a request to CTH to perfect the charge granted to ATT by CFI. But CTH owed no obligation to do that, nor could its failure to do so constitute an Event of Default under the Facility Agreement, to which it was not party. It is true that a breach by CTH, as a member of the Telecom Group, of any Transaction document might, if unremedied, give rise to an Event of Default under clause 17.10 of the Facility Agreement, but it was not a requirement of any Transaction Document (as defined) that CTH should take any steps by way of perfecting, or assisting in the perfection of the CFI English share charge.

"CFI did have an obligation under clause 16.10(C) of the Facility Agreement to take all such steps as ATT might reasonably request for the purpose of perfecting any security created by CFI, but Walkers letter of 16 April 2007 was not a request to CFI to perfect any security created by CFI, so that no Event of Default under clause 16.10(C) can have arisen as a result of any failure or refusal on the part of CFI to comply with that request."

The trial judge then continues at paragraph 152 as follows:

"While these defences (I have not dealt with them all) work as far as they go, they all ignore the rather obvious fact that Mr. Parsons forwarded the requests made by Walkers to Ms. Cetinalp on the same day and asked for instructions as to how to proceed. No documentary response has been disclosed, but Cukurova (I deliberately use the broad designation) must have understood as a group what was being asked of it. Any confusion between perfection and enforcement would have been dispelled by Walkers' letter of 17th April 2007 at the latest, what was being required of it by ATT. It seems to me that the absence of any response must be taken as a refusal by the group and each of its constituent parts to take any steps to comply. I do not think that that blanket refusal can be surgically analysed by reference to individual parts of the Finance Documents and chopped so fine that it can be made to disappear."

The learned judge appears to conclude on this point at paragraph 154 as follows:

"I am therefore satisfied that an Event of Default within the meaning of to [*sic*] the provisions of [at] any rate Clause 4.4 of the CFI English share charge (taken together with clause 17.1(A) of the Facility Agreement) and of clause 16.10(C) of the Facility Agreement arose out of the failure to [*sic*] CFI to take any steps to comply with ATT's request to perfect the security which it had granted."

The learned judge concludes this point at paragraph 158/9 as follows:

> "I think that what this analysis reveals is that the real question, for the purposes of the post-16 April part of the case, is not whether Events of Default can be identified by an application to the facts of specific provisions of the Finance Documents, but whether in all the circumstances ATT was entitled to rely, when it purported to appropriate, upon any of the facts which happened.
>
> The attempt to accelerate the loan on 16 April 2007 was a major breach of contract, which not only ruptured the lender/borrower relationship but also menaced the CTH shares in the most obvious and potentially irreversible manner."

[11] Learned Queen's Counsel for the appellant argued strongly that the trial judge was completely out of order in coming to the conclusion he came to in paragraphs 158/9 quoted above. His argument is that at no point did the respondent ever plead to the issue identified by the judge in those paragraphs, nor did the issue ever form part of the respondents' case at trial, nor was the point ever put to counsel for the appellant. Having reviewed the considerable material contained among the papers for this appeal, I find that I agree with eminent counsel. As counsel for the appellant points out, the application of the *audi alteram partem* rule has recently been dealt with by the Privy Council in a case deriving from this jurisdiction, Townsend v Persistence Holdings Ltd.[4] As their Lordships put it,

> "It is simply a denial of justice to dismiss an appeal on the basis of a point which has not been argued or put to counsel for the appellant, so that he can deal with it before it is decided."

Based on my failure to find any reference to the point in my review of the papers of this appeal, I must agree with learned Queens Counsel for the appellant.

[12] Counsel for the appellant further argued that if the letter of 16th April (the acceleration letter) was in breach of the terms of the contract between the appellant and Cukurova, then it was, in the most generous construction nothing more than a potential repudiation of the contract. If so, he argued, in the colourful words of Asquith LJ in Howard v Pickford Tool Co,[5] "[a]n unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind." The learned Lord Justice continued:

[4] [2008] UKPC 15.
[5] [1951]1 K.B. 417 at 421.

"Therefore a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it appeared at the same time, as it must appear in this case, that it was not accepted." In the case at bar, there is no evidence that the respondents accepted the alleged repudiation. Indeed, at paragraph 5.4.4 of the "Re-Amended Defence of the First and Second Defendants" in Suit No. BVI HCV 2007/0072 it is pleaded on behalf of the respondents:

> "On its true construction, clause 17.12 of the Facility Agreement does not preclude CFI or any other relevant entity from taking reasonable steps (including legal action) to maintain the status quo pending the resolution of a bona fide dispute in respect of the Facility Agreement or the parties' rights and obligations thereunder."

[13] In the light of the conclusion arrived at above, it is necessary to look at the specific language of clause 4.4 of the share charge agreement which reads as follows:

> "The Chargor shall promptly do whatever the Lender requires:
> (a) to perfect or protect the Charges or the priority of the Charges; or
> (b) to facilitate the realisation of the Charged Assets or the exercise of any rights vested in the Lender or any Delegate, including executing any transfer, charge, assignment or assurance of the Charged Assets (whether to the Lender or its nominees or otherwise), making any registration and giving any notice, order or direction."

[14] In the Expert Report to the Court by the by The Right Honourable Lord Millet made on the instructions of Alfa (hereafter "the Millet Report") at paragraph 18 the learned Lord opines as follows:

> "Possession of the share certificates and executed transfer enables the mortgagee to be registered as the shareholder in place of the mortgagor, thereby obtaining the legal title to the shares, without the need for an application to the court and without further recourse to the legal owner. Registration merely converts the security into a legal mortgage but has no further effect. It does not enforce the security and does not affect the mortgagor's equity of redemption or right to redeem. The process is known as "perfecting the security". As it is neither a means of enforcing the security nor a precondition of enforcement, the mortgagee is entitled to perfect the security at any time and whether or not there has been a default; but commercial considerations usually preclude this until there is a real likelihood that the mortgagee may wish to enforce the security in the near future. On the fact of this case I consider that an English court would give effect to the mortgagee's right to registration as holder of the shares whether or not the mortgagor was in breach of the terms of the mortgage (whether such breach was financial or otherwise). The mortgagee would be entitled to perfect its security by being registered as holder of the Charged Shares and the mortgagors would be in

> breach of contract by doing anything to obstruct or hinder registration. If and in so far as Alfa's failure to be registered as holder of the Charged Shares was due directly or indirectly to any action or inaction on the part of CFI and CH, then as between CFI and CH on the one hand and Alfa on the other the court would, (if it were relevant for any purpose) treat the shares as if they were registered, for otherwise CFI and CH would seem to be relying on their own wrong, something that the courts would not countenance."

With all due deference to the Noble Lord, I would gratefully adopt his statement as the law of this jurisdiction. It is clear to me that the learned trial judge also accepted that this is the law of the Virgin Islands[6].

[15] It is not in dispute that not only did the respondents fail to do what the appellants required them to do to perfect the security, but they actively sought to prevent the perfection of the security by Claim No. 119 of 2007. I hold this to be an act of default.

