

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0001

BETWEEN:

SONERA HOLDING B.V.

Appellant

and

CUKUROVA HOLDING A.S.

Respondent

Before:

The Hon. Dame Janice Pereira
The Hon. Mr. Don Mitchell [Ag.]
The Hon. Mr. Paul Webster [Ag.]

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington QC. and Mr. Ben Valentin for the Appellant
Ms. Arabella Di Iorio and Mr. James Nadin for the Respondent

2013: May 9;
July 11.

Civil Appeal - Provisional Charging Order - Injunction to support Charging order - Injunction to restrain disposition of assets after redemption of shares – equity of redemption in respect of charged shares validly appropriated – whether amounting to present beneficial interest - Civil Procedure Rules Part 48.

On 19th February 2013 Sonera applied *ex parte* for a provisional charging order over Cukurova's shares in CFI and Cukurova's entitlement to dividends and other payments from CFI, and for injunctive relief. The judge dismissed the application for the provisional charging order and on 5th March 2013, after an *inter partes* hearing granted an interim injunction restraining Cukurova from assigning or parting in any way with its or CFI's rights over the Charged Shares, and from causing or permitting the restructuring of CFI or CTH,

or causing them to enter into any liquidation or reorganisation process. The judge gave a return date for the continuation of the interim injunction on 27th March 2013, on which day he discontinued the interim injunction.

On appeal the issues were (1) what was the nature of Cukurova's interest in the Charged Shares following the judgment of the Privy Council recognising its equity of redemption and granting it relief from forfeiture notwithstanding that the Charged Shares had been validly appropriated by Alpha Telecom Turkey Limited ("Alpha") who held the Charged Shares as security and who had appropriated them consequent on Cukurova's default on its loans from Alpha; (2) If Cukurova held an equity of redemption, whether the court should exercise its discretion under Part 48 of the CPR to grant a provisional charging order and an injunction to restrain Cukurova from using the Charged Shares as security for a loan to finance the redemption of the Shares, such loan ranking in priority to Sonera's judgment debt and/or; grant an injunction to restrain Cukurova, after it redeems the Charged Shares, from transferring or otherwise disposing of the Charged Shares or its interest in CFI, CTH or TCH, and from causing or permitting the restructuring of CFI or CTH, or causing any or all of them to enter into any liquidation or reorganisation process.

Held: allowing the appeal to the extent of granting the injunction restraining Cukurova from disposing of its interest or the interest of CFI or the interest of CTH, howsoever held, in TCH whether by sale, transfer, charge, liquidation or any other means whatsoever, and dismissing the applications to grant the provisional charging order and an injunction, restraining Cukurova from using the Charged Shares as security for a loan to finance the redemption of the Shares, and making no order as to costs, that:

1. The Privy Council in its judgment delivered on 30th January 2013 held that notwithstanding the appropriation of the Charged Shares by Alpha, Cukurova retained an equity of redemption in the Charged Shares and was entitled to relief from forfeiture. Cukurova's equity of redemption is a present equitable interest in the Charged Shares which is a sufficient interest in respect of which Sonera could apply for a charging order under Part 48 of the CPR. However, in the circumstances of this case, the court declines to exercise its discretion to grant the provisional charging order sought as to do so will more than likely have the effect of preventing the re-acquisition of the Charged Shares by Cukurova thus destroying the very equity of redemption which it now has. Cukurova will then be in the position of having no assets in the jurisdiction and the judgment debt will be unenforceable. These factors, though unusual, must be relevant considerations in the exercise of the discretion having regard to the objective of a charging order which is enforcement of a judgment.

The Royal Oak Company Limited v Ikitilat [2008] EWHC 1703 applied; **London and South Western Railway Co. v Gomm** [1882] 20 Ch D 562 cited; **Chattey and another v Farndale Holdings Inc. and others** [1996] EWCA Civ 696 cited; **Bircham & Co., Nominees (2) Ltd and another v Worrell Holdings Limited** [2001] EWCA Civ 775 cited.

2. An injunction should not be granted to prevent Cukurova from acquiring an even more valuable asset that will be subject to the jurisdiction of the BVI courts in circumstances where it does not have any other assets in the jurisdiction. Further, the findings of material non-disclosure are confirmed.

