

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/018
HCVAP 2010/024

BETWEEN:

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

Appellants/Applicants

and

ALFA TELECOM TURKEY LIMITED

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Mr. Kenneth MacLean, QC, Ms. Arabella di Iorio and Mr. James Nadin for the Intended Appellants/Applicants
Mr. Stephen Smith, QC, Mr. Robert Levy and Mr. Oliver Clifton for the Respondent

2011: September 20;
December 5.

Civil appeal – Appeal to Her Majesty in Council – Stay of execution of order of the Court of Appeal under section 7 of the Virgin Islands (Appeals to Privy Council) Order 1967 and section 39 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 – Whether the inherent jurisdiction of the Court of Appeal to stay execution and grant or continue an injunction may be exercised upon giving conditional leave to appeal to Her Majesty in Council – Whether the declaratory orders effectively granted by the Court of Appeal to the respondent can be stayed

The Court of Appeal granted the relief sought by the respondent in Claim No. BVIHC (COM) 2007/072. The effect of the Court of Appeal's judgment was to make nine declarations and several orders in terms of paragraphs (7C) to (7D) and (8) of the respondent's amended statement of claim. These declarations and orders are the subject of the intended appeal to her Majesty in Council. The declarations and orders concern the

respondent's rights and ownership of 51 shares in one of the appellants'/applicants' companies registered in the Virgin Islands following the appellants'/applicants' defaults under a loan facility granted by the respondent to the appellants'/applicants and the respondent's appropriation of the share charges given by the appellants'/applicants to secure sums totaling approximately US\$1.352 billion advanced under that loan facility. Paragraphs (7C) and (7D) of the orders mandate that the appellants'/applicants take the required steps to perfect the respondent's ownership of the 51 shares. Paragraph (8) of the orders mandate that there be an inquiry as to what sums are due from the first appellant/applicant to the respondent by reason of the events referred to in the Statement of Claim and payment forthwith of all such sums following such enquiry. The appellants'/applicants applied to the Court of Appeal for a stay of execution of the declarations and orders pending the appeal and for the continuation of the injunction which the appellants'/applicants had obtained against the respondent prior to the final determination of the respondent's claim. The respondent opposed the application on several grounds. The respondent contended, among other things, that the Court of Appeal lacked jurisdiction to stay the declarations, and grant or continue the injunction under the rules governing appeals to the Privy Council.

Held: granting conditional leave to appeal to Her Majesty in Council against the final decision in Claim No. BVIHC (COM) 2007/072; staying paragraphs (7C), (7D) and (8) of the reliefs granted to the in this said claim; making a conditional injunctive order in the terms set out in paragraph 46 below pending the appeal; ordering that the costs of the application for conditional leave to appeal be costs in the appeal; and ordering that the costs in the application for stay be costs to the respondent to be paid by the appellants'/applicants and if not agreed, to be assessed, that:

1. There is no longer any room for successfully arguing that the code of procedure for appeals to the Privy Council constituted by the **Virgin Islands (Appeals to Privy Council) Order 1967**¹ and the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009**² ("the 2009 Judicial Committee Order"), has impliedly and altogether excluded the Court of Appeal's inherent jurisdiction to stay an order of its own and continue or grant an injunction pending an appeal to the Privy Council, where to do otherwise may render the appeal, if successful, nugatory. There now exists a provision in section 39 of the 2009 Judicial Committee Order, which specifically recognizes the existence of that inherent jurisdiction and empowers the Court of Appeal to stay the order appealed from and grant an injunctive order, or continue or discontinue an injunctive order made in the court below.

Commissioner of Police and another v Bermuda Broadcasting Co. Ltd. and Others [2007] UKPC 46 ; **Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment of Belize and another** [2003] 1 W.L.R. 2839; **In re CVC Opportunity Equity Partners Ltd.** [2000] CILR 320 considered.

¹ Statutory Instrument No. 234 of 1967.

² Statutory Instrument No. 224 of 2009.

2. A declaratory judgment cannot be stayed since it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against an appellant/applicant. Although the declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, in the meantime there is no enforcement nor any claim to it. The Court of Appeal made no determination of the rights of the parties requiring enforcement by making the declarations sought by the respondent in Claim No. BVIHC (COM) 2007/072 and the appellants' /applicants' application for stay in relation to those declarations must be refused.
3. The appellants/applicants have shown that their proposed grounds of appeal to the Privy Council are reasonable and that they have an arguable case. The Court should refrain from speculating on the appellants'/applicants' prospects of success on those proposed grounds. Having weighed and considered the balance of convenience and the competing rights of the parties, it appears that there is a risk that if a stay of paragraphs (7C), (7D) and (8) of the reliefs granted to the respondent is not granted, the appeal will prove abortive if the appellants/applicants succeed. Consequently, those paragraphs should be stayed pending the appeal to Her Majesty in Council.
4. The appellants/applicants have demonstrated that the undertakings offered by the respondent are inadequate to ensure that the respondent will not deal with the charged shares while the appeal is pending, in a manner that will prejudice the interests of the appellants/applicants. In the event that this occurs, damages would in fact not be an adequate remedy. However, since a stay will cause the appellants/applicants to retain control over the charged shares while the respondent will be out of money under the loan facility, then if the appellants/applicants succeed in their appeal, they will be bound to pay over to the respondent a sum as previously tendered by them in May 2007.
5. The injunction should continue therefore in the terms expressed in paragraph 2(1) to (8) of the Draft Order filed on 13th September 2001, subject to the condition that appellants/applicants pay into court the sum of US\$1,446,824,709.42 which was previously tendered by them to the respondent in payment or part payment of the loan.