[16] On April 27th 2007 Walkers, the solicitors for the appellants, wrote to Cukurova Finance International Limited in the following terms:

> "As you are aware, we act for ATT. We refer to ATT's letter dated 16 April 2007 addressed to Cukurova Finance International Limited ("CFI") and copied to Cukurova Holding AS ("Cukurova") (further copy attached). As stated in that letter, there are currently at least sixteen continuing Events of Default under the Facility Agreement dated 28 September 2005 between ATT, CFI and Cukurova.
>
> "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 2003 (the "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.
>
> "For the avoidance of doubt, we reserve all of our rights under the Facility Agreement (and under the Security Documents, Transaction Documents and Finance Documents referred to therein)."

[6] cf. paragraph 153 of the judgment.

[17] Based on the learning in the Privy Council decision handed down on 5th May 2009[7] and based on my finding that an event of default had taken place on the 27th April 2007, the English share charges were enforced by a valid appropriation of shares, referred to in the letter of Walkers of the 27th April 2007.

Good faith / Bad faith

[18] In the learned trial judge's judgment, notwithstanding that he found that there were no events of default, he went through a very detailed analysis of the claims of bad faith alleged by the respondents.[8] He concluded at paragraphs 215 and 218 of the judgment in this way:

> "[215] The question is whether, if my earlier conclusions on the claimed Events of Default should be set aside, this would preclude ATT from relying on its appropriation. In my judgment, it should not, because Alfa's behavior on 17 April 2007, reprehensible as it was, was not causative of any prejudice or loss to Cukurova. There is no general rule that breaches of trust (or, I would add, acts done in bad faith) which have no impact on the outcome of events must be visited with what would amount to an award of bounty to the party technically entitled to complain. On the contrary the position is the reverse.[9]…
> "[218] ATT was not guilty of any bad faith in and about the conclusion, management or enforcement of the facility, other than in the matter of the press conference of 17 April 2007 and (less blatantly) in the press releases of 30 April and 10 May 2007. Had I decided the case on Events of Default in favour of ATT, none of these matters would have provided Cukurova with an answer to ATT's claim."

[19] The respondents challenge this conclusion of the trial judge in their counter-notice. The respondents identify no less than eleven findings of fact by the trial judge as to the appellant's intention and purpose 'throughout the relevant period' which, they argue, demonstrate bad faith. The examples of bad faith, according to the respondents, which I reproduce in italics are:

[7] See paragraphs 16a and 17a above.
[8] Paragraphs 164 – 218 of judgment.
[9] Swindle v Harrison [1997] 4 All E.R. 705.

(i) *It was ATT's intention from the outset to use the power of appropriation (or a pre-pack receivership) to acquire the charged shares.*[10] What the trial judge said in his judgment at paragraphs 209/210 is instructive. He said:

> "Cukurova's complaint in these respects is that Alfa decided in about the end of January 2007 to identify matters which could be deployed as Events of Default and use them to acquire the charged shares….
>
> I have already found that Alfa's intention from the outset was to use the power of appropriation (or its ability to procure a pre-pack receivership) in order to acquire the shares. That involved the exercise of rights which Cukurova had agreed to confer upon ATT. Although I have held that Alfa was wrong in claiming that it had the right to accelerate the loan and appropriate the shares, its attempts to do so were, with the exception of the press conference of 17 April 2007, no more than unsuccessful attempts to exploit commercial advantages which Cukurova had freely agreed to as a matter of contract and were untainted by bad faith."

I agree entirely with the trial judge with his conclusion in regard to bad faith.

(ii) *It was ATT's expectation and aim that CFI would default on the loan when the first interest payment fell due in November 2006 and that it would therefore be able to acquire the charged shares by enforcing its security.*[11]

As far as it goes, this is a correct statement of the trial judge's finding, but only as far as it goes. Paragraphs 176 – 178 inclusive of the judgment are instructive:

> "Based upon this evidence I find as a fact that when the transaction closed it was the expectation and aim of Alfa that Cukurova would default in November 2006 and that its remaining stake in TCH would fall into Alfa's lap.
>
> "Does that mean that Alfa entered into the transaction in bad faith and, if it does, does that mean that Alfa was in some way disabled from resorting to the remedy of appropriation?
>
> "I was referred to some authority on the question of bad faith, but none on the topic of concluding a contract in bad faith. There is in fact an interesting discussion in Chitty which makes clear that the concept has no place in English law so far as concerns the negotiation and conclusion of contracts. Without authority, however, I have no doubt that in entering into the transaction Alfa did not act in bad faith. No criticism is to be made of a party who negotiates and enters into a contract with a properly

[10] See paragraph 210 of the learned judge's judgment.
[11] See paragraph 176 of the learned judge's judgment.

> advised counterparty, even if one consequence may be to confer benefits on the first party which are highly unwelcome to the counterparty but which suit the first party's commercial objects very well. The insistence on the conclusion of a binding agreement before extending interim finance seems to me to have been perfectly acceptable commercial behaviour. Cukurova did not need warning that if CFI committed an Event of Default the shares might be appropriated or sold. It makes no difference if the contract is a mortgage. Cukurova's argument comes close to suggesting that Alfa had a duty not to enter into the transaction, simply because it hoped and expected that the outcome would result in its obtaining the whole 27% stake in CTH. That seems to me to be untenable."

Again, I find that the learned trial judge expresses what I perceive to be the law.

(iii) *ATT sought to ensure that this would happen by starving CFI of funds by blocking distribution of dividends from CTH.*[12]

Again the words of the trial judge at paragraphs 185 and 186 are instructive:

> "I have no doubt that this conduct on the part of ATT [refusal to agree to the distribution of the dividend] was designed to starve CFI of funds in the hope that that would cause or help to cause CFI to default on the interest payments. Although ATT had been aware since at the latest 12 October 2006 that Cukurova was attempting to fund the payments by realizing the 5.88% Turkcell holding which it finally managed to achieve by 21 November 2006, that does not alter my conclusion that Alfa was withholding distributions in the hope of provoking a default. If Cukurova sold the holding, then the interest would be paid. If it did not, retention of the distributions in CTH would be likely to provoke an Event of Default, which I find to have been the intention behind Alfa's obstruction of the distributions.
>
> > "This conduct cannot, in my judgment, be seen as amounting to bad faith on the part of ATT in its capacity as lender and mortgagee. In any case, it was within ATT's rights as a shareholder of CTH to insist on the 2006 financial statements before voting for a distribution."

I make the further point that by its letter dated 24 October 2006 Alfa Telecom advised CH and CFI in the following terms:

> "There are two matters of which you should be (and we believe are) aware:
>
> - The 2001, 2005 and 2006 Dividends were received by CTH during the course of its financial year ending 31st December 2006. As set out in section 2 above, distributions of consolidated profit by CTH are to be made in accordance with CTH's financial statements for the relevant

[12] See paragraph 185 of the learned judge's judgment.

financial year. Until CTH's financial statements for the year ending 31 December 2006 have been prepared, there is simply no basis on which CFI can insist on any distributions being made by CTH (or, indeed, seek to complain if they have not been).