Hadmor Productions Limited v Hamilton [1983] AC 191 at 220 applied

3. The injunction restraining Cukurova immediately upon the redemption of the Charged Shares, whether acting by its directors, officers, servants or agents or otherwise howsoever from taking any steps to dispose of its interest or the interest of CFI or the interest of CTH, howsoever held, in TCH whether by sale, transfer, charge, liquidation or any other means whatsoever” is re-imposed having regard to the following:
 - (a) Sonera is an unpaid judgment creditor of Cukurova for over \$1 billion and there is no evidence that Cukurova intends to pay the outstanding judgment debt.
 - (b) This Injunction will not interfere with Cukurova’s redemption of the Charged Shares, but it will give Sonera some security against what will become Cukurova’s even more valuable asset in the jurisdiction; and
 - (c) The balance of convenience favours the re-imposition of the injunction. Cukurova will have completed the redemption of the Charged Shares by the time the injunction becomes effective and it will affect only future dispositions of the Charged Shares which should not take place without the court’s approval in light of the substantial judgment debt that Cukurova still owes to Sonera.

JUDGMENT

- [1] This is a judgment of the Court. This appeal is another chapter in the long-running disputes between the Sonera group of companies, the Cukurova group of companies and, though not a party to these proceedings, the Alpha group of companies. This chapter concerns an application by the appellant, Sonera Holding B.V. (“**Sonera**”), for a provisional charging order over the assets in the BVI of the respondent, Cukurova Holding A.S. (“**Cukurova**”), and for an injunction to support the provisional charging order.

- [2] The assets over which the provisional charging order is sought are Cukurova's beneficial interest in shares in Cukurova Finance International Limited ("**CFI**"), and Cukurova's beneficial interest in any and all amounts received or due to the company, including any dividend payments, from Cukurova Telecom Holdings Limited ("**CTH**"). The application for the injunction was made under Part 48.5 (2) of the Civil Procedure Rules 2000 ("**CPR**") and/or under the court's inherent jurisdiction, to secure the provisional charging order and all other assets in the Virgin Islands in which Cukurova has a beneficial interest pending the grant of a final charging order.
- [3] Both parts of the application were refused by the learned trial judge, Bannister, J., by orders dated 5th March 2013 and 27th March 2013 respectively. Sonera appealed against both orders.

Background

- [4] Cukurova and CFI are members of the Cukurova group of companies. Prior to September 2005 Cukurova owned 52.91% of the shares of a company called Turkcell Holding SA ("**TCH**"). The remaining shares of TCH were held by Telia Sonera Finland OYJ ("**Telia Sonera**"), the Appellant's parent.
- [5] TCH in turn held 51% of the shares in Turkcell Iletisim Hizmetleri AS ("**Turkcell**"), a cell phone network provider in Turkey.
- [6] In March 2005 Cukurova entered into an agreement with Sonera to sell its 52.91% shareholding in TCH to Sonera. Notwithstanding this agreement Cukurova transferred its shares in TCH to CTH, a BVI company which in turn is wholly owned by CFI, another BVI company. The transfer was done to defeat Sonera's claim to the TCH shares.
- [7] On 1st June 2005 Cukurova entered into a subscription agreement with Alpha Telecom Turkey Limited, a BVI company and part of the Alpha group of

companies of Russia ("**Alpha**"). The subscription agreement provided *inter alia* that :

- (a) for a subscription price of \$1.6 billion Alpha would receive 49% of the issued shares of CTH (leaving Cukurova with 51% of the shares in CTH);
- (b) Alpha would enter into a facility agreement to grant CFI a facility of \$1.352 billion secured by a charge over CFI's shares in CTH and Cukurova's shares in CFI, and a separate unsecured loan facility of \$355 million.

[8] The parties entered into the facility agreement on 28th September 2005. On the same day CFI executed a charge by way of equitable mortgage over CFI's 51% shareholding in CTH, and on 25th November, 2005 Cukurova granted Alpha a similar charge over its 100% shareholding in CFI¹. Both charges were given as security for the repayment by CFI of the \$1.352 billion loan facility and gave Alpha the right to appropriate the Charged Shares at any time after the charges became enforceable.

[9] In an arbitration begun by Telia Sonera against Cukurova in Vienna in August 2005 the Vienna tribunal issued an interim award in March 2008 which found that by transferring the TCH shares to CTH, and by granting Alpha certain rights under the Alpha transactions in 2005, Cukurova had breached the transfer restrictions in a 1999 Turkcell Holding Shareholders Agreement ("**THSA**"), between the original shareholders of TCH. The Vienna tribunal ordered Cukurova to take all measures available to it to re-acquire the TCH shares from CTH. Cukurova did not comply with the terms of the Vienna interim award.