JUDGMENT

- [1] **EDWARDS, J.A.:** There are 2 applications before us. The first is a notice of motion for conditional leave to appeal to Her Majesty in Council filed on 29th July 2011 by the first and second appellants/applicants, Cukurova Finance International Limited ("Cukurova Finance") and Cukurova Holdings AS ("Cukurova Holdings") respectively, together referred to as "Cukurova", who were the

defendants in Claim No. BVIHC (COM) 2007/072 and the claimants in Claim No. BVIHC (COM) 2007/119. This application is not opposed. Cukurova's appeal lies as of right within the meaning of section 3(1)(a) of the **Virgin Islands (Appeals to Privy Council) Order 1967**³ ("the Virgin Islands 1967 Order") which states:

"3. (1) Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases –
(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards, final decisions in any civil proceedings."

The Nature and Result of the Claims

- [2] The claims in short concern the appropriation of share charges given by the appellants/applicants Cukurova to secure sums totaling approximately US\$1.352 billion advanced under a loan facility granted by the respondent ("ATT" or "Alfa") to Cukurova. Cukurova Holdings wholly owns Cukurova Finance and together they form part of a group of companies worldwide, with extensive cell phone network provider business interests in Turkey. ATT is part of a large Russian conglomerate "Alfa", whose business interests include telecommunications and cell phone networks. The share charges are governed by English law.
- [3] The learned trial judge identified the issues to be: (a) whether ATT was entitled to accelerate the loan on 16th April 2007; (b) whether ATT was entitled to enforce the English share charges on 27th April 2007; (c) whether the attempted appropriation was ineffective as having been done in bad faith and for a purpose other than the recovery of ATT's lending under the facility agreement; and (d) if ATT's enforcement was valid and effective, whether Cukurova Finance is entitled to some sort of equitable relief upon tender of the outstanding loan.
- [4] The trial judge dismissed the action of ATT in Claim No. BVIHC (COM) 2007/072 and declared in his order in respect of Claim No. BVIHC (COM) 2007/119 that:

³ Statutory Instrument No. 234 of 1967.

"2. Cukurova Holding[s] 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[s] 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[s] 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[s] 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 below."

The Appeal

- [5] ATT appealed against that order and Cukurova also filed a counter notice of appeal. By a majority decision (Kawaley J.A. [Ag.] agreeing with the result while dissenting on certain findings of the majority) the Court of Appeal set aside the judgment and order of the learned trial judge, granted the relief sought by the respondent ATT in claim No. BVIHC (COM) 2007/072, dismissed Cukurova's claim in No. BVIHC (COM) 2007/119, dismissed Cukurova's cross appeal in Cukurova's counter notice which advanced additional grounds for supporting the judgment, and ordered that costs awarded to ATT below are to be taxed if not agreed and the costs of the appeals awarded to ATT in the main appeal to be taxed if not agreed.
- [6] The relevant reliefs sought by ATT in its amended statement of claim for Claim No. BVIHC (COM) 2007/072 which effectively stand as the order of the Court of Appeal were:
- "(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 [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."

The Other Application

[7] The second notice of application filed on 1st September 2011 by Cukurova is for a stay of the order of the Court of Appeal dated 20th July 2011, and continuation of the injunctive order made by Joseph-Olivetti J. dated 27th April 2007. This application is opposed by the respondent. Prior to the trial, the terms of the share charge, and the validity of the novel remedy of an appropriation under the share charge were the subject of a preliminary decision in these litigation proceedings between the parties. Before the preliminary issue was heard by Joseph-Olivetti J., Cukurova on an application without notice applied for and obtained injunctive relief which prevented ATT from taking enforcement steps in relation to the charged shares or registering the transfer of the shares. This injunctive order of Joseph-Olivetti J. dated 27th April 2007 was in the following terms:

"IT IS ORDERED that:

Without prejudice to the Claimant/Respondent's assertion that it has made appropriations of the shareholdings pursuant to the English law share charges referred to below:

1. Alfa Telecom Turkey Limited ("Alfa") be restrained whether acting by its directors officers servants or agents or otherwise howsoever from doing the following acts or any of them:
 - (i) registering or attempting to register the transfer of any shares of Cukurova Telecom Holdings Limited ("CTH") to any person or entity;
 - (ii) taking any steps to enforce the written charges dated respectively 28 September 2005 (the English CTH Share Charge) and 25 November 2005 (the BVI CTH Share Charge) or the security granted thereby over CFI's shareholding in CTH including without limitation taking any of the steps set out in Schedule 2 of the English CTH Share Charge and in Schedule 2 of the BVI CTH Share Charge;
 - (iii) registering or attempting to register the transfer of any shares of Cukurova Finance International Limited ("CFI") to any person or entity;
 - (iv) taking any steps to enforce the written charges dated respectively 25 November 2005 (the English CFI Share

Charge) and 25 November 2005 (the BVI CFI Share Charge) or the security granted thereby over Cukurova Holding's shareholding in CFI including without limitation taking any of the steps set out in Schedule 2 of the English CFI Share Charge and in Schedule 2 of the BVI CFI Share Charge."

[8] Schedule 2 to the BVI CFI Share Charge provides for the ATT to have the following rights:

"The Lender shall have the right, either in its own name or in the name of the Chargor or otherwise and in such manner and on such terms and conditions as the Lender thinks fit, and either alone or jointly with any other person:

- (a) **Enter into possession**
to take possession of, get in and collect the Charged Assets and to require payment to it of all Dividends;
- (b) **Deal with Charged Assets**
to sell transfer, assign, exchange or otherwise dispose of or realize the Charged Assets to any person either by public offer or auction, tender or private contract and for a consideration of any kind (which may be payable or delivered in one amount or by installments spread over a period or deferred);
- (c) **Claims**
to settle, adjust, refer to arbitration, compromise and arrange any claims, accounts, disputes, questions and demands with or by any person who is or claims to be a creditor of that Chargor or relating to the Charged Assets;
- (d) **Legal actions**
to bring, prosecute, enforce, defend and abandon actions, suits and proceedings in relation to the Charged Assets or any business of that Chargor;
- (e) **Redemption Security**
to redeem any Security (whether or not having priority to the Charges) over the Charged Assets and to settle the accounts of any person with an interest in the Charged Assets;
- (f) **Rights of Ownership**
to exercise and do (or permit the Chargor or any nominee of it to exercise and do) all such rights and things as the Lender would be capable of exercising or doing if it were the absolute beneficial

owner of the Charged Assets; and

(g) **Other powers**

to do anything else it may think fit for the realization of the Charged Assets or incidental to the exercise of any of the rights conferred on the Lender under or by virtue of any Finance Document to which the Chargor is party, the LPA or the Insolvency Act.”