- Distributions can only be made in accordance with 'applicable law'. As CTH is a BVI company, it must comply with BVI law. As ATTL has previously advised, it is not possible, as a matter of BVI corporate law, for CTH to pay dividends to only one Shareholder (i.e. to CFI). The only way dividends may be lawfully paid is for them to be paid pro rata to both CTH's shareholders."

(iv) As at October 2006, ATT's commercial aim was not to secure repayment of the loan, but rather to assume ownership of the charged shares.[13]

This is indeed what the trial judge found. I find no help, however, in this finding for the respondent. It is clear, from both the chronology of events and the findings of the learned trial judge on the eleven issues of 'bad faith' finding, which, as learned Queen's Counsel for the respondent points out are not challenged by the appellant, that the appellant and the respondent were large companies playing in a cut-throat world of high finance. It would be naïve for a court to expect, or indeed insist, that sympathy rather than reliance on strict legal rights would or ought to rule the day. I find no evidence of 'bad faith' in this finding.

(v) *ATT was aware in 2007 of the progress of Cukurova's efforts to refinance the loan.*[14]

(vi) *The reason ATT kept quiet about its plans to accelerate the loan was because it wished to spring the acceleration on Cukurova and reduce the window within which Cukurova might be able to complete a refinancing of the loan.*[15]

Both (v) and (vi) above refer to the same finding of the trial judge. Again I find no evidence of 'bad faith' where a mortgagee or lender awaits the optimum time to exercise its rights, rights fully negotiated between the parties, who the trial judge found, were well advised by professionals.

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[13] See paragraph 195 of the learned judge's judgment.
[14] See paragraph 201 of the learned judge's judgment.
[15] See paragraph 201 of the learned judge's judgment.

(vii) *The letter by which ATT purported to accelerate the loan contained allegations of events of default which were 'astonishing' and 'absurd'*[16]

Assuming that paragraphs 124 and 126 of the judgment could be interpreted as learned Queen's Counsel for the respondent would have it, it really would not matter at all if all of the cited Events of Default (bar one) were 'astonishing' and/or 'absurd'. The attempt to found an activity on a series of false understandings of the law is hardly an act of bad faith if there is a single sound legal reason to found the action.

(viii) *Having purported to accelerate the loan on 16th April 2007, ATT held a press conference in Cukurova's home town, Istanbul, on the very next day. At least one of Mr. Reznikovich's motives for addressing the press conference in the manner that he did was to cast Cukurova in as bad a light as possible and to make it harder for Cukurova to complete a refinancing of the loan.*[17]

As I read the Secured Facility Agreement at clause 17.18 headed "Acceleration" at any time that there is an Event of Default that is continuing, the Lender (ATT) may by notice to the Borrower "declare that all or part of the loan, together with accrued interest, and all other amounts accrued and outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable". In what is referred to as the acceleration letter dated 16th April 2007 from ATT to Cukurova Holdings AS, at paragraph 4 ATT states "As explained in this letter, there are currently at least sixteen continuing Events of Default under the Secured Facility Agreement. In reliance on each of these severally, we hereby notify you (as Borrower) that we are declaring the entire Loan, together with accrued interest, is now payable immediately". At that point, from the perspective of ATT, the loan was due and ATT was entitled to enforce its security. The finding by the trial judge regarding the press conference on 17th April 2007 is to be found at paragraph 36 of the judgment. It is one sentence and bears repeating: "Also on 17 April 2007 Alfa held a press conference in Istanbul at which it announced that Events of Default had occurred under the Facility Agreement." I do not consider that action to

[16] See paragraphs 124 and 126 of the learned judge's judgment.
[17] See paragraphs 204 and 214 of the learned judge's judgment.

support the allegation of bad faith. The statement in the press conference may well have made the respondent's task of raising monies in the market more difficult, but the reality is that if only one of the events of default had occurred, then the appellant had already secured the right to exercise appropriation.

(ix) *Mr. Reznikovich received the JP Morgan information memorandum dated 18 April 2007 shortly after that date and became aware as a result that Cukurova's refinancing of the loan was scheduled to close in mid-May 2007*[18] *[CBI/I/67].*

Assuming that to be the truth, I am at a loss as to what effect that fact is urged in aid of.

(x) *ATT sought to rely on certain communications from Deutsche Bank in a specious attempt to manufacture a reason to justify its purported appropriation*[19] *[CB1/1/69].*

(xi) *ATT issued press releases on 30 April 2007 and 10 May 2007 which were clearly calculated to put off anyone considering advancing money to the respondents against the collateral of the charged shares*[20] *[CB1/1/69].*

Neither of the two findings of fact by the learned trial judge come near to a finding of bad faith, as the trial judge himself found.

The duty to act in good faith and for a proper purpose

[20] I believe that any discussion of this subject must start by recognising that the remedy of appropriation and the remedies of a mortgagee are substantially different. In the case of a mortgage the mortgagee enters into possession as an exercise of a series of rights designed exclusively towards seeking repayment. As was stated, however, by the Privy Council in their judgment on the preliminary issue: "Their Lordships agree that appropriation is much closer to sale than it is to foreclosure. It is in effect a sale by the collateral-taker to himself, at a price determined by an agreed valuation process." At paragraph 13 of that latter judgment their Lordships said:

[18] See paragraph 205 of the learned judge's judgment.
[19] See paragraph 207 of the learned judge's judgment.
[20] See paragraph 208 of the learned judge's judgment.

> "It is reasonably clear from Article 4(1), (2) and (4) of the Directive that appropriation is to be a self-help remedy available to a collateral-taker so long as the SFCA [security financial collateral arrangement] provides for it, and also contains provisions for valuation. If the power of appropriation is exercised the collateral-taker takes the collateral as his own property, at its value under the agreed mechanism, subject (if that value exceeds the secured debt) to a liability to pay the excess to the collateral-provider, and with a claim for the balance of the debt if the value is less than the secured debt."

[21] I am of the view that learned Queen's Counsel for the respondent misled himself in his argument when he stated at paragraphs 290 and 291 of his written argument as follows:

> "A mortgagee breaches his duty to act in good faith and for a proper purpose where it exercises its powers for any other purpose than to obtain repayment of the loan….A fortiori, a mortgagee who exercises his powers with the purpose of preventing the mortgagor repaying the loan acts for a collateral purpose."

[22] As stated above, even if the actions of the appellant amounted to foul play, those that took place after the acceleration letter took place at a time when the appellant's rights had accrued and those that took place before the acceleration letter were part and parcel of the 'hardball' being played by two competitors.

[23] I believe that I have said enough to make it clear why, in my view, this appeal should be allowed.

[24] Notwithstanding paragraph 23 above, I believe that I should deal with two other Events of Default that were dealt with by learned Queen's Counsel for the appellant and respondents. More might be considered gilding the lily, and would, in any event delay the delivery of this judgment.