[10] In June 2005 Sonera had also began separate arbitration proceedings against Cukurova in Geneva. On 27th July 2009 the Geneva tribunal ordered Cukurova to give specific performance of its agreement to sell the TCH shares to Sonera. Sonera subsequently waived its claim for specific performance and elected instead

¹ Cukurova's shares in CFI and CFI's shares in CTH are referred to jointly as "the Charged Shares".

to pursue a claim for damages. On 1st September 2011 the Geneva tribunal issued its final award which required Cukurova to pay Sonera US\$932 million, plus interest and costs.

[12] On 24th October 2011 Sonera obtained an order for the registration of the final arbitration award as a judgment of the BVI court. Cukurova's application to set aside the BVI Judgment was dismissed by Bannister, J. on 19th September 2012 and the appeal from that judgment was dismissed by this court on 9th May 2013.

[13] Meanwhile, all was not going well between the Cukurova group and the Alfa group. On 16th April 2007 Alpha's solicitors wrote CFI with a copy to Cukurova identifying several events of default under the facility agreement and demanded immediate repayment of the \$1.352 billion. Alpha also asked to be registered as the owner of the Charged Shares.

[14] Also on 16th April 2007 Alpha filed two claims in the Commercial Court, the first seeking a declaration that it was entitled to accelerate repayment of the \$1.352 billion loan and demanding immediate repayment, and the second for an order compelling CFI and CTH to comply with the request to register Cukurova as a shareholder of the companies. The two claims were heard by Bannister, J. in April 2010. Insofar as his findings are relevant to this appeal Bannister, J. found that Alpha had not made out any of the events of default and dismissed the claims. The Court of Appeal found that three of the events of default had been made out and that Alpha had properly accelerated the repayment of the loan and appropriated the Charged Shares.

[15] Cukurova appealed to the Privy Council and in a judgment delivered on 30th January 2013 the Board held that Alpha was entitled to appropriate the Charged Shares, but that Cukurova retained an equity of redemption in the Charged Shares and was entitled to relief from forfeiture on terms to be set by the Board. The Board invited submissions from the parties on the terms of the proposed relief

from forfeiture and its decision is now awaited. While the terms are not yet available it is clear that upon payment of the amounts ordered by the Board and compliance with the other terms of the final order Cukurova and CFI will be able to redeem the Charged Shares from Alpha.

The proceedings before Bannister, J.

- [16] On 19th February 2013 Sonera applied *ex parte* for a provisional charging order over Cukurova's shares in CFI and Cukurova's entitlement to dividends and other payments from CFI, and for injunctive relief. Bannister, J. heard Mr. John Carrington Q.C., Counsel for Sonera, on the application on 27th February 2013. He dismissed the application for the provisional charging order and deferred his decision on the interim injunction until the following day. On 28th February 2013 he informed Mr. Carrington that he had concerns about the injunction and would listen to oral submissions on 5th March 2013.
- [17] On 5th March 2013, Mr. Ben Valentin appeared for Sonera by telephone. The Judge granted an interim injunction restraining Cukurova from assigning or parting in any way with its or CFI's rights over the Charged Shares, and from causing or permitting the restructuring of CFI or CTH, or causing them to enter into any liquidation or reorganisation process. The return date for the continuation of the interim injunction was set for 26th March 2013. On 27th March 2013, following the *inter partes* hearing the previous day, the Judge discontinued the interim injunction.
- [18] It is apparent from the skeleton arguments and the oral submissions that Sonera is seeking two distinct injunctions, namely:
- (a) to restrain Cukurova from using the Charged Shares as security for a loan to finance the redemption of the Shares, such loan ranking in priority to Sonera's judgment debt. We will call this "**the Loan Injunction**"; and

(b) to restrain Cukurova, after it redeems the Charged Shares, from transferring or otherwise disposing of the Charged Shares or its interest in CFI, CTH or TCH, and from causing or permitting the restructuring of CFI or CTH, or causing any or all of them to enter into any liquidation or reorganisation process. We will call this “**the Second Injunction**”.

[19] The position as at the date of the hearing of this appeal is therefore that Sonera is entitled to payment of the arbitration award of \$932 million plus interest and costs. The award is registered as a judgment of the BVI court. There is no stay of the judgment and it remains entirely unsatisfied. In fact there is no evidence that Cukurova has made any attempt to pay any part of the judgment debt.