Issues Raised by the Applications

[9] Although the criteria for granting conditional leave has been satisfied, the terms of the order are in issue because of (i) the nature of the reliefs granted to ATT in the order dated 20th July 2011; (ii) the nature of the order sought by Cukurova in their stay application; (iii) the opposition of ATT challenging the merits of the stay application; and (iv) the submissions of counsel for the parties concerning the power of the Court to stay execution under the statutory regime governing appeals to the Privy Council. The jurisdictional questions raised are important to litigants in civil proceedings, who wish to preserve the status quo of the subject matter of litigation pending the grant of final leave to appeal to Her Majesty in Council and the subsequent determination of the appeal by the Privy Council. Our decision should bring some clarity and certainty on the law concerning the following issues:

- (i) Whether the Court of Appeal has general jurisdiction when granting conditional leave to Cukurova to stay the execution of the order in its entirety where it grants declarations claimed by Alfa in Claim No. 2007/072 in its judgment and order dated 20th July 2011?
- (ii) Whether the Court of Appeal has jurisdiction to grant an injunction restraining acts ordered in its judgment and order dated 20th July 2011 when granting conditional leave to appeal? If yes;
- (iii) Whether the Court of Appeal can exercise such jurisdiction after the result of the appeal drawn up in the order dated 20th July 2011 has been perfected?

[10] Before addressing the issues together I propose to set out the relevant law governing the applications and procedure for appeals to the Privy Council. Thereafter I will consider the submissions of counsel and the authorities they referred to concerning the jurisdiction of the Court. Finally, I will determine the jurisdiction issues and then the merits of the application for stay.

The Relevant Rules Governing Appeals to the Privy Council

[11] The rules governing the procedure for appeals to the Privy Council for the dependent territory of the Virgin Islands are laid down by two statutory instruments: (i) the **Virgin Islands (Appeals to Privy Council) Order 1967**⁴ (“the Virgin Islands 1967 Order”); and (ii) the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009**⁵ (“the 2009 Judicial Committee Order”). The Virgin Islands 1967 Order is concerned mainly with the steps which must be taken to assert and begin the Privy Council appeal process in the Court of Appeal prior to filing the notice of appeal in England. The 2009 Judicial Committee Order is concerned primarily with the procedure that must be followed in England in order to prosecute the appeal in England. There are no local ordinances in the Virgin Islands regulating the practice in such appeals. For both applications the following sections of the Orders are relevant.

Section 4 of the Virgin Islands 1967 Order

“Application for leave to appeal

4. Applications to the Court for leave to appeal shall be made by motion or petition within twenty one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of this intended application.”⁶

Rule 11(2) of THE SCHEDULE to the 2009 Judicial Committee Order

“Filing of application for permission to appeal

11. – (1) Every application to the Judicial Committee for permission to appeal shall be in the appropriate form.

⁴ Statutory Instrument No. 234 of 1967.

⁵ Statutory Instrument No. 224 of 2009. See paragraph 1 of this judgment which sets out section 3(1) of the 1967 Order governing the appellants'/applicants' right to appeal to Her Majesty in Council.

⁶ This section has been modified by Rule 11(2) of the Schedule to the 2009 Judicial Committee Order.

(2) An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later)."

Section 5 of Virgin Islands 1967 Order

"Conditional leave to appeal

"5. Leave to appeal to Her Majesty in Council in pursuance of the provisions of this Order shall in the first instance, be granted to the Court only-

- (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution or of the Judicial Committee ordering the appellant to pay costs of the appeal (as the case may be); and
- (b) upon such other conditions (if any) as to the time within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

Rule 37(2) of THE SCHEDULE to the 2009 Judicial Committee Order PART 5

"Security for costs

37(2) Where permission to appeal has been granted by the court below, security for costs of the appeal shall be a matter for that court.

Section 7 of Virgin Islands 1967 Order

"Stay of execution

"7. Where the decision appealed from requires the appellant to pay money or do any act, the Court [of Appeal] shall have power, when granting leave to appeal, either to direct that the said decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said decision to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

Rule 39(1) OF THE SCHEDULE to the 2009 Judicial Committee Order PART 5

“Stay of execution of conservatory order

39. – (1) Any appellant who wishes to obtain a stay of the order appealed from or some conservatory order pending an appeal must seek it from the court below in the first instance.

(2) In exceptional circumstances the Judicial Committee may grant a stay of execution or a conservatory order.”

Section 8 of the Virgin Islands 1967 Order

“Manner of providing security

8. For the purposes of sections 5 and 7 of this Order, a person may provide security in any manner that the Court may approve in this case, and for the avoidance of doubts it is declared that such security may with the approval of the Court consist in whole or in part of a deposit of money.”

Section 5 of the 2009 Judicial Committee Order

“Partial revocations

5. The instruments listed in column 1 of the following table (which have the references listed in column 2) are revoked only and in so far they relate to the powers of the Judicial Committee of the Privy Council and the procedure to be adopted by it with respect to proceedings before it.

Column 1 Title	Column 2 Reference
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...
The Virgin Islands (Appeals to Privy Council) Order 1967 (c).....S.I. 1967/234”

Rule 1 of THE SCHEDULE to the 2009 Judicial Committee Order PART 1

“Scope

1.– (1) The rules in Parts 1 to 6 of this Schedule and the practice directions which supplement them provide the procedure for civil and criminal appeals to the Judicial Committee of the Privy Council under its general appellate jurisdiction.”