Material adverse effect

[25] The first alleged Event of Default that I will deal with relates to the Geneva Arbitral award. As I understand the evidence, and the facts as found by the trial judge, by a press release of 26th January 2011, TeliaSonera announced that the ICC arbitral tribunal in Geneva had found that a binding agreement had been concluded between TeliaSonera and CH in 2005 as a consequence of which CH was required to transfer its TCH shares to TeliaSonera upon payment of US$3.1 billion.

[26] The existence and nature of the arbitration proceedings had been disclosed by the respondents to ATT. As the trial judge opined, the disclosure appeared to be comprehensive. Lack of disclosure, however, is not the complaint of ATT. Rather ATT complains that this award formed the basis of an Event of Default as it caused a Material Adverse Effect. The acceleration letter (of 16 April 2007) read at paragraphs 16 – 19 as follows:

> "Material Adverse Effect
>
> 16. Clause 17.16 provides that it is an Event of Default if any event or circumstance occurs which, in our opinion, has had or is reasonably likely to have a Material Adverse Effect.
>
> 17. Material Adverse Effect means, inter alia, a material adverse effect on the financial condition, assets or business of you or any member of the Group (which is defined to include Cukurova).
>
> 18. In January 2007, it was announced by TeliaSonera that an ICC arbitral tribunal in Geneva had held that Cukurova was obligated to join TeliaSonera in good faith efforts to bring about a closing of an alleged March 2005 transaction in which Cukurova is said to have agreed to sell its shares in Turkcell Holding to TeliaSonera. As you are aware, those shares were purchased, and are currently held by, Cukurova Telecom Holdings Limited ("*CTH*") on the basis that no prior claims existed to them. In these circumstances, there can be no prospect of Cukurova being able to close the alleged agreement as reportedly required by the Geneva Award. A likely consequence will be that the award of specific performance will be replaced by a significant damages award. In our opinion, this is likely to have a material adverse effect on the financial condition of Cukurova and/or other members of the Group.
>
> 19. This constitutes an Event of Default that is continuing."

[27] Clause 17 of the Facility Agreement is the clause which describes Events of Default and reads, to the extent relevant in this context, as follows:

> "17 EVENTS OF DEFAULT
> Without prejudice to clause 16.12 (D) above [not relevant in this context], each of the events or circumstances set out in this clause 17 is an Event of Default…
>
> 17. 16 Material adverse effect
> Any event or circumstance occurs which in the opinion of the Lender has or is reasonably likely to have a Material Adverse Effect"

[28] "Material Adverse Effect" is itself defined in the Facility Agreement as meaning a material adverse effect on the financial condition, assets or business of the borrower or of any member of the Group.

[29] The learned trial judge held that the Geneva arbitral award did not qualify as an Event of Default. His reasoning, as expressed at paragraph 101 of the judgment, was based on his conclusion "that there is no evidence that the Altimo board ever formed an opinion, let alone a fact based and reasoned opinion, that the Geneva arbitration award either had had, or was reasonably likely to have a material adverse effect on the condition, assets or business of CH or any other member of the Group…" The trial judge also concluded that the Altimo board must be treated as the controlling mind and will of ATT for the purpose of deciding whether an event was likely to have a Material Adverse Effect. In the opinion of the trial judge Mr.Pavel Nazarian, the sole de jure director of ATT was, to use my words, a mere rubber stamp when he signed the acceleration letter.

[30] With the greatest respect to the trial judge, I find his logic flawed. Even a rubber stamp requires a decision maker to decide to apply it. I hope that I do not mislead myself when I say that I find this issue one of some simplicity. Firstly, the Material Adverse Effect becomes an Event of Default if, in the opinion of the Lender the event has or is likely to have a Material Adverse Effect (my emphasis). It is clear that if, as the trial judge suggests, the controlling mind and will of ATT was expressed over the signature of Mr. Naziarian, that in and of itself does not make it any less valid. Indeed, the very Facility Agreement was signed by Mr. Naziarian.

[31] Thus, I would hold that the Geneva arbitral award did constitute an Event of Default.

Insolvency

[32] Clause 17.5 of the Facility Agreement describes an Event of Default in the following way:

> "(A) The Borrower or a member of the Telecom Group is unable or admits inability to pay its debts as they fall due, suspends making payments on any of its debts or, by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness.

> (B) The value of the assets of the Borrower or any member of the Telecom Group is less than its liabilities (taking into account contingent and prospective liabilities).
> (C) A moratorium is declared in respect of any indebtedness of the Borrower or any member of the Telecom Group."

[33] The second Event of Default relied on by the appellant in the acceleration letter was that CH was insolvent. It was put this way:

> "13. Clause 17.5 provides that it is an Event of Default if you are unable to pay your debts as they fall due and/or if the value of your assets is less than your liabilities.
> "14. The Balance Sheet (as certified by your sole director) indicates that you have no means of continuing to pay your debts as they fall due and that the value of your assets is US$235,572,932 less than the value of your liabilities and are therefore insolvent on either test.
> "15. This constitutes an Event of Default that appears to be continuing."

[34] At paragraph [70] of his judgment, the learned trial judge says "ATT contends that CFI is or has been in breach of sub-clause 17.5(A) on the grounds that it is unable to pay its debts as they fall due. When I asked Mr. Stephen Smith QC whether he was persisting with this allegation he declined formally to withdraw it. I need only say that there is no evidence in support of any such contention and I disregard it." I too, could find no evidence in support of the contention that CFI was unable to pay its debts and agree with the trial judge that this complaint should be disregarded.

[35] The much more serious complaint, however, (serious, at least in the sense of its urging) was that according to the CFI financial statements, sent to ATT on 22nd February 2007, CFI's liabilities exceeded its assets.

[36] Clearly, the starting point must be the financial statements themselves. In stark terms, the financial statements showed that CFI owned assets worth US$1,707,000,000. This value is not challenged by the respondents.[21] The statements also showed that CFI had liabilities of US$1,924,000,000. In other words, the financial statements showed that there was a shortfall of over US$200,000,000 as between assets and liabilities.

[21] See paragraph 12.3 of Re-amended defence.

[37] The fact of the negative balance in the financial statements is not contested. Rather, the trial judge sought to interpret clause 17.5. Mr. Palmer, ATT's expert accountant, whose evidence seemed to find favour with the learned trial judge[22] opined that if references in clause 17.5 of the Facility Agreement were to book value, than CFI was, in the words of the trial judge, balance sheet insolvent as at December 2006. This led the trial judge to question whether clause 17.5 referred to CFI's assets and liabilities as quantified and described in its financial statements from time to time or as referring to the actual realisable value of its assets and, correspondingly, to the true nature and extent of its actual liabilities.