The Issues

[20] The main issues on this appeal are:

- (a) The nature of Cukurova’s interest in the Charged Shares following the judgment of the Privy Council recognising its equity of redemption and granting it relief from forfeiture.
- (b) Whether a provisional charging order should be granted.
- (c) Whether the Loan Injunction should be granted.
- (d) Whether the Second Injunction should be granted.

Issue 1 – Cukurova’s interest in the Charged Shares

[21] The Privy Council found that the charge granted by Cukurova over the Charged Shares was by way of an equitable mortgage², and that the mortgagor (Cukurova) retained the equity of redemption.³ Cukurova disputes that the Privy Council decided that it retained the equity of redemption in the Shares. The relevant

² Paragraph 15 of the Judgment.

³ Paragraph 94.

passage in the judgment of the Board is in paragraph 94 where their Lordships say:

“However, as already stated, the commonest such case [of relief from forfeiture] is that of a mortgage or charge where the mortgagor or chargor retains the equity of redemption. In our opinion this is such a case.”

We take this as a finding by the Privy Council that Cukurova retained the equity of redemption in the Charged Shares and that this is the nature of its interest notwithstanding the novel concept of “appropriation” introduced into English law by the **Financial Collateral Arrangements (No.2) Regulations 2003 (“the Regulations”)**.⁴ The Privy Council further held that Cukurova was entitled to relief from forfeiture. The effect of the order is that once Cukurova meets the conditions set for redemption it will be restored to full legal and beneficial ownership of the Charged Shares and legally, Alpha could have no say about it.

[22] The Judge refused Sonera’s application for a provisional charging order. The reason for his decision can be gleaned from Mr. Carrington’s note of the *ex parte* hearing on 27th February 2013. The note reads –

“ . . . Cukurova had no present beneficial interest in the shares and even though they could have a future interest if they complied with terms of relief from forfeiture, the rules only contemplated a current beneficial interest.”

[23] There is nothing in the record to suggest that this is not an accurate representation of the Judge’s reasons for refusing the provisional charging order. In fact Sonera recited the note without demur in paragraph 21 of its skeleton argument filed on 26th April 2013. At the injunction hearing on 5th March 2013 the learned Judge further described Cukurova’s interest as –

“First of all, it does seem to me that as things stand Cukurova does have more than a mere *spes*. It seems to me to have something substantial even though the Privy Council hasn’t explained exactly what it is because all the indications are that subject to tying up quantum they are going to

⁴ The provisions of the Regulations dealing with Financial Collateral Arrangements had been expressly incorporated into the Share Charges.

be permitted to either redeem, reopen, or foreclosure, or get relief from forfeiture, whichever is the correct analysis.”⁵

Discussion

[24] Applications for charging orders are made under Part 48 of the CPR. The nature of the debtor’s interest in the shares to be charged is set out in Rule 48.3 (2) (d) as follows:

“The affidavit [in support of the application] must –

...

(d) state that to the best of the deponent’s information and belief the debtor is beneficially entitled to the stock or personal property as the case may be.” (my underlining)

Rule 48.1 (2) defines stock as including “*shares and dividends arising therefrom*”

[25] Rule 48.3 does not specify or limit the type of beneficial interest in the shares to be charged. Cukurova’s beneficial interest is the equity of redemption in the Shares and the right to be relieved from forfeiture upon compliance with the terms to be set by the Privy Council. Once Cukurova complies with the terms, which are expected to relate mainly to the amount of money to be paid and the time for payment, Alpha will be obliged to retransfer the full legal and beneficial title in the Charged Shares to Cukurova failing which it will be in contempt of the Board’s Order. Mr. Valentin submitted that this arrangement gives Cukurova a beneficial interest in the Charged Shares, albeit that the redemption will take place in the future. He relied on **London and South Western Railway Co. v Gomm**⁶, **Chattey and another v Farndale Holdings Inc. and others**⁷ and **Bircham & Co., Nominees (2) Ltd and another v Worrell Holdings Limited**⁸, all of which in varying degrees support his position that an option to purchase property in the future can support a beneficial interest in the property. The cases deal with

⁵ At pages 6-7 of the Transcript of Proceedings.

⁶ [1882] 20 Ch D 562.

⁷ [1996] EWCA Civ 696.

⁸ [2001] EWCA Civ 775.

options over land but we are satisfied that the principle applies to other forms of property.