The Submissions on Jurisdiction

[12] Learned Queen’s Counsel Mr. Smith submitted that section 7 of the Virgin Islands 1967 Order gives power to the Court of Appeal to stay only that part of its order made against Cukurova on 20th July 2011 which requires Cukurova to secure registration of ATT as holder of the charged shares. The other reliefs granted are

for declarations which cannot be the subject of a stay or suspension under section 7 of the Virgin Islands 1967 Order. The limitations in section 7 also would not permit the Court to continue the injunction of Joseph-Olivetti J.

[13] Learned Queen's Counsel Mr MacLean submitted that we can make the order sought on Cukurova's application for stay because apart from section 7 of the Virgin Islands 1967 Order, the Court has power to grant interim relief pending the appeal to the Privy Council by virtue of the **Supreme Court Order 1967**⁷ ("the Court Order"); sections 7, 24, 27, 28, 30(1)(b), and 31 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act 1969**⁸ ("the Court Act"); and Rules 62.20(1), 17.1(1)(b), 17.1(1)(h)(ii), 17.1(3) (5) and 17.2(1) of the **Civil Procedure Rules 2000**.

[14] Section 7 of the Court Act provides that:

"The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940, were vested in the High Court of Justice in England."

[15] Section 24 of the Court Act enables the High Court to grant injunctions "in all cases in which it appears to the Court or Judge to be just and convenient that the order should be made." CPR 17.1(1)(b) states that the High Court may grant interim remedies including an interim injunction. CPR 17.1(1)(h)(ii) states that High Court may grant "an order for the ... preservation of relevant property." CPR 17.1(3) makes it clear that the fact that a particular interim remedy is not listed in Rule 17.1 does not affect any power that the court may have to grant that remedy. CPR 17.2(1) provides that:

"An order for an interim remedy may be made at any time, including –
(a) after judgment has been given ..."

[16] Section 28 of the Court Act states that:

⁷ S.I. 1967/223, Revised Laws of the Virgin Islands 1991 (formerly the West Indies Associates States Supreme Court Order 1967).

⁸ Cap. 80, Revised Laws of the Virgin Islands 1991 (formerly the West Indies Associated States Supreme Court Ordinance (Virgin Islands)1969).

"The jurisdiction of the Court Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Ordinance and rules of court and where no special provisions are contained in this Ordinance or rules of court such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England- (a) ... (b) in relation to civil matters in the Court of Appeal (Civil Division)."

[17] Section 27 of the Court Act specifies the jurisdiction of the Court of Appeal as follows:

"27. Subject to the provisions of this Ordinance, there shall be vested in the Court of Appeal –

(a) the jurisdiction and powers which at the prescribed date were vested in the former Court of Appeal;

(b) the jurisdiction and powers which at the prescribed date were vested in the British Caribbean Court of Appeal;

(c) such other jurisdiction and powers as may be conferred upon it by this Ordinance or any other law.

[18] Those powers in section 27(a) of the Court Act include the power to grant relief to prevent appeals being rendered nugatory. In **Wilson v Church (No. 2)**⁹ Cotton L.J. in his leading judgment, while speaking of an appeal from the Court of Appeal to the House of Lords, said that:

"...when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory;"

Rawlins J.A. (as he then was) as a single judge in **Enzo Addari v Edy Gay Addari**,¹⁰ recognized and accepted that the Court of Appeal has this inherent discretionary jurisdiction to grant a stay of proceedings while an appeal is pending upon such terms as the Court determines where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which cannot be compensated in damages.

⁹ (1879) L.R.12 Ch D 454 at 458

¹⁰Territory of the Virgin Islands Civil Appeal No. 21 of 2005 (delivered 23rd September 2005, unreported) at paragraph 13.

[19] Section 30(1)(b) of the Court Act provides:

“30(1) Subject to the provisions of this Ordinance or any other enactment

–

(a) ...

(b) an appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court and **for the purposes of, and incidental to, the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all powers, authority and jurisdiction of the High Court.**” (My emphasis).

CPR 62.20(1) also states that “in relation to an appeal the Court of Appeal has all the powers and duties of the High Court...”.

[20] Section 31(1) of the Court Act provides that:

“31 (1) “On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have power to -

(a) confirm, vary, amend or set aside the order as the High Court might have made or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;”

[21] Mr. MacLean referred us to several authorities including the Bermuda case of **Commissioner of Police and another v Bermuda Broadcasting Co. Ltd. and others**¹¹ and the Belize case of **Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment of Belize and another**.¹² In both cases the Court of Appeal refused to grant an interlocutory injunction pending the hearing of the appeal to the Privy Council. In the Bermuda case, the Court of Appeal held that the Court lacked the jurisdiction to do so. It is the **Appeals Act 1911** Title 8 Item 86 of the Laws of Bermuda that governs appeals to the Her Majesty in Council and not an Order in Council. Section 2 of this Act is comparable to section 3(a) of the Virgin Islands 1967 Order. Section 7 of the Virgin Islands 1967 Order which deals with stay of execution is identical to section 5 of the **Bermuda Appeals Act 1911**. The Privy Council Board opined

¹¹ [2007] UKPC 46.

¹² [2003] 1 W.L.R. 2839.

that the Court of Appeal in Bermuda had the requisite jurisdiction to have continued the holding injunction pending the determination of the appeal to the Privy Council having regard to sections 8(1) and 9 of the **Court of Appeal Act 1964** and the Rules of the Court of Appeal including Rules 2/25 and 2/28.¹³

[22] In the Belize case the Court of Appeal declined to assume jurisdiction to grant an interlocutory injunction on the basis that its powers (so far as relevant to an appeal to the Board) are exhaustively set out in section 9 of the **Privy Council Appeals Act** and that section 9 does not extend to the grant of an injunction against a successful respondent. The Privy Council was asked to determine whether the Belize Court of Appeal was right to hold that they lacked jurisdiction to grant an interlocutory injunction pending the hearing of the appeal to the Privy Council. Having accepted that section 9¹⁴ of the **Privy Council Appeals Act** was limited in scope, the appellant's counsel relied instead on the general powers of the Court of Appeal under section 19(1)(a) of the **Court of Appeal Act**¹⁵ and in particular, its

¹³ See: Act No. 221 of 1964. Section 8 (1) states: "Subject to this Act and any Rules, in the determination of appeals before it, the Court of Appeal shall have all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction." Section 9 enables the Court of Appeal President or such appointed Justice of Appeal to make Rules for carrying the Act into effect. See Bermuda Statutory Instrument Rules of the Court of Appeal for Bermuda [*made under section 9 of the Court of Appeal Act 1964 and brought into operation on 2 August 1965*]. Rule 2/25 states: "The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision." Rule 2/28 states: "The Court shall not review any judgment once given and delivered by it save and except in accordance with the practice of the Court of Appeal in England." See also Section 19(c) of the Supreme Court Act 1905:4 Bermuda which states that a judge of the Supreme Court may grant an injunction by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient and any such order may be made unconditionally or upon such terms and conditions as the Court thinks just.