[38] As stated above, there was no dispute by the respondents as to the value of assets shown. The argument centered around the liabilities. The trial judge said this in his judgment at paragraph 75:

> "So far as liabilities are concerned, the evidence satisfies me that the US$574m appearing in CFI's balance sheet in consequence of the funding which it had received on 24 November 2006, if not technically capital (because the legal formalities of appropriating the payments to capital had not been undertaken) was for all practical purposes to be treated as capital. Mr. Karamehmet had control of CH (and therefore of its subsidiary CI) – indeed, it was provided that an Event of Default would occur should he or his heirs cease to control CFI and CH. His clear evidence, which as I say I accept, was that his intention was that the payments made on behalf of CFI in November 2006 should be capital investment. When asked about his reaction to 16 April 2006 letter calling the loan he said, in relation to the insolvency allegation, that, Cukurova felt there was no insolvency since the payments were intended as capital. Mr. Berkmen gave evidence to similar effect."

[39] I find this a fairly remarkable conclusion. If I may be permitted to draw an albeit imperfect analogy, that is a bit like saying that my bank should honour my cheques notwithstanding that I have exceeded my overdraft limit because I have sufficient monies in my pocket to cover the excess even though I have not bothered to put into my account. That simply cannot be right.

[40] This Event of Default I also find is established.

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[22] "Mr. Palmer, who was scrupulous throughout his evidence" para 71 of judgment.

[41] In conclusion, I would allow the appeal and set aside the judgment and order of the learned trial judge. The relief sought by the appellant in Claim No.: BVIHC(COM) 2007/072 is hereby granted and the respondent's claim in Claim No: BVIHC (COM) 2007/119 is dismissed. It follows that the cross-appeal set out in the respondents' counter-notice advancing additional grounds for supporting the judgment must be dismissed.

[42] The respondents in the main appeal appealed the judge's July 22nd 2010 decision that interest continued to be payable on the loan from May 2007. The appellants in the main appeal filed a counter-notice seeking to uphold this decision on additional grounds. There is no need to deal with the interest appeal, as it follows from the result on the main appeal that the judge's decision on interest must also be set aside. As the appellants correctly note in paragraph 3 of section A of their counter-notice, "in the event that ATT succeeds in appeal no. BVI/HAP 210/0018, then this appeal is otiose as, following appropriation, there is no question of any interest being payable as the appropriation extinguishes the debt due from CFI to ATT".

Costs

[43] It is unclear whether the appellants have formally appealed the judge's July 22nd 2010 costs order; logically this should be set aside as an incident of the result on the main appeal. The appellants' notice of appeal dated June 30, 2010 reserved the right to amend the Notice once all orders had been made[23], but no formal amendment was forthcoming. Somewhat curiously, the notice of appeal includes no formal prayer for the costs of the main appeal, although the appellant's counter-notice on interest asks that the interest appeal be dismissed with costs.

[23] See footnote 1 on page 1 of the appellant's notice of appeal.

[44] I would propose to deal with the costs below and of the appeal as follows. Unless either party applies by letter to the court within 28 days to be heard as to costs: (a) the judge's order as to costs is set aside and costs awarded to the claimant below to be taxed if not agreed; and (b) the costs of the appeals are awarded to the appellants in the main appeal, to be taxed if not agreed.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Albert J. Redhead
Justice of Appeal [Ag.]

KAWALEY, JA. [AG.]:

The main appeal

[45] I agree that the appeal should be allowed on the grounds that the Learned Judge erred in law in finding that (a) no acts of default had occurred before the acceleration letter was sent, and (b) that the appellant was not entitled to rely on subsequent acts of default because the validity of the acceleration letter was vitiated since it relied on invalid grounds. For the reasons lucidly and more fully set out in the Judgment of the President with which I substantially concur, the appellant, Alfa Telecom Turkey Limited ("ATT") was entitled to accelerate the loan pursuant to its April 16th 2007 letter in respect of at least one valid act of default and to subsequently exercise its appropriation rights. In deference to the impressive array of arguments which were advanced both orally and in writing, I set below some additional observations of my own.

Material adverse effect

[46] The arbitration award was a material adverse effect because, irrespective of the fact that the precise extent of the financial impact remained to be finally determined, it potentially entitled TeliaSonera to an award of damages initially estimated to be in excess of US$150

million. The letter itself was sufficient evidence that an agent of ATT, its sole director, had formed the contractually requisite opinion that a material adverse effect had occurred.

[47] In the context of commercial lending arrangements, in my judgment the courts must be astute to avoid opening the door to an infinite variety of technical challenges to the lender's payment request. In the present instance, ATT's April 16th 2007 acceleration letter was signed by its authorised agent (Mr. Nazarian) who had previously signed various significant documents on its behalf. The learned judge rejected the contention that this letter was vitiated by bad faith. Having regard to this crucial finding, in my judgment it was not properly open to the judge to find that the signature of the letter by Alfa's authorised agent was insufficient evidence that the lender had formed the opinion that a material adverse development had occurred. If, as the judge found, the letter's signatory only acted upon the instructions of other individuals (acting through a company named Altimo) who were the true directing minds of ATT, the April 16th 2007 letter could only have been sent upon such individuals' instructions.

[48] Moreover, the learned judge found in any event (at paragraph 31 of his judgment) that the directing mind of ATT considered the effect of the arbitration award on April 2nd 2007, and resolved to (a) declare an act of default, (b) call in the loan, and (c) if CFI failed to pay, exercise the right to appropriate. The fact that the relevant directing minds did not form the relevant opinion at the precise time that they testified that they did, as the learned judge found, did not support the further finding that the opinion was not formed at all before the relevant letter was signed and sent. In my view, such a finding was only properly open if the judge also found that the opinion asserted in the letter was vitiated by bad faith. The crucial question, absent bad faith, was merely whether or not in objective terms a material adverse effect had indeed occurred i.e. was there a sufficient factual basis for the asserted opinion?

[49] The legal rules relating to the attribution of knowledge upon which Cukurova relied are primarily designed for use in the context of proving the mental element of wrongdoing alleged against an artificial legal person. The relevant rules are designed to supplement the traditional rules of agency where such rules are deficient, not to displace them

altogether. These principles were properly engaged in the analysis of whether the exercise of ATT's various rights (particularly its appropriation rights) was vitiated by bad faith. As regards the material adverse effect opinion, no finding was made that this opinion was advanced on April 16th 2007 (a) by the letter's signatory, actually acting in bad faith or being reckless as to the good faith of those upon whose instructions he was acting, and/or (b) by those who directed ATT, acting in bad faith in instructing that the letter be signed and sent. Having found that it was open to ATT to conclude that a material adverse effect occurred, as the judge clearly did, in my judgment it was not open to him to find that no opinion to this effect was formed by the lender in the face of the express assertion of this act of default in the April 16th 2007 letter. The position might have been otherwise had the letter not been signed by ATT's sole director with undisputed authority to bind the company.