[26] The issue for this Court is whether Cukurova's equity of redemption in the Charged Shares coupled with the right to relief from forfeiture is a sufficient interest to entitle it to a provisional charging order under Part 48 of the CPR.

[27] Bannister, J.'s concerns with Cukurova's interest in the Charged Shares is that even though it is more than a mere *spes*, it is a future interest which does not qualify as a chargeable beneficial interest under Part 48. However, the equity of redemption which the Privy Council found that Cukurova has in the Charged Shares is an equitable interest that arises when the mortgage was created and is more in the nature of a present interest, as opposed to the right to redeem (or the relief from forfeiture) which only arises after the contractual date to redeem. The difference between the two is summed up by the learned editors of **Snell's Equity**⁹ as follows:

"The mortgagor's equitable right to redeem is distinct from the mortgagor's "equity of redemption"; the former does not exist until the legal date for redemption has passed, whereas the latter exists as soon as the mortgage is made. The equity of redemption is accurately described as "an equitable interest in the land consisting of the sum total of the mortgagor's rights in the property"; it amounts to ownership of the property subject to the mortgage, and the equitable right to redeem is merely one of its component elements."

In our opinion the equity of redemption is a present equitable interest in the Charged Shares which was created at the same time as the mortgages. The Privy Council treated the case as such.

[28] Cukurova submitted in paragraphs 27 and 28 of its skeleton argument that by virtue of a 2010 insertion into the Regulations the equity of redemption in the Charged Shares, which would have arisen in 2005, was extinguished when Alpha

⁹ 32nd Ed. at 38-001.

appropriated the Charged Shares. The Privy Council applied the pre-2010 Regulations to the appropriation of the Charged Shares in its judgment delivered on 5 May 2009 in separate but related proceedings. The effect of the 2010 amendment to the Regulations is a matter of English law and there was no evidence of its meaning and effect before the learned Judge or this Court. In any event the Privy Council found in paragraph 94 of its January 2013 judgment that Cukurova retained its equity of redemption in the Shares (see paragraph 20 above). This finding by the Board is sufficient to dispose of the argument that Cukurova's equity of redemption was extinguished by the 2010 amendment to the Regulations.

- [29] We would also add that the 2010 amendment post-dated the creation of the mortgages and, applying BVI rules of interpretation, there is nothing in the amendment, whether expressly or by necessary implication that suggests that it was meant to have retroactive effect. As such it is caught by the presumption against retroactivity and cannot be seen as taking away Cukurova's vested equitable rights in the Charged Shares, in this case the equity of redemption.
- [30] But even if we are wrong and Cukurova's interest in the Shares is a future interest in that the right to redeem will only arise when the Board announces the terms of redemption, we are satisfied that the right to redeem the Shares is a sufficient beneficial interest to give the court the jurisdiction to grant a provisional charging order under Part 48.
- [31] Mr. Valentin referred us to the case of **The Royal Oak Company Limited v Iktilat**¹⁰ a decision of Floyd, J. sitting in the Chancery Division. The case concerned s. 2 (1) of the **Charging Orders Act 1979** which extends the availability of relief to "*any interest held by the debtor beneficially*". Floyd J. found that –

¹⁰ [2008] EWHC 1703 (Ch).

“ . . . the equity of redemption is a sufficient interest in land to bring [the applicant] within the terms of section 2 of the Charging Orders Act 1979.”¹¹

He further observed that –

“There is nothing in the section which lays down any further requirement as to the nature of the debtor’s interest. If the debtor has no beneficial interest in the asset (i.e. here, the land), a charging order cannot properly be made.”¹²

[32] There is no difference in substance between the crucial words in s. 2 of the 1979 Act (*“any interest held by the debtor beneficially”*) and Part 48.3 (2) (d) of the CPR (*“the debtor is beneficially entitled to the stock”*). The important requirement in both provisions is a finding that the debtor (Cukurova) has a beneficial interest in the charged property. There are no limiting words in Rule 3(2)(b) as to the type or quality of the beneficial interest that is required and the court should not read such words into the Rule. The guidance from Floyd, J. is helpful but we would have come to the same conclusion in any event from the clear, unqualified wording of Rule 3(2)(b).

[33] The quality, or quantity depending on how you look at it, of the beneficial interest comes into play when the court is assessing the enforcement of the charging order. The ultimate goal of a charging order is the sale of the debtor's interest in the charged property. If a debtor has full legal and beneficial ownership of prime commercial real estate he has an interest that is highly marketable. On the other hand a debtor who has a contingent future beneficial interest in property, generally speaking has a less marketable interest. The court will obviously consider the nature and quality of the beneficial interest, and all other circumstances in exercising its discretion under Part 48, and it is conceivable that a case could arise where the court would refuse to make a charging order because of the debtor's limited beneficial interest in the charged property or other special circumstances.