¹⁴ Section 9 of the Belize Privy Council Appeals Act (now repealed) states: "Where the judgment appealed from requires the appellant to pay money or perform a duty the Court shall have power, when granting leave to appeal, either to direct that the judgment appealed from be carried into execution, or that the execution thereof be suspended pending the appeal, as to the Court seems just, and in case the Court directs the judgment appealed from to be carried into execution, the person in whose favour it was given shall before the execution thereof enter into good and sufficient security to the satisfaction of the Court for the due performance of such order as Her Majesty in Council shall think fit to make thereon."

¹⁵ Section 19 (1)(a) of the Belize Court of Appeal Act states: "19.-(1) On the hearing of an appeal under this Part, the Court shall have power to- (a) confirm, vary, amend or set aside the order or make any such order as the Supreme Court or the judge thereof from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the case may require;"

final words authorising “such further or other order as the case may require”. Their Lordships declined to express a view on this point since the Court of Appeal had declined jurisdiction, did not consider that it had any discretion to exercise, and did not express any view as to how it might have exercised its discretion. Lord Walker of Gestingthorpe in his leading judgment observed¹⁶:

“In England the Court of Appeal has jurisdiction to grant an injunction, even to a wholly unsuccessful appellant, pending a possible appeal to the House of Lords: (see *Polini v Gray* (1879) 12 Ch D 438 and the discussion of the authorities by Megarry J in *Erinford Properties Limited v Cheshire County Council* [1974] Ch 261, 266).”

It is this jurisdiction that we received by virtue of sections 7, 24, and 27(a) and 30(1)(b) of the Court Act.

- [23] Queen’s Counsel Mr. MacLean submitted further that section 28 of the Court Act would also permit us to continue the injunctive order in the absence of any special provision in section 7 of the Virgin Islands 1967 Order or elsewhere, for us to grant or continue an injunctive order pending the possible appeal to the Privy Council. In that regard, we should apply the practice and procedure in England in the absence of any special statutory local provision.
- [24] Queen’s Counsel Mr. Smith’s countering submissions focused on the limited scope of the statutory provisions in the Court Act that Mr. MacLean was relying on. Mr. Smith submitted that none of these sections can avail Cukurova as the provisions in those sections concern the powers of the Court of Appeal prior to the determination of an appeal. He submitted further that the judicial statement of Rawlins J.A. (as he then was) in **Addari**, where he acknowledged the inherent discretionary jurisdiction of the Court of Appeal to grant a stay of proceedings pending the hearing of an appeal, was made within the context of an appeal that was pending in the Court of Appeal while in the instant proceedings no appeal is pending in the Court of Appeal. Once the appeal has been determined, the Court of Appeal no longer has those powers, and its only remaining powers are the

¹⁶ *Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment of Belize and another* [2003] 1 W.L.R. 2839 at para. 32.

powers conferred by the Virgin Islands 1967 Order, he said. Concerning the rules in the **Civil Procedure Rules 2000** which Mr. MacLean referred to, CPR 17.1 and CPR 17.2(1) have no application when the appeal has been determined, and Cukurova's reliance on these rules are also misconceived, said learned Queen's Counsel Mr. MacLean.

Discussion

[25] In the past, our Court of Appeal has looked exclusively to the provisions of the Order in Council or other instrument which governs the appeal procedure to the Privy Council in matters concerning a stay of execution pending the grant of final leave to appeal to Her Majesty in Council. Our Court of Appeal has always strictly observed all of the provisions in the **West Indies Associated States (Appeals to Privy Council) Order 1967**,¹⁷ the Virgin Islands 1967 Order, the **Judicial Committee (General Appellate Jurisdiction) Rules Order 1982** (now revoked) and the existing **Judicial Committee (Appellate Jurisdiction) Rules Order 2009** as a coherent code. Our approach has obviously been guided by past practice, and the approach of the Privy Council itself. Norman Bentwich, in his legal publication, **The Practice of the Privy Council in Judicial Matters**¹⁸ helpfully indicates that:

"The Court below is generally absolutely bound by the rules of the Order in Council or other instrument which governs the admission of the appeal...[at page 202] ...The appellant in his application for leave generally asks, where the rules provide for it, to have execution suspended. Where the Court refuses to stay execution, it often requires the respondent to give security to carry out the order which the Sovereign in Council may direct" (My emphasis).

¹⁷ This Order was modified and retitled by the Dominica Modification of Enactments Order 1978, S.I. 1978/1030; the Saint Lucia Modification of Enactments Order 1978, S.I. 1978/1899; the St Vincent Modification of Enactments Order 1979, S.I. 1979 No. 917; the Antigua and Barbuda Modification of Enactment Order 1981, S.I. 1981/1105; the St Christopher and Nevis Modification of Enactments Order 1983, S.I. 1983/882.

¹⁸ Bentwich, Norman, 2nd Ed. (1937) at page 194.

