IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO: BVIHCM (COM) 2011/119

Between:

SONERA HOLDING B.V

Respondent/Claimant

and

CUKUROVA HOLDING A.S.

Applicant/Defendant

and

(1) ALFA TELECOM TURKEY LIMITED

(2) ALTIMO HOLDINGS & INVESTMENTS LTD

Respondents/Part18Defendants

Appearances: Mr Kenneth Maclean QC and Ms Arabella di Iorio for the Applicant, Çukurova Holding AS;
Mr John Carrington QC and Mr Ben Valentin for the Respondent, Sonera Holding BV;
Mr Iain Milligan QC and Mr Oliver Clifton for the Part 18 Defendants/Respondents, Alfa Telecom Turkey Limited and Altimo Holdings & Investments Ltd

JUDGMENT

[2013: 8, 16 May]

(Anti suit injunction – claimant creditor under judgment registered in the BVI by way of enforcement of arbitral award against defendant – defendant awarded provisional relief by Privy Council from forfeiture of shares formerly charged to first Part 18 defendant and appropriated by first Part 18 defendant – claimant refused order in BVI restraining defendant from reacquiring the formerly appropriated shares pursuant to Privy Council's order unless it could do so without encumbering them for the purpose – claimant also judgment creditor of defendant in New York in respect of same arbitral award – claimant applying in District Court in New York for turnover of defendant's assets, including its 'right to redeem' the shares – District Court enjoining defendant from exercising 'right to redeem' pending determination whether the right should be turned over to

claimant - defendant seeking order requiring claimant to have District Court injunction set aside and not further to prosecute its turnover order in the District Court – whether injunction granted by District Court undermining of any judgment or order of the BVI Court – whether conduct of claimant in District Court unconscionable - whether Court should interfere indirectly with enforcement processes of foreign court)

[1] **Bannister J [ag]:** This is an application by Çukurova Holdings AS ('Çukurova') for an injunction requiring Sonera Holding BV ('Sonera') to take all steps possible to procure that orders made on 8 and 18 April 2013 on Sonera's application to the United States District Court for the Southern District of New York ('the District Court'), which have the effect of preventing Çukurova (among other things) from acquiring certain valuable property pending determination of an application by Sonera for turnover under the US Federal Rules of Civil Procedure and the New York Civil Procedure Law and Rules ('CPLR') for the enforcement of judgments of the United States District Court, be set aside. By consent at the outset of the hearing Alfa Telecom Turkey Limited ('ATT') and Altimo Holdings & Investments Ltd were added as part 18 Defendants and I received helpful submissions on their behalf from Mr Iain Milligan QC, who appeared on their behalf together with Mr Oliver Clifton.

[2] The District Court made its orders in the course of applications made by Sonera for enforcement of a judgment registered against Çukurova in New York under the New York Convention and which made a final arbitration award obtained by Sonera against Çukurova on 1 September 2011 for payment of just under US$1 billion enforceable in New York as a judgment of the New York Court. The same award was enforced in this jurisdiction by registration on 24 October 2011, so that Sonera is a judgment creditor of Çukurova both here and in New York and in the same amount.

[3] The background and history of these proceedings is well known to those interested and since it is important that I give my decision as soon as possible, I hope I will be forgiven for not setting it out again in full. The critical facts for present purposes are (1) that ATT has been found by the Privy Council, on appeal by Çukurova from a decision of the Eastern Caribbean Court of Appeal, to have been entitled to have appropriated certain very valuable shares in two BVI incorporated companies which had been charged to it by Çukurova, but (2) that the Privy Council has further held that relief against forfeiture should be available to Çukurova on appropriate conditions, including, obviously, payment of whatever is the correct amount to which ATT is found to be entitled to in that event. At the time of writing the Board has yet to hand down judgment setting out what those conditions are, although its decision is expected imminently.

[4] The terms of the District Court's order of 18 April 2013 included a provision enjoining Çukurova from

> 'selling, transferring, assigning, hypothecating or pledging . . . (b) Çukurova's right to redeem shares in the Redemption Transaction'

The expression 'Redemption Transaction' is not defined in the District Court's findings of fact, but it is clear from their terms that the District Court was intending to refer to Çukurova's expressed intention to reacquire the appropriated shares by taking advantage of the second element (as set out above) of the Privy Council's decision. The District Court described Çukurova's opportunity to do so as a 'right' (apparently following terminology used by Counsel during the course of the hearings before that Court) – hence, no doubt, the use of the term 'Redemption Right' in the decision and of 'Redemption Transaction' both in the decision of 18 April 2013 and in the operative part of the District Court's order. The District Court's order is a preliminary one and is the subject of a final hearing to take place at some time in the not too distant future.