[50] The letter should have been, as Mr. Stephen Smith, QC concisely put it in reply, the beginning and end of it. In my judgment it would undermine the commercial efficacy of such loan agreements if, absent vitiating bad faith, the validity of demand letters were to require positive proof supported by contemporaneous documentation that an authorised agent of the lender subjectively formed an opinion that an act of default has occurred. It should be sufficient for the lender to establish that (a) an objective factual basis for the relevant opinion has been shown to exist, and (b) that objective evidence of the formation of the relevant opinion by an authorised agent of the lender may be found within the body of the relevant demand letter itself. Clause 17.16 of the Facilities Agreement described the relevant act of default as follows: "*Any event or circumstance which in the opinion of the Lender has had or is reasonably likely to have a Material Adverse Effect*" [emphasis added]. In my judgment, the purpose of the underlined phrase (or similar other wording) in a loan instrument is to (a) empower the lender to form a unilateral judgment as to the borrower's financial position, and (b) deprive the borrower of the ability to join issue with the lender on whether or not a material adverse effect has occurred, in circumstances where reasonable men might differ but some arguable evidential basis for the lender's opinion is shown to exist.

[51] In this context, precisely how, when and by whom the opinion was formed ought to be of marginal, if any, significance. What matters is whether the lender (a) asserts that in its opinion a material adverse effect has occurred, and (b) does so in circumstances where it cannot fairly be concluded that no reasonable factual basis for the asserted opinion exists. The judge accepted that on April 2nd 2007, ATT formed the opinion that TeliaSonera ("TS") might obtain an arbitral award in the region of $165 million and rejected the notion based on oral evidence alone that ATT had on or before the date of the acceleration letter calculated the award as potentially totalling $1 billion. His positive finding was, as Mr. Stephen Smith, QC argued, enough to support an ultimate finding that a sufficient objective basis for the asserted opinion that the award had a material adverse effect on the borrower existed.

[52] One of the challenges for judges at all levels in high-stakes commercial litigation such as the present where one is bombarded with an array of arguments advanced by highly persuasive counsel is ensuring that essentially pragmatic legal and evidential principles (which in the ordinary case are tacitly accepted without argument) do not become detached from their common sense roots. This problem is particularly acute at the trial stage. In all the circumstances of the present case, and having considered this issue under far less pressure than the trial judge was able to, I am bound to conclude that the finding that the requisite opinion was not formed by ATT was against the weight of the evidence.

Insolvency

[53] Conversely, I would affirm the judge's fundamentally pragmatic approach to the issue of insolvency (and the alleged breach of clause 17(B)) for similar common sense reasons. To this extent, I am regretfully unable to concur with the views of the President on this particular act of default. While it is clearly right that in technical accounting terms CFI was at the material time insolvent on a balance sheet basis, there was in the relevant commercial context no sufficient significance flowing from this bare fact. As Mr. MacLean, QC persuasively submitted in the course of argument in response to questions from the Bench, it makes no sense to construe an intercompany liability entered on the books of a SPV such as CFI in the same manner as one would view a similar entry in the books of a

more traditional trading entity. Mr. Stephen Smith, QC in reply conceded that a purely technical act of default could not be relied upon. In my judgment it was open to the judge, having regard to the oral evidence he heard and accepted and the factual matrix within which the Facilities Agreement was consummated read with its strict terms, to find (in effect) that the balance sheet insolvency upon which ATT relied was wholly technical, easily capable of being remedied by an administrative act and, accordingly, did not constitute to any material extent an act of default.

[54] In other words, the judge was entitled to find that the true substantive balance sheet position did not reflect an excess of liabilities over assets at the material time. In the absence of evidence that CFI was unable to pay its debts as they fell due, the fact that an item which was not in substance a liability was recorded as such in the CFI balance sheet did not constitute an act of default upon which ATT could rely. Clause 17.5 of the Facilities Agreement, it must be remembered, provides as follows:

> "(A) The Borrower or a member of the Telecom Group is unable or admits inability to pay its debts as they fall due, suspends making payments on any of its debts or, by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness.
> (B) The value of the assets of the Borrower or any member of the Telecom Group is less than its liabilities (taking into account contingent and prospective liabilities).
> (C) A moratorium is declared in respect of any indebtedness of the Borrower or any member of the Telecom Group."

[55] It is clear from sub-paragraphs (A) and (C) that what the Agreement contemplates as giving rise to an act of default is one or more occurrences which have the effect that the Borrower's solvency has been compromised in real commercial terms. I see no reason to construe sub-paragraph (B) as envisaging that an act of default automatically occurs if a balance sheet is presented in such a way as to suggest that liabilities exceed assets; this is not what the clause actually says. In my judgment, clause 17(B) contemplates a situation where it is reasonably open to the Lender to conclude that in real financial terms balance sheet insolvency has occurred. This head of insolvency (in contrast to the commercial or cash-flow heads) implicitly requires some analysis of what the true balance sheet position is.

Reliance on invalid acts of default

[56] Further and in any event, I concur with the crucial conclusion of the President that the learned judge erred in any event in concluding that the April 16th 2007 letter was vitiated because its reliance on invalid acts of defaults constituted a fundamental breach of contract. However, I would not simply base my decision on the grounds that ATT was not afforded an opportunity to address this point alone, or that any breach of contract on ATT's part was at most a repudiation which was not accepted.

[57] As Mr. Smith rightly contended, service by a lender of a demand letter relying on acts of default which are disputed by the borrower and subsequently not made out cannot constitute a breach of contract unless there is an express or implied duty to rely only on valid acts of default in the relevant lending agreement.[24] While there may have been an implied duty for ATT to assert acts of default in good faith, in my view there is no justification for construing the Facilities Agreement as containing an implied term that the lender would only assert such acts of default which might, if disputed by the borrower, be either (a) agreed to be valid, or (b) determined by a competent court to be valid.

[58] Far from such a term being essential for the working of the relevant contract and one which the parties would have agreed to insert had they averted to it, it is to my mind difficult to imagine any reasonable lender ever agreeing to lend on such borrower-friendly terms. It is, therefore, unsurprising that in a case which was argued before the judge with zealous comprehensiveness, this argument was not advanced by the respondents themselves in the court below.

The cross-appeal – Bad faith

[59] The respondents complained that having regard to the facts found by the judge and the legal test for bad faith he correctly held applied, the learned judge "*should have concluded that in purporting to appropriate the charged shares the Appellant acted with the purpose and intention of preventing the Respondents from repaying the loan and in order to acquire the mortgaged property for itself and, accordingly, that it did not exercise the power of*

[24] Concord Trust v The Law Debenture Corpn plc [2005] 1 W.L.R. 1591.

appropriation in good faith for a proper purpose.[25]" Although I concur with the President's conclusion that this complaint must be rejected, I will add a few words of my own on this issue, the importance of which is enhanced by the Court's findings in respect of the main appeal.

The crucial factual findings: background

[60] The background to the relevant loan arrangements may be summarised as follows. ATT is a special purpose vehicle ("SPV") incorporated for the purpose of the relevant lending. The 1st respondent ("CFI") was also a SPV created for the same purpose. CFI is wholly owned by the 2nd respondent ("CH"). ATT is owned by a Russian group described in these proceedings as the Alfa Group ("Alfa"). CH and CFI belong to a Turkish group of companies described as "Cukurova"). Cukurova's financial difficulties in 2003-2004 resulted in it looking for potential purchasers for its lucrative interests in a Turkish cell phone provider ("Turkcell"). CH indirectly owned a 27% interest in Turkcell through its 53% interest in Turkcell Holding AS ("TCH"). The other 47% of TCH was owned by the Finnish Sonera, which subsequently merged with the Swedish Telia and has been described herein as TeliaSonera or "TS". Alfa and TS were two suitors for this Turkish telephonic prize.