[26] In **Electrotec Services Ltd. v Issa Nicholas (Grenada) Ltd.**¹⁹ Lord Hoffmann at 204C stated that the appeal procedure for an appeal from the Court of Appeal of Grenada to the Judicial Committee of the Privy Council was governed by the **West Indies Associated States (Appeals to Privy Council) (Grenada) Order 1967** which applies to the proceedings in the Court of Appeal, and the **Judicial Committee (General Appellate Jurisdiction) Rules Order 1982** (now revoked) which applies to the proceedings before their Lordships' Board in London. Lord Hoffmann confirmed that:²⁰

"Since these two instruments govern a single system of appeals, **it is necessary to construe them as a coherent code.**" (My emphasis)

[27] Lord Hoffman also had to consider whether the Board had an inherent jurisdiction to require security for costs in the case before it. He concluded:²¹

"As for the inherent jurisdiction, their Lordships consider that there is much to be said for the view that any inherent power which the Board may have had ...has been impliedly excluded by the code of procedure for appeals constituted by the West Indies Order and the Judicial Committee Rules.... It is not however necessary to decide whether the inherent jurisdiction has been altogether excluded because their Lordships are satisfied that if it exists, it should be exercised only in exceptional cases; for example, when it appears likely that the bringing of the appeal is an abuse of process. It is not suggested that this is such a case."

[28] In **Pacific Wire & Cable Company Ltd. v Texan Management and others**,²² the Court of Appeal upheld the appeal by Pacific against the order of the High Court which stayed the proceedings in the British Virgin Islands (on forum conveniens grounds), ordered the first four respondents to pay the costs of Pacific before this Court and in the court below, and that the costs be assessed if not agreed. Having granted the appellant conditional leave to appeal to Her Majesty in Council, the Court had to consider whether the nature of its decision in the appeal met the qualifications for the grant of a stay under section 7 of the Virgin Islands 1967 Order. Consistent with past practice, the Court confined itself to determining

¹⁹ [1998] 1 W.L.R. 202.

²⁰ At 204D

²¹ At 206D-H.

²² (Territory of the Virgin Islands) HCVAP 2006/019.

whether its decision which had the effect of lifting the stay of proceedings (on forum conveniens grounds) and reinstating the claim, was one which required the defendants to do several acts under section 7 of the Virgin Islands 1967 Order. The Court held that its statutory jurisdiction for the grant of stay under section 7 had been established because the defendants would be under a positive duty to assist the court in the case management process and would have to file their pleadings, effect discovery, and generally do all acts preparatory to and inclusive of the trial of the claim.

[29] I must also note that in another dependent territory, the Cayman Islands, the appeal procedure governing appeals to Her Majesty in Council are governed by the **Cayman Islands (Appeals to Privy Council) Order 1984**²³ and the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009**. Interestingly, in a case not mentioned by either Queen's Counsel, the Cayman Island Court of Appeal on 4th December 2000 held in **In re CVC Opportunity Equity Partners Ltd.**²⁴ that the Court of Appeal has inherent jurisdiction to suspend its own order discharging an injunction restraining the presentation of a winding-up petition, pending an appeal against that order to the Privy Council. Although leave to appeal can be granted only in accordance with the provisions of the **Cayman Islands (Appeals to Privy Council) Order 1984**, the court's powers are not limited by section 7 of the Order, providing for the execution or suspension of orders requiring the appellant to pay money or do any other act. Other orders may be suspended under the court's inherent jurisdiction to ensure that a successful appellant to the Privy Council will not be deprived of the fruits of its appeal. It appears that this decision supports Queen's Counsel Mr. MacLean's contention.

[30] Having carefully considered the arguments of both Queen's Counsel and the law, I am of the firm view that there is no longer any room for successfully arguing that the code of procedure for appeals to the Privy Council constituted by the Virgin Islands 1967 Order and the 2009 Judicial Committee Order, has impliedly and

²³ This Order has provisions similar to the Virgin Islands 1967 Order including provision on stay of execution pending appeal identical to section 7 in the Virgin Islands 1967 Order.

²⁴ [2000] CILR 320 at Note 8a.

altogether excluded the Court of Appeal's inherent jurisdiction to stay its order and continue or grant an injunction pending an appeal to the Privy Council where to do otherwise may render the appeal, if successful, nugatory. There now exists within the instruments constituting the coherent code for the single system of appeals to the Privy Council, a provision in section 39 of the 2009 Judicial Committee Order which specifically recognizes the existence of that inherent jurisdiction and empowers the Court of Appeal to stay the order appealed from, and grant an injunctive order, or continue or discontinue an injunctive order made in the court below.

[31] At the risk of repeating myself, section 39 of the 2009 Judicial Committee Order²⁵ states that any appellant who wishes to obtain a stay of execution of the order appealed from or some conservatory order (injunctive order) must seek it from the court below in the first instance. Neither Queen's Counsel referred to section 39 in their submissions or oral arguments. It would seem that section 39 has modified the effect of section 7 of the Virgin Islands 1967 Order. Support for my view may exist in the definition of the word "appellant" in section 2 of the 2009 Judicial Committee Order. The word "appellant" is interpreted to mean "a person who files an application for permission to appeal or who files a notice of appeal." In that regard section 39 would also negative Queen's Counsel Mr. Smith's submission that the Court of Appeal is functus to make the order sought by Cukurova after the Order stating the result of the appeal has been perfected. Section 39 did not exist in the revoked **Judicial Committee (Appellate Jurisdiction) Rules Order 1982**.

[32] However, I agree with Queen's Counsel Mr. Smith that a declaratory judgment cannot be stayed. It is elementary that the declaratory judgment merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against Cukurova. While the declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, in the meantime there is no enforcement nor any claim to it. The Court of Appeal made no determination of the rights of the parties requiring

²⁵ See paragraph 11 of this judgment where this provision is set out.

enforcement by making the declarations sought by Alfa, so Cukurova's application in relation to the declarations made by the Court of Appeal must be refused.

- [33] I would conclude therefore that the Court of Appeal has jurisdiction to grant or continue the injunctive order in the terms stated in the order of Joseph-Olivetti J. as well as stay the execution of its order except for the declarations, provided the terms of the injunction and stay relate to that part of the order under appeal, pursuant to section 39 of the 2009 Judicial Committee Order.