[5] Mr Kenneth Maclean QC, who appeared together with Ms Arabella di Iorio for Çukurova on this application, submits that unless an order is made against Sonera compelling it to have the orders[1] of the District Court set aside, the decision of the Privy Council to the effect that relief from forfeiture should in principle be available to Çukurova will be rendered nugatory; that Courts are entitled to take *in personam* action in order to protect the integrity of their judgments; that Sonera's efforts in the District Court, which can be of no direct benefit to Sonera, are being made unconscionably in collusion with ATT for the purpose of frustrating any effective grant by the Privy Council of relief from forfeiture and for the exclusive benefit of ATT; and that it is consistent with both principle and authority that Sonera should be prevented from achieving that object

[6] The difficulty I have with this line of argument insofar as it relies upon the integrity of the proceedings now before the Privy Council is that I think that any order to protect the integrity of those proceedings, if it is to be made at all, is properly to be made by the Privy Council. I ceased to have any functions with regard to those proceedings some three years ago, and no authority has been cited to me in which a judge at first instance has made an order in aid of proceedings which had originally been tried by him but which at the time when he made it were pending in a Court of final appeal. I appreciate that Sonera is not before, or within the jurisdiction of, the Privy Council, but I do not consider that that feature of the matter enables me to make orders in defence of the proceedings currently before the Board, or to take into account, other than at the most general level, the events which have happened before that tribunal.

[1] a holding order was made *ex parte* on 8 April 2013

[7] Quite different considerations apply to the proceedings which are currently before this Court for the enforcement of Sonera's judgment, in which it is clearly open to me, if I think fit, to grant an injunction to protect the integrity of the proceedings and of any judgments or orders made in those proceedings.

[8] Apart from the order giving leave to Sonera to enforce the arbitral award within this jurisdiction, the only other orders which I have made are (1) an order, on an *ex parte* application on 27 February 2013, refusing to make a charging order or to grant an injunction effectively restraining Çukurova from consummating any transaction consequent upon the grant by the Privy Council of relief from forfeiture of the appropriated shares; (2) an order, made on 28 February 2013, again refusing to grant such an injunction, albeit sought in a slightly modified terms; (3) an *ex parte* order, made on 5 March 2013, which had the effect of permitting Çukurova to reacquire the shares, provided that it did not encumber them for the purposes of raising the price to be paid on reacquisition ; and (4) an order, made on an *inter partes* hearing on 26 March 2013, by which I refused to continue the relief granted in Sonera's favour on 5 March 2013.

[9] It is important for present purposes to examine carefully what I decided on that last occasion. I decided that I had no right to enjoin an enterprise from charging acquired assets for the purpose of funding their acquisition – which is what Sonera was asking me to do. I decided nothing more, although I found as a matter of fact (a) that Çukurova did not have sufficient free assets to fund the acquisition without obtaining outside funding for the purpose and (b) that any such funder was bound to insist upon a first charge over the reacquired shares. Although in his skeleton argument Mr Maclean QC describes those latter two factual findings as reasons for my refusal of the injunction sought, in fact they were not. Those findings were made to deal with Sonera's claim that the injunction would do no harm to Çukurova because the evidence established that it did not need to charge the shares. I found that that was not so, which disposed of that argument, but my sole reason for the decision was that I regarded it as wrong in principle to prevent a party from acquiring assets, whether or not the assets acquired would be charged in order to fund their acquisition, unless the party applying for the injunction could point to some right to prevent the acquisition from completing. I found that Sonera had failed to demonstrate any contractual right. No proprietary right had been contended for.

[10] The purpose of Sonera's applications in the District Court is to obtain a turnover order pursuant to section 5225(a) of the CPLR. As I understand it, a turnover order is a means of execution whereby assets of a judgment debtor are not sold, but simply turned over to the judgment creditor *in specie* in satisfaction, or part satisfaction, of the judgment debt. Among the assets sought to be turned over were (a) any funds raised by Çukurova in connection with its efforts to raise financing for the 'redemption' of the appropriated

shares; (b) as stated above, Çukurova's 'right[2] to redeem'; and (c) Çukurova's interests in certain specified entities. Holding relief having been granted on 8 April 2013, on 18 April 2013 Judge Cote, having heard argument on 16 April 2013, granted the preliminary injunction with which I am concerned, giving her reasons in writing.

