

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

CLAIM NO: BVIHC (COM) 2007/072

ALFA TELECOM TURKEY LIMITED

Claimant

and

(1) CUKUROVA FINANCE INTERNATIONAL LIMITED

(2) CUKUROVA HOLDINGS AS

Defendants

and

CLAIM NO: BVIHC (COM) 2007/119

(1) CUKUROVA FINANCE INTERNATIONAL LIMITED

(2) CUKUROVA HOLDINGS AS

Claimants

and

ALFA TELECOM TURKEY LIMITED

Defendant

Appearances: Mr Stephen Smith Q.C., Mr Robert Levy QC and Mr Oliver Clifton for Alfa
Mr Kenneth MacLean Q.C., Ms Arabella di Iorio and Mr James Nadin for Cukurova

JUDGMENT

[2010: 3, 4 November]

(Mortgagor entitled to redeem but only upon payment of interest pursuant to terms of Facility Agreement – interest payable under Facility Agreement yearly - no interest payments made since 24 November 2006 – whether interest to be compounded – Interest Periods under the Facility Agreement overlapping by one day – whether double interest payable in respect of final day of each period)

- [1] **Bannister J [Ag]:** On 20 May 2010 I gave judgment in these consolidated proceedings, holding that Cukurova Holdings AS (CH) and Cukurova Finance International Limited ('CFI') were entitled to redeem the equitable mortgages granted by each of them pursuant to a Facility Agreement entered into between Alfa Telecom Turkey Limited ('ATT') as Lender and CFI as Borrower and CH (as surety) on 28 September 2005 ('the Facility Agreement') and under which ATT had advanced a total of US\$1.707 bn to CFI, upon payment by CFI to ATT of the amount outstanding under the mortgages (US\$1.352 bn together with interest from 25 November 2006). ATT had contended at trial that it was too late for CFI to redeem since ATT had appropriated the mortgaged property and the underlying debt had been extinguished in consequence.
- [2] On 22 July 2010 I gave a further judgment in which I held that, despite an offer to repay all of the sums then outstanding made by CFI to ATT on 25 May 2007 and despite the fact that CFI (indirectly) had between 25 May 2007 and 25 May 2010 set aside the full amount required to repay the loans, CFI remained liable to pay interest in accordance with the provisions of the Facility Agreement for the period since interest was last paid on 24 November 2006.
- [3] These decisions are under appeal.
- [4] The parties have been able to agree the terms of an order, with the exception of the calculation of the amount of interest to be paid (if my decisions stand) by CFI upon redemption. Two questions remained to be decided: (1) whether interest should be compounded and (2) whether interest was to be paid twice in relation to the final day of each contractual Interest Period (as defined). I heard argument and gave my decision on 3 November 2010. These are my reasons.

Compound or simple Interest?

- [5] Mr Stephen Smith QC submits, for ATT, that interest should be paid compounded with yearly rests; Mr Kenneth Maclean QC, for CFI, says that simple interest only is payable.
- [6] The provisions of the Facility Agreement dealing with the payment of interest are to be found in clauses 7, 8 and 23.3. The relevant parts of clauses 7 and 8 are in the following terms:

7.1 Calculation of interest

The rate of interest on the Loan for each Interest Period is the percentage rate per annum which is the aggregate of the applicable:

- (A) Margin; and
- (B) LIBOR.

7.2 Payment of interest

The Borrower shall pay accrued interest on the Loan on the last day of each Interest Period.

7.3 Default interest

- (A) If the Borrower fails to pay any amount payable by it under a Finance Document on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment in full (both before and after judgment) at a rate which is 3.5 per cent higher than the rate which would have been payable if the overdue amount had, during the period of non-payment, constituted the Loan in the currency of the overdue amount for successive Interest Periods, each of a duration selected by the Lender (acting reasonably). Any interest accruing under this clause 7.3 shall be immediately payable by the Borrower on demand by the Lender.
- (B) Default interest (if unpaid) arising on an overdue amount will be compounded with the overdue amount at the end of each Interest Period applicable to that overdue amount but will remain immediately due and payable.

7.4 Notification of rates of interest

The Lender shall determine the applicable rate of interest for each Interest Period at or about 11:00 a.m. (London time) on the first day of the relevant Interest Period. The Lender shall promptly notify the Borrower of the determination of a rate of interest under this Agreement.

.....

8.1 Interest Periods

- (A) Each Interest Period shall be a period of 1 year.

- (B) The first Interest Period shall start on the Completion Date. Each subsequent Interest Period shall start on the date the previous Interest Period ends.
- (C) No Interest Period shall extend beyond the Final Maturity Date.

....

8.3 Non-Business Days

If an Interest Period would otherwise end on a day which is not a Business Day, that Interest Period will instead end on the next Business Day in the calendar month (if there is one) or the preceding Business Day (if there is not).'

The 'Borrower' under the Facility Agreement is CFI. The Facility Agreement is a 'Finance Document' (as defined) and is the only such Finance Document relevant to this issue. Clause 23.3 of the Facility Agreement provides as follows:

'23.3 Day count convention

Any interest, commission or fee accruing under a Finance Document will accrue from day to day and is calculated on the basis of the actual number of days elapsed and a year of 360 days.'

[7] Clause 7.3 of the Facility Agreement is a model of opacity, but it is reasonably clear that the only circumstance under which interest is to be compounded pursuant to the Facility Agreement is where CFI has failed to pay a sum due (thus triggering the obligation to pay interest at the default rate). If that default interest remains unpaid at the end of each Interest Period 'applicable to the overdue amount' it is to be compounded with the overdue amount at the end of each such 'applicable interest period'. How this would work in practice would depend upon the meaning to be given to 'each Interest Period applicable to that overdue amount'.