The Application for Stay

- [34] The principles governing applications for granting a stay of execution and injunctive relief are well known and I do not intend to repeat the submissions of both Queen's Counsel as to how these principles should be applied. I consider it sufficient to state that in the exercise of its existing discretion the Court should also consider (i) what aspects of the Court's Order will be the subject of the appeal to Her Majesty in Council; and (ii) whether it is necessary to suspend the effect of the Order of the Court of Appeal relating to paragraphs (7C), (7D), and (8) of the reliefs claimed in Claim No. BVIHC (COM) 2007/072 and/or continue the injunction dated 27th April 2007, so as to ensure that if the Cukurova applicants are successful appellants in their appeal to the Privy Council they will not be deprived of the fruits of their appeal.

- [35] I have read and considered the 14 pages of the document Exhibit "JSR 10" which sets out the alleged principal errors of fact and law in the Court of Appeal's judgment dated 20th July 2011 which Cukurova intends to appeal. I am of the view that the proposed appeal traverses the entire order in terms of the relief previously stated at paragraph 6 of this judgment.

- [36] Cukurova's grounds for the application state that if no stay is granted, there is a serious risk that the respondent will take steps which will render worthless or substantially damage the values of the charged shares, such that even if the Privy Council appeal is successful and Cukurova redeems the charged shares,

Cukurova will suffer irremediable harm. During the progress of the litigation between the parties since 2007 the status quo has been preserved on every appeal, and there is no compelling reason why it should not continue to be preserved pending the appeal to the Privy Council.

- [37] Some further background facts must be given here in order to appreciate the degree of harm to Cukurova that would flow from the alleged risk that Alfa may dispose of the charged shares. Before the agreements with ATT had materialized, Cukurova Holdings indirectly owned shares in Turkcell Holding AS, a Turkish Company, and its subsidiary Turkcell Illetisim Hizmetleri AS (together "Turkcell"). The Finnish/Swedish cell phone company TeliaSonera Finland OYJ ("TeliaSonera") also owned shares in Turkcell. ATT wanted to acquire Cukurova's interest in Turkcell in the face of TeliaSonera's pre-emption rights under a shareholders agreement requiring Cukurova to first offer its shares to TeliaSonera for purchase. On 17th June 2005, TeliaSonera commenced arbitration proceedings against Cukurova Holdings in Geneva claiming specific performance of an agreement for the sale of Cukurova's 27% indirect interest in Turkcell. Cukurova denied the existence of such an agreement. TeliaSonera obtained an order from the Swiss Court which inhibited the negotiations going on between Cukurova before the shareholders agreement and facility agreement relating to the Cukurova Telecom Holdings Limited (BVI) shares and the loan were executed. ATT subsequently became aware of a press release²⁶ announcing that the ICC arbitral tribunal had found that a binding agreement had been concluded between TeliaSonera and Cukurova Holdings. The press release stated that the tribunal ordered Cukurova Holdings to transfer its Turkcell shares to TeliaSonera upon payment of US\$1.3 billion. Following a request by ATT on 12th February 2007 for Cukurova's balance sheet for the preceding financial year which ATT received on 22nd February 2007, ATT convened a Board Meeting. The Board resolved to declare a default under the facility agreement, call in the loan and perfect ATT's title to the 49% shares and Cukurova's mortgaged 51% shares.

²⁶ Dated 26th January 2007.

[38] On 16th April 2007, without prior intimation that it had concerns about any matter connected with its acquisition of its 49% shareholdings in Cukurova Telecom Holdings Limited (BVI) or with the loan it had made to Cukurova, ATT wrote to Cukurova Finance with a copy to the Cukurova Holdings. This letter from ATT set out sixteen alleged events of default under the facility agreement, and demanded immediate repayment of the secured loan. On this same date, ATT filed its Claim No. 72 of 2007. On 25th April 2007 Alfa wrote to Cukurova Finance giving notice that on 27th April 2007 at 4:00 p.m. it would appropriate the collateral. On 25th May 2007, Cukurova tendered to Alfa the sum of US\$1,446,824,709.42 in payment or part payment of the loan and ATT refused it.

[39] It was against this background that the ongoing litigation commenced between the parties. The decision of the Court of Appeal relates only to three of the 16 alleged defaults. In his supporting ninth affidavit Mr. John Simons Reynolds deposed:²⁷

"46. Cukurova's claim in Action 119 is for the redemption of the Charged Shares. If Alfa disposed of the Charged Shares to a third party, it would be impossible for redemption to occur. Further, it is likely that it would be impossible for Cukurova to unwind such a transaction and therefore impossible for Cukurova ever to get the Charged Shares back. Accordingly, if Alfa disposed of the Charged Shares, Cukurova's appeal would be rendered nugatory.

"47. In such circumstances, it is entirely appropriate that the Injunction should remain in place pending the determination of Cukurova's appeal. Given that the Injunction has remained in place for four years, there is no legal basis for it to be removed at this late stage.

"48. It should be noted that the Charged Shares are a unique, irreplaceable asset, given the unique interest in Turkcell which they convey. As such, it would not be possible for Cukurova to be compensated in damages for the loss of the Charged Shares. In any event, Alfa is a special purpose vehicle with no assets beyond its stake in CTH; if it disposed of the Charged Shares, it would not be in any financial position to make good the loss suffered by Cukurova..

"49.... In particular, there is a serious risk that in the intervening period Alfa could seriously damage the value of the Charged Shares or render

²⁷ At para. 46 et seq.

them valueless by either disposing of CTH's shares in Turkcell Holding or using CTH's shares in Turkcell Holding to enact irreversible strategic changes at the Turkcell Holding or Turkcell level to the detriment of Cukurova.

"50. The relief sought by Alfa in Action 72 included declarations that its appropriation was effective and that it was entitled to be registered as the holder of the Charged Shares and orders requiring Cukurova to procure such registration. Paragraph 41 of the Court of Appeal's judgment granted Alfa all the relief which it sought

"51. Unless the effect of the Court of Appeal's Judgment is stayed, there is a serious risk that Alfa will consider itself entitled to the entire share capital of CTH and will act accordingly, in its own interests and to the detriment of Cukurova.