[61] On March 25th 2005, TS issued a press release stating that it had agreed in principle with Cukurova to buy its 27% interest in Turkcell. Alfa claims that Cukurova explained that all that had been agreed was a two months exclusivity period. From April until when the transactions closed in November, Alfa financed certain critical debt obligations of Cukurova. Both Cukurova's bankers and TS refused to do so. On May 23rd 2005, TS issued a press statement asserting that Cukurova's failure to conclude an agreement for the sale of its Turkcell stake constituted a breach of contract which TS would refer to arbitration. Cukorova's public position was that no binding agreement had been reached. By May 31st 2005, Alfa and Cukurova were close to finalising an agreement for the sale of roughly half of its interest in Turkcell for US$1.6 billion, with a further secured loan of US$1.352 billion and US$355 million by way of unsecured lending. A Subscription

[25] Paragraph 14(5) of the respondents' counter-notice.

Agreement was entered into on June 1st 2005. On June 17th 2005, TS commenced arbitration proceedings against CH in Geneva claiming breach of the disputed agreement and the CH shareholders' agreement.

[62] On September 20th 2005, ATT, CFI and CH executed the Shareholders Agreement. On September 28, 2005, the Facilities Agreement was executed. ATT agreed to lend CFI US$1.352 billion against the security of CFI's 51% holding in Cukurova Telecom Holdings Limited ("CTH") and CH's two shares in CFI. On the same date ATT and CFI executed the English share charge, which included the right to appropriate the shares pursuant to the Financial Collateral Arrangements (No. 2) Regulations 2003 (UK). A similar charge (excluding the right to appropriate) was executed by CFI and CH two months later under BVI law. Meanwhile, closing was temporarily impeded by an injunction TS obtained in Switzerland in October; this was lifted on November 23rd 2005. On November 25th 2005, the ATT/CFI/CH transaction closed. These uncontroversial background facts show that this commercial lending and the supporting security arrangements were consummated against the background of Cukurova having courted both Alfa and TS as potential purchasers of its Turkcell stake at a time when it was in dire financial straits. Moreover, prior to TS commencing arbitration proceedings against CH with a view to compelling Cukurova to agree to its investment demands, Alfa and Cukurova were considering not a secured lending, but an acquisition by Alfa of its Turkcell stake.

[63] Alfa's interest in acquiring the secured assets for investments purposes was no secret hidden desire. It formed part of the fabric of the negotiations between the parties which were consummated, as a fall-back position, in the form of a secured lending rather than as a pure investment. Cukurova flirted with both TS and Alfa and chose to treat with Alfa, abandoning the "marriage" plans when TS sued for breach of promise. This essential aspect of the background to the transaction which closed on November 25th 2005 falls to be taken into account in analyzing the judge's approach to the bad faith argument.

[64] The judge then found that in January 2007, Cukurova began efforts to find alternative financing to pay off the ATT lending. By letter dated April 16th 2007, without any prior complaints about the lending, ATT demanded immediate repayment of the loan and

complained of sixteen acts of default ("the acceleration letter"). Proceedings were commenced seeking declarations that ATT was entitled to call in the loan on the same date. The following day, CFI challenged ATT's right to take this action and promised to follow up with a detailed reply that never came. ATT promised to give two working days notice of any enforcement action. Further, ATT held a press conference in Istanbul announcing that Events of Default had occurred. On April 25th 2007 ATT wrote to CFI (a) expressing surprise at not having heard further from CFI, and (b) giving notice that the moratorium on enforcement would expire at 4:00pm on April 27th 2007 unless CFI agreed to be responsible for any losses flowing from an extension of the deadline.

[65] The learned judge also found as follows: on April 27th 2007, shortly before 4:00pm, lawyers for CFI and CH (Maples & Calder, BVI) informed ATT's lawyers (Walkers BVI) that they would be applying to court to restrain any enforcement action. Shortly after 4:00pm the same day, Walkers advised Maples & Calder: "... *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*..." At 6:30pm, Olivetti J granted the borrowers an injunction restraining any further enforcement action without prejudice to ATT's claim to have appropriated the shares earlier that day. On May 17th CFI indicated it proposed to repay the loan and four days later ATT rejected the proposal as too late. ATT rejected a formal tender of payment on May 25th 2007.

The crucial factual and legal findings: bad faith

[70] The judge found[26] that the directing mind of ATT, Altimo, was "*contemplating and actively investigating*" as early as the end of September 2006, "*the consequences of becoming...the owner of the whole 27% stake in CTH.*" The matter was further considered in December. Although it appears ATT's witnesses sought to deny or minimise the nature of these deliberations, the judge found as regards the discussions about acquiring the stake: "*It shows neither good nor bad faith – rather, simple commercial planning.*"[27]. The

[26] At paragraph 190 of his judgment.
[27] Paragraph 196 of the learned judge's judgment.

respondents however relied heavily on the following finding as a clear example of why the judge ought to have found that the purported appropriation was vitiated by bad faith:

> "I find that the reason why Alfa kept quiet about its plans to call the loan was because it wished to spring acceleration on it so as to reduce the window within which Cukurova might be able to achieve a refinancing."[28]

[71] The judge also found, rejecting ATT's evidence in this regard, that on or shortly after April 18th 2006, Alfa received documentation indicating that Cukurova was likely to close its refinancing of the loan in mid-May. Further, a press release issued by Altimo on April 30th 2006 was "*clearly calculated to put off anyone who might be thinking of advancing money on the charged shares.*"[29] However, in a short sentence later in the same paragraph which is crucial to the legal analysis which followed, Bannister J noted: "*While the press release might have justified proceedings in defamation, it has no connection with the concept of bad faith as I understand it.*" His crucial reason for rejecting the bad faith argument as vitiating the appropriation (assuming he was wrong in his primary finding that ATT was not entitled to rely on the acceleration letter because there were no prior valid acts of default) was that:

> "…Alfa was within its rights to look for grounds which would entitle it to call the loan. It did so without using any underhand methods. It did not entice CFI into committing any Event of Default or lay traps for CFI. It is irrelevant whether Alfa thought that the defaults which it purported to have identified were damaging to its interests. The only question is whether or not they had occurred as Alfa claimed, and that is something which is to be decided independently of Alfa's state of mind...The actual exercise of the power of appropriation...cannot, in my judgment, be attacked on the grounds that it was not done in good faith. This was a right conferred on ATT as a matter of bargain under arrangements freely entered into between parties who enjoyed the highest level of expert legal and financial advice...The fact that it wished to acquire the shares does not require the conclusion that it acted in bad faith in attempting to do so."[30]

[72] Mr. MacLean, QC found fault in particular with two passages in the judgment. Firstly, in the passage just cited, he suggested that Bannister J clearly erred and impermissibly

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[28] Paragraph 201 of the learned judge's judgment.
[29] Paragraph 208 of the learned judge's judgment.
[30] Paragraphs 211 and 216 of the learned judge's judgment.

contradicted a matter finally determined by Olivetti J when he made the following statement: "*The actual exercise of the power of appropriation...cannot, in my judgment, be attacked on the grounds that it was not done in good faith.*" Clearly, all the judge was stating was that the facts relied upon by the respondents did not support a valid attack on the exercise of the relevant powers on bad faith grounds. This is the only way the quoted portion of the judgment can be sensibly read in the context of the judgment as a whole.