[11] The first question is whether the grant of this injunction undermines or threatens the integrity of my judgment of 27 March 2013. I have no doubt that it does not. The refusal to grant the injunction, if it decided anything at all, decided only that I had no right to grant it. Çukurova was in no way intended to be a beneficiary of my refusal to grant the injunction. The refusal of the injunction protected no right of Çukurova, nor did it preserve, temporarily or otherwise, any property (let alone any assignable property) of Çukurova. The injunction was refused because I considered that Sonera had failed to identify any principle under which grant of the relief sought could be justified. That decision cannot be undermined by an injunction granted in the District Court attaching Çukurova's 'right to redeem.' There is no connection between the two things. Contrary to the submission of Mr Maclean QC, I consider that the summary of the effect of my order of 27 March 2013 presented to the District Court by Mr Van Tol, Counsel for Sonera, on 16 April 2013,[3] so far from being misleading, was a fair and accurate exposition of what the application before me had decided.

[12] I accept, although it was not put quite like this by Mr Maclean QC, that the application to the District Court was plainly opportunistic and the result of someone having had second thoughts. In this Court Sonera was telling me that it wanted Çukurova to reacquire the shares. In the District Court it had changed its mind and sought the opposite. But that does not make it unconscionable or objectionable in any way. All it means is that, at the preliminary stage, at any rate, Çukurova has turned out to be vulnerable because it has a judgment against it in New York. Even if, as must be the case (since Sonera can have no possible interest in seeking to be substituted for Çukurova in the Privy Council proceedings) the whole exercise is being orchestrated by and carried out entirely for the benefit of ATT, still I fail to see how it can be described as an unconscionable collateral attack on anything said or done here in Sonera's enforcement proceedings. I denied Sonera the relief it was asking for. The fact that another Court is prepared to give it something qualitatively different, but which is not inconsistent with any decision of this Court, seems to me to be neither here nor there. The District Judge was fully aware of what had transpired here and plainly decided that it was not sufficient to require her to stay her hand. Given the facts, I see no way in which that decision can be said to have infringed any principle of comity.

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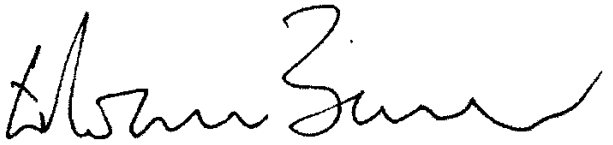
[2] as a matter of English law there might be room for argument as to whether Çukurova's opportunity to re-acquire the appropriated shares pursuant to discretionary relief awarded by the Privy Council is classifiable as a right at all, let alone a property right capable of assignment by way of turnover, but Judge Cote has decided, as a matter of New York law, that it is and for present purposes that settles the question

[3] set out between page 32 line 16 and page 33 line 18 of the transcript

[13] Quite apart from all that, I have no intention, on the facts of this case at any rate, of interfering, however indirectly, with the enforcement processes of a friendly foreign Court. It is one thing for a Court to enjoin the prosecution of proceedings brought elsewhere in order to outflank the Court's order. It is quite another thing to prevent a judgment creditor in a foreign Court from seeking to enforce the judgment in accordance with the law of the jurisdiction in which he has obtained it. I was shown no authority (outside the context of cross border insolvency) in which a court has taken steps to restrain a judgment creditor from pursuing enforcement processes in a foreign Court and I find it hard to conceive of circumstances (otherwise than in cross border insolvency matters) under which it would be appropriate to seek to do so. Enjoining a foreign party from further prosecuting proceedings is quite different in character from indirectly preventing a foreign Court from enforcing its own judgments. The forum for objecting to particular means of enforcement is the enforcing foreign Court or on appeal from the foreign Court.

Conclusion

[14] For these reasons, I am not prepared to grant the relief sought by Çukurova. It has not proved necessary for me to analyse any of the several authorities cited, since my reasons for refusing this application do not turn on anything other than principles which were common ground at the hearing. Essentially, my decision turns on the facts.



Commercial Court Judge
16 May 2013