¹¹ Ibid paragraph 51.

¹² Supra note 9 at paragraph 7.

But this goes to the exercise of the court's discretion, not to its jurisdiction to make a charging order.

We are satisfied that Cukurova's equity of redemption is a very valuable asset which can be made the subject of a provisional charging order.

Issue 2: The provisional charging order

[34] Having found that Cukurova has a beneficial interest in the Charged Shares the next issue is whether this court should exercise its discretion under Part 48 of the CPR to grant a provisional charging order. The jurisdiction to grant the order is in Part 48.5 (1) which reads –

“In the first instance the court must deal with an application for a Charging Order without a hearing and may make a provisional charging order.”

The use of the word “may” imports a discretion to grant or refuse an order, even if the debtor has a beneficial interest in the property to be charged. In considering how to exercise our discretion under Part 48.5 (1) we take the following into consideration:

- (a) Sonera is an unpaid creditor for over \$1 billion.
- (b) Cukurova does not have any other assets in the BVI and apart from the Charged Shares Sonera's judgment is virtually unenforceable in the BVI.
- (c) The effect of a provisional charging order under Part 48.9(1) is that any disposition of Cukurova's interest in the Charged Shares (the equity of redemption) would not be valid against Sonera. The grant of the provisional charging order will have the effect of giving Sonera priority over any intended lender to Cukurova. The learned Judge's finding, which follows the findings by the Privy Council and is supported by the evidence of Mr. Mehmet Emin Karamehmet which the Judge accepted, is that the proposed lenders of the funds to redeem the Charged Shares will not make

the loan if they do not have first priority over the Charged Shares.¹³ This issue will be expanded upon when dealing with the Loan Injunction below.

The inevitable, though regrettable, conclusion is that the grant of the provisional charging order will more than likely have the effect of preventing the re-acquisition of the Charged Shares by Cukurova thus destroying the very equity of redemption which it now has. Cukurova will then be in the position of having no assets in the jurisdiction and the judgment debt will be unenforceable. These factors, though unusual, must be relevant considerations in the exercise of the discretion having regard to the objective of a charging order which is enforcement of a judgment. Like Bannister J. we would refuse the application for a provisional charging order albeit for different reasons.

Issue 3 – Injunction to prevent charging the shares

[35] The learned Judge's reasons for not granting the 'Loan Injunction' are set out in the transcript of his decision on 27^h March 2013. They are:

- (a) A creditor must take his debtor as he finds him. Cukurova does not have any assets in the jurisdiction and will not be able to reacquire the shares without using them as security for the acquisition monies.
- (b) The Turkcell Holdings Shareholders Agreement ("**the THSA**") does not prevent Cukurova and CFI from charging the Shares.
- (c) There was material non-disclosure by Sonera at the *ex parte* hearing on 5th March 2013.

Before dealing with these points the Court is reminded of its role as an appellate tribunal in reviewing a judge's exercise of his discretion to grant or refuse an

¹³ Transcript of 27 March 2013 hearing.

interim injunction. Lord Diplock set out the basic principle in **Hadmor Productions Limited v Hamilton**¹⁴ as follows–

“An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently.”

We now deal with the learned Judge's reasons for refusing the Loan Injunction.

Cukurova's financial position

[36] In the related proceedings between the Cukurova companies and Alpha this Court made an order on 5th December 2011 staying its own order of 20th July 2011 which allowed the appropriation of the Charged Shares to proceed and granted injunctive relief on condition that Cukurova and CFI pay \$1,446,824,709.42 into court within 90 days. Cukurova appealed to the Privy Council for a discharge or variation of this order. The Privy Council set aside the order for payment into court. In the course of its advice delivered by Lord Mance on 23rd May 2012 the Board found that

“... the indications are that [Cukurova and CFI] would be unable **at this stage to raise either themselves or from others the necessary monies** to meet the condition. Alpha challenges the sufficiency of [Cukurova's] and CFI's evidence on this last factual aspect, but it is in the Board's opinion made sufficiently good for present purposes.”¹⁵ (*emphasis added*).