[73] Mr. MacLean, QC warmly embraced the unchallenged finding that Mr. Reznikovich's press conference of April 17th 2006 was an act of bad faith because "*a mortgagee who takes steps calculated to prevent or hinder the mortgagor from complying with a demand for payment acts in bad faith.*"[31] However, the respondents' counsel submitted that in the following paragraph of his judgment (the second passage he criticised) the learned judge asked the wrong question:

> "[215] The question is whether, if my earlier conclusions on the claimed Events of Default should be set aside, this should preclude ATT from relying upon its appropriation. In my judgment, it should not, because Alfa's behavior on 17 April 2007, reprehensible as it was, was not causative of any prejudice or loss to Cukurova. There is no general rule that breaches of trust (or, I would add, acts done in bad faith) which have no impact on the outcome of events must be visited with what would amount to an award of bounty to the party technically entitled to complain. On the contrary, the position is the reverse. At the time of the press conference Cukurova had yet to begin its search for new finance in earnest and, as has been seen, the process was not envisaged to complete until mid May. In the event, Cukurova's refinancing succeeded, even without the use of the CTH shares as security for the refinancing."

Summary: key factual and legal findings on bad faith

[74] In summary, the learned judge found as follows: (a) ATT's intention of acquiring the shares was irrelevant to the exercise of its contractual appropriation rights (assuming at least one prior act of default had occurred); (b) ATT merely enforced its contractual rights in relying upon any act of defaults which did occur, calling the loan and appropriating; and (c) although the April 17th 2006 press conference constituted an act of bad faith, in actual factual terms its impact on and/or connection with CFI's inability to repay the loan within the requisite period was insufficient to impeach or invalidate ATT's contractual right to

[31] Paragraph 214 of the learned judge's judgment.

appropriate the shares on April 27th. In my judgment it is impossible to find fault with these factual and legal findings. It remains to be explained why I feel bound to find that there is no merit to the arguments advanced for setting these findings aside.

[75] In the course of argument, Mr. Kenneth MacLean, QC argued that an underlying flaw in the conclusions reached by the judge on this issue flowed from the fact that his approach to it was coloured by his admitted disagreement with Olivetti J's finding at the preliminary issues stage that the relevant appropriation power had to be exercised in good faith and for a proper purpose. Although this submission cannot be dismissed out of hand, it can only be accepted with some refinement. In my judgment it is clear that Bannister J took the view that the doctrine of bad faith should play a limited role in the commercial context of exercising rights of appropriation under a contract negotiated between sophisticated international commercial lawyers. He looked at the relevant evidence through this lens. In so doing, the judge was simply following an orthodox equity approach, seeking to minimise the extent to which equitable principles designed to provide relief to disadvantaged parties are allowed to interfere with the enforcement of contractual rights as between parties dealing with each other on a more or less level playing field. As I observed in OA 'CT-Mobile' v IPOC International Growth Fund Ltd.[32] citing eminent text authority:

> "Although equitable rules are, historically, grounded in mediaeval notions of religious conscience, courts of equity have always sought to deliver real world justice, to saints and sinners alike. As Spry points out:
>
> > 'Courts with equitable jurisdiction do not judge the moral qualities of litigants in the abstract. A plaintiff who has behaved unconscionably may be refused one remedy but granted another, because in the first place there is, but in the second case there is not, a sufficient connexion between the behaviour in question and the particular relief that is sought to render equitable intervention unjust.' "

[76] These textured principles apply generally to any legal context in which it is contended that a party should be denied relief to which they would otherwise be legally entitled because of their inequitable conduct. The respondents sought to characterise the scalpel-like bad faith doctrine as a blunter instrument which could be deployed in a mechanistic way without regard to the factual matrix at hand. It was contended that the judge had erred by failing to properly apply the principles articulated in mortgage cases with starkly different facts.

[32] [2006] Bda L.R. 69 at paragraph 90.

Quennell v Maltby[33] was a case where the mortgagee was held to be foreclosing to assist her husband to evict his tenants, university students in protected tenancies. Downsview Nominees Ltd. v First City Corp. Ltd.[34] was a case dealing with commercial charges but where the bad faith complained of was manifested by breaches of a duty of care which caused actionable loss. Barnes v Queensland National Bank[35] was a case concerning the exercise of a mortgagee's power of sale in a manner which both (a) involved a breach of the mortgagee's duties to the mortgagor, and (b) caused financial loss to the mortgagor. The nature of the bargain entered into by the parties in the present case does not permit the respondents to complain of the sort of loss which might occur on a sale because the relevant instrument provides a mechanism for fair value to be ascertained when appropriation occurs.

[77] So there is no authority for the proposition that a mortgagee's contractual enforcement rights are vitiated by the fact that because he has some collateral motive for exercising them in circumstances where the relevant enforcement action itself does not occasion damage in respect of which the mortgagor is entitled to obtain legal relief. Moreover, Mr. Stephen Smith, QC for the appellants aptly relied on the following passage in the judgment of Griffiths CJ in the Australian High Court decision in Barnes v Queensland National Bank[36]:

> "The motive of the mortgagee, as distinguished from his intention, is not material. A lawful act does not become unlawful merely because the doer was actuated in doing it by an evil motive. But if a mortgagee exercises a power of sale, not for the purpose of obtaining payment of the mortgage debt (although that is a necessary consequence in whole or in part), but for the purpose of depriving the mortgagor of the opportunity of retaining the property by redemption, and, to use the words of Lord Herschell, "if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed," we should say that he had not been exercising his power of sale in good faith."

[33] [1979] 1 W.L.R. 318.
[34] [1993] A.C. 295 (New Zealand Privy Council).
[35] [1906] 3 C.L.R. 925.
[36] Ibid at p. 943

[78] For these additional reasons, I would affirm Bannister J's rejection of the respondents' submission that the appropriation effected on April 27th 2007 should be held to be vitiated by bad faith.

The cross-appeal-relief from equitable forfeiture

[79] Having rejected the bad faith argument on the grounds that there is no basis for depriving ATT of its contractual rights on equitable grounds, it follows that the alternative equitable forfeiture claim must also be rejected. The judge's summary conclusion on this issue must be affirmed.

Conclusion

[80] For the above reasons, I agree that the main appeal should be allowed, the cross-appeal should be dismissed and that the appellants should be entitled to the consequential relief proposed by the President at the end of his judgment.

Ian Kawaley
Justice of Appeal [Ag.]