52. ...

"53. It appears that, unless a stay is granted, Alfa will proceed on the basis that the CTH Shareholders' Agreement has fallen away, such that it is free to do what it likes with CTH's assets and free to promote its own interests at the Turkcell Holding and Turkcell levels, without any reference to the interests of Cukurova.

"54. This has been confirmed by Alfa in recent correspondence. In particular, in a letter dated 5 August 2011, Alfa stated:

"We note also that one of the consequences of the decision that the Eastern Caribbean Court of Appeal handed down on 20 July 2011 is that we are beneficially entitled to 100% of the shares in CTH and CFI and the CTH Shareholders' Agreement therefore falls away".

"55. If Alfa proceeds on this basis, as it apparently intends to do, it is very likely that Cukurova will suffer harm which will be irreparable."

[40] Mr. Reynolds gave several examples of instances where Alfa has acted in breach of the Shareholders Agreement. He deposed that the risk of irreparable damage is increased because Alfa is now acting in concert with Teliasonera which holds the remaining 47.09% of Turkcell Holding's share capital and the Teliasonera Group also holds a direct 13.09% stake in Turkcell with Alfa having three directors on the Board of Turkcell Holding and two directors on the board of Turkcell. Mr. Reynolds also deposed that Teliasonera and Alfa have plans to alter the

composition of the Turkcell board and work together to acquire control of Turkcell, and dispose of certain assets and interests of Turkcell. He deposed that unless a stay is imposed, and the injunction continued pending the appeal to the Privy Council, Alfa will take irreversible steps to promote its own interests and those of Teliasonera at the expense of Cukurova; and even if Cukurova succeeds in the Privy Council, and redeems the charged shares, the charged shares will be rendered worthless or seriously devalued.

[41] Mr. Christopher Hardman, in his seventeenth affidavit, addressed the merits of the proposed appeal to the Privy Council, identified the reasons why the Cukurova appellants have no reasonable prospect of success on their proposed appeal to the Privy Council, and referred to the undertakings given by Alfa in a letter dated 13th September 2011. In this letter Alfa offered: (1). not to dispose of or otherwise deal in the charged shares; (2). not to cause Cukurova Telecom Holdings Limited to dispose of or otherwise deal in its interest in Turkcell Holding; (3) not to cause Turkcell Holding to dispose of or otherwise deal in its interest in Turkcell; and (4). not to cause Turkcell to dispose of or otherwise deal in its stake in any company (including but not limited to its interest in Fintur) outside of the ordinary course of business. Mr. Hardman also addressed Cukurova's failure to cooperate, and their obstructive influence over the management of Turkcell, and explained that Alfa has acted as it did with a view to providing a practical way forward for the business. He identified the risks of prejudice to Alfa who owns the shares, where the Cukurova appellants are allowed to remain in a position to vote on shares that they do not own, having had the benefit of control over the shares and the sale proceeds for over four years.

[42] Cukurova contends that despite Alfa's offered undertakings, Cukurova's interests are not protected as Alfa is still free to take other actions such as removing the Cukurova appointed directors from the board of Cukurova Telecom Holdings Limited which would destroy Cukurova's director or shareholder influence over the management of Turkcell. Alfa would still be able to cause Turkcell and its subsidiaries to dispose of assets other than shares.

- [43] I am satisfied that the applicants Cukurova have shown that their proposed grounds of appeal to the Privy Council are reasonable and they have an arguable case. I refrain from speculating upon Cukurova's prospects of success on those proposed grounds. Having weighed and considered the balance of convenience and the competing rights of the parties, it appears that there is a risk that if a stay of paragraphs (7C), (7D) and 8 of the reliefs granted to Alfa is not granted, Cukurova's appeal will prove abortive if the Cukurova appellants succeed. However I am also mindful of the fact that Alfa has a judgment in its favour entitling it to the Charged Shares. As matters currently stand, Cukurova, by virtue of a stay, will retain control over the charged shares whilst at the same time Alfa will be out of money under the loan facility. At the very least, were Cukurova to succeed in its appeal, they will be bound to pay over to Alfa a sum as previously tendered by them in May 2007.
- [44] I would exercise my discretion and grant a stay of those paragraphs. The appellants/applicants have also demonstrated that the undertakings offered by Alfa are inadequate to ensure that Alfa will not deal with the charged shares while the appeal is pending in a manner that will prejudice the interests of Cukurova while the appeal is pending. In the event that this occurs I have no doubt that damages would in fact not be an adequate remedy.
- [45] I would therefore continue the injunction in the terms expressed in paragraph 2(1) to (8) of the draft Order filed on 13th September 2001. This is however subject to the condition that Cukurova pays into court the sum of US\$1,446,824,709.42 which was previously tendered by Cukurova to Alfa in payment or part payment of the loan.

[46] The Orders of the Court in respect of the Applications would therefore be as follows:

1. Leave to appeal to Her Majesty in Council is hereby granted upon condition that:
 - (i) the appellants/applicants within 90 days of the date hereof do enter into good and sufficient security in the sum of five hundred pounds sterling for the due prosecution of the appeal, such security to consist of a deposit of the said amount at the Court Office;
 - (ii) within 90 days of the date hereof the appellants/applicants do take the necessary steps for the purposes of procuring the preparation of the records, the settling of such records with the Solicitors for the respondent, and the certification of the record by the Registrar of the Court of Appeal; and
 - (iii) the record shall be prepared in accordance with Rules 18 to 20 of the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009** and its Practice Direction 4.2.1 to 4.3.2 and Practice Direction 5; and shall be transmitted to the Registrar of the Judicial Committee of the Privy Council without delay where final permission to appeal has been granted.
2. The appellants/applicants shall make an application to the Court for final permission to appeal to Her Majesty in Council, supported by the certificate of the Registrar that the security for costs ordered herein has been given within the time prescribed by this Order to the satisfaction