Although this finding was made in relation to the Cukurova companies' inability to pay the amount ordered to be paid into court, it is a sum that is less than the lowest amount that they will have to pay to redeem the Shares. The estimated

¹⁴ [1983] AC 191 at 220.

¹⁵ At paragraph 13.

redemption cost is \$1.5 to \$3 billion. Bannister, J. also observed that the evidence before the Board on this point was substantially the same as the evidence that was before him. At pages 10-11 of the transcript of the hearing on 27th March 2013 he said –

“Now, that decision [of the Privy Council] which was based on evidence which it is now clear to this Court was substantially the same as the evidence on assets with which this Court has been provided, was only ten months ago. The evidence to which I have just referred which is contained in Mr. Karamehmet’s affidavit is to the effect that the position has not changed, although Mr. Valentin made some criticisms of the detail and particularity of Mr. Karamehmet’s evidence. In my judgment it shows, at any rate to my satisfaction, that Cukurova is not in a position to raise the funds without resort to the shares.”

The Board’s finding is therefore relevant to Cukurova’s ability to redeem the Charged Shares and it was considered by Bannister, J.

[37] In delivering his decision on the injunction application on 27th March 2013 Bannister, J. found¹⁶

“In fact, it is clear that Cukurova will not be able to re-acquire the shares without using them as security. This is because, one, it has, on the evidence, insufficient chargeable assets apart from the shares which could be used to fund the probable cost of re-acquisition, these costs being somewhere between 1.5 and 3 billion United States dollars.”

And later in the decision¹⁷

“There’s the fact that it is not, in my judgment, shown that Cukurova could re-acquire the shares without using the shares themselves as security.”

[38] These are important and compelling findings of fact by the Privy Council and the judge who heard the application, and we accept them. The inevitable conclusion is that we find that the grant of an injunction would have the effect of denying Cukurova the opportunity to redeem the Charged Shares with the further

¹⁶ Pages 6 – 7 of Transcript of the hearing.

¹⁷ Page 9 of the Transcript of the hearing.

consequence that it will not have assets in the jurisdiction against which the Sonera judgment could be enforced.

Non-Disclosure

[39] In dismissing the application for injunctive relief the learned judge found two instances of material non-disclosure by Sonera at the *ex parte* hearing, namely:

(a) failing to bring to the Judge's attention the Privy Council's decision in the May 2012 Cukurova appeal; and

(b) failing to disclose the THSA at the hearing and to direct the Judge's attention to the flaws in the arguments relating to the THSA.

[40] We have said enough about the importance of the May 2012 judgment of the Privy council in relation to the issue of Cukurova's inability to redeem the Charged Shares without using them as collateral for the acquisition loan to indicate that it was incumbent on Sonera, in discharging the high duty of disclosure that it owes to the Court on an *ex parte* application, to disclose and deal with the Board's finding. Bannister, J. clearly expressed his view of the importance of the Board's finding and concluded that –

“I believe that it should have been drawn to my attention, a substantial claim for the application made then by Mr. Valentin by telephone was the availability or otherwise alternative sources of funds. The view of the Privy Council on the evidence then shown to it was clearly both material and capable of influencing the Court's discretion. I should say that in making the order which I did, I did not form any conclusions about the availability or otherwise to Cukurova of sufficient funds to fund the acquisition without resort to the shares. But it is a fact, it seems to me, that given the way the point was argued, the Privy Council's expressed views were material and would have been capable, depending on the thought process of the Tribunal of influencing the Court's decision.”¹⁸

By “*the Court's decision*” we take Bannister, J. to be referring to his own decision and the effect of the non-disclosure.

¹⁸ Page 11 of the Transcript of 27 March 2013.

- [41] At the hearing before the learned Judge, Sonera submitted that Cukurova was already contractually prohibited from granting security over its shares in CFI by the terms of the THSA such that continuing the injunction would not cause Cukurova any prejudice. However, the THSA was not produced at the hearing. The learned judge thought this was a material failure to comply with Sonera's disclosure obligation on an *ex parte* application. Further, that the weaknesses in the argument relating to the THSA should have been dealt with in greater depth.
- [42] We agree with the learned Judge that these were two instances of material non-disclosure, but even if we did not agree there is no basis for upsetting the Judge's findings. Further, there is no room in this case to continue the injunction notwithstanding the non-disclosure because:
- (a) the finding that Cukurova will be unable to redeem the Shares if the injunction is continued; and
 - (b) there are no exceptional circumstances that would justify a departure from the general rule that notwithstanding a finding of non-disclosure by the applicant for an *ex parte* injunction the court has a residual discretion to continue the injunction or discharge it and impose a new injunction. The authorities establish that this discretion should be exercised sparingly and we do not think it should be exercised in relation to the Loan Injunction having regard to the considerations to which we alluded above.
- [43] In the circumstances we agree with Bannister, J. that an injunction should not be granted to prevent Cukurova from acquiring a valuable asset that will be subject to the jurisdiction of the BVI courts in circumstances where it does not have any other assets in the jurisdiction. Further, the findings of material non-disclosure are confirmed. That is sufficient to dispose of the appeal in respect of the application for the Loan Injunction and it is not necessary to deal with the learned judge's