[8] Fortunately, I do not have to wrestle with this language, because if nothing else is clear about clause 7.3 it is certainly clear that it is not engaged unless there has been a failure on the part of CFI to pay a sum due. Mr Stephen Smith QC accepts, rightly, that it cannot apply in circumstances where there has been a refusal on the part of ATT to accept payment. He further accepts, as he must, that there is nothing in the Facility Agreement expressly making provision for calculating

interest payable after a wrongful appropriation followed by a refusal on the part of the mortgagee to accept an offer on the part of the borrower to make repayment in full.

- [9] As mentioned above, in my judgment of 22 July 2010 I held, consistently with the authorities upon which I relied, that on redemption CFI was obliged to tender interest in accordance with the provisions of the Facility Agreement. Those provisions, as has been seen, provide for the payment of compound interest only in circumstances which have not arisen. The only other possible method of calculating interest is by way of simple interest and it therefore follows that I held on 22 July 2010 that on redemption CFI must tender interest calculated as simple interest from 25 November 2006 until payment. I do not believe that it is open to me now to depart from my decision and if ATT wishes to challenge it, it must do so on appeal.
- [10] I should, however, mention the arguments advanced by Mr Stephen Smith QC in support of his submission that interest should be compounded.
- [11] First, he says, rather optimistically, that if the parties had contemplated a situation where there had been a wrongful attempt at appropriation followed by a refusal on the part of ATT to accept an offer to make repayment in full, they would have agreed that CFI should pay compound interest with annual rests until actual redemption. This proposition has only to be stated for it to be rejected. None of the requirements (necessity, obviousness) for the implication of contractual terms is remotely satisfied.
- [12] Next, he submits that had the redemption money been paid into court on 25 May 2007, it would have earned compound interest and that would have accrued to the benefit of ATT (in accordance with the principle in **Edmondson v Copland**¹). The difficulty with this submission is that there is no evidence as to whether it is correct as a matter of fact that the money *in court* would have earned compound interest payable to ATT had it taken the money out or to CFI had the funds been withdrawn with permission.
- [13] Finally, Mr Stephen Smith QC says that the modern tendency is for the courts to recognise that an award of compound interest will often meet the justice of the case more satisfactorily than one of simple interest. He referred me to certain passages in **Sempra Metals v IRC**² which bear that out,

¹ [1911] 2 Ch 301

² [2008] 1 AC 561

but that was a restitution claim and I cannot at the moment see why (assuming I was not bound by my earlier decision that the matter is governed by the provisions of the Facility Agreement) it would be in the slightest bit just to award ATT compound interest in the light of the events which have happened, or, for that matter, what legal basis I would have for doing so if I wished to.

Is interest payable twice on the last day of each Interest Period?

- [14] Obviously not, although it will take a moment or two to explain why not.
- [15] Mr Stephen Smith QC starts by saying that the first Interest Period ended on 24 November 2006. Relying upon clause 8.1(B) he says that the second Interest Period therefore must have started on 24 November 2006 and will have run on for a year, or such greater or lesser number of days as took account of clause 8.3 (business days being defined³ as days other than a Saturday or Sunday on which banks are open for business in London, New York City and Istanbul). There is thus an overlap of one day between any one Interest Period and its successor. He argues that in respect of that day, which on his submission falls within two separate Interest Periods, interest must be paid twice and (although this was not alluded to at the hearing, potentially at two different rates, one having been determined by the Lender under clause 7.4 at the beginning of the expiring Interest Period and the other calculated by the Lender under the same provision on the first day of the succeeding one).
- [16] This paradoxical conclusion results, I think, from a failure to take account of the provisions of clause 23.3 of the Facility Agreement. Clause 23.3 makes clear that interest accrues from day to day and is calculated upon the basis of the actual number of days elapsed and a year of 360 days. This does not mean that a year, for the purposes of the Facility Agreement, is only 360 days long. It means, as the excerpt from Paget's Law of Banking⁴ to which I was referred makes clear and as I am told is common ground, that interest at the rate of one three hundred and sixtieth of the rate applying during the relevant Interest Period is charged for each successive day falling within that Interest Period.
- [17] The function of the Interest Periods under the Facility Agreement is to define (a) the time within which the rate calculated pursuant to clause 7.1 is to apply and (b) the date upon which payment of

³ Clause 1.1 of the Facility Agreement

⁴ 13th Ed, para 13.6

accrued interest is to be paid, which may be a calendar year or slightly more or less than a calendar year (clause 8.3). It is no doubt because of this potential variation in the length of successive Interest Periods, dependent upon matters outside the parties' control (holidays in London, New York City and Istanbul), that each Interest Period after the first is expressed under clause 8.1(B) to commence on the date the previous Interest Period ends, so as to ensure that no accidental gaps open up.

[18] Although the Interest Periods limit times, they do not of themselves impose any obligation. That is done under the Facility Agreement by clause 23.3. Interest will accrue due pursuant to clause 23.3 in respect of the last day of an Interest Period at the rate applicable to that Interest Period and that interest will be payable on the day upon which it accrued due. Although the new Interest Period overlaps, in point of date, with the final day of the preceding one, clause 23.3 makes clear that interest can accrue due only once in respect of the same day. The first day of the new Interest Period therefore automatically falls out of account so far as any liability for interest in respect of the new Interest Period is concerned.

[19] The same result could have been achieved by providing that the new Interest Period commenced at midnight upon the day upon which its predecessor ended, but the effect is the same in practice.

Conclusion

[20] The order will therefore be drawn up on the basis that simple, not compound interest will be payable by CFI on redemption and that interest is payable only once in respect of the last day of any Interest Period, at the rate applying to that Interest Period.

Commercial Court Judge

4 November 2010