other reason for dismissing the application that the THSA did not prevent Cukurova from dealing with the Charged Shares.

The Second Injunction

- [44] Different considerations apply to the Second Injunction. As set out above in paragraph 17(b) this injunction restrains Cukurova, after it redeems its shares in CFI, from disposing of any of its assets in the BVI, including the shares in CFI. This injunction will not interfere with Cukurova's ability to redeem the Charged Shares. This is the main reason why the Loan Injunction was not continued.
- [45] The findings of material non-disclosure are not directly related to the Second Injunction. Cukurova's failure to direct the Judge's attention to the 2012 Privy Council decision relating to Cukurova's financial circumstances is only relevant to the acquisition of the Charged Shares, not to how Cukurova deals with them after they are acquired. Equally, the failure to address the learned judge adequately on the flaws in Cukurova's argument relating to the THSA is not relevant to the Second Injunction.
- [46] In considering whether to re-impose the Second Injunction we bear the following in mind:
- (a) Sonera is an unpaid judgment creditor of Cukurova for over \$1 billion.
 - (c) There is no evidence that Cukurova intends to pay the outstanding judgment debt.
 - (d) The 2005 transfer of the CTH shares to CFI was done to defeat the claim by Sonera for the Shares
 - (d) The Second Injunction will not interfere with Cukurova's redemption of the Charged Shares, but it will give Sonera some security against what will become Cukurova's even more valuable asset in the BVI.

- (e) The Judge's observation at pages 15 – 16 of the transcript of 27th March 2013 that the very high duty that is cast on applicants for *ex parte* relief and the value judgments that have to be made, sometimes at very short notice. The Judge was at pains to make it clear he was not criticising counsel who appeared on the application. We take this to mean that the non-disclosures were material but not egregious.
- (f) The balance of convenience favours the re-imposition of the injunction. Cukurova will have completed the redemption of the Charged Shares by the time the injunction becomes effective and it will affect only future dispositions of the Shares which should not take place without the court's approval in light of the substantial judgment debt that Cukurova still owes to Sonera and which Cukurova, up to the hearing of this appeal, has not proffered so much as a proposal for payment by utilization of non BVI assets of any kind.

Taking all of these matters into consideration we would exercise our residual discretion and re-impose the Second Injunction in terms of the order that the Court will make.

Summary of findings

- [47] To recap, our findings on the issues are:
- (i) Cukurova has a beneficial interest in the Charged Shares that is sufficient for the Court, in its discretion, to grant a provisional charging order over. However, for the reasons set out in paragraph 34 above the court in its discretion will not grant the provisional charging order.
 - (ii) The Loan injunction should not be re-granted because it will have the effect of preventing Cukurova from redeeming the Charged Shares, and

also because of Sonera's material non-disclosures during the course of the ex parte application.

(iii) The Second Injunction is re-granted on the terms set out below.

Both parties have had some success on this appeal and accordingly we would make no order as to costs.

[48] Finally, we have become aware that the Privy Council in its decision handed down on 9 July 2013¹⁹ has determined the terms on which Cukurova may redeem the Charged Shares from Alpha. This judgment which was drafted before the determination of that decision merely notes that decision and is not affected by it.

Order

[49] The order that this Court makes is that

(1) the appeal is allowed to the extent of granting the following injunction:

“Immediately upon the redemption of the Charged Shares Cukurova is restrained, whether acting by its directors, officers, servants or agents or otherwise howsoever from taking any steps to dispose of its interest or the interest of CFI or the interest of CTH, howsoever held, in TCH whether by sale, transfer, charge, liquidation or any other means whatsoever”; and

(2) No order as to costs.

BY THE COURT

¹⁹ [2013] UKPC 20; Privy Council Appeal No. 0023 of 2012; 0024 of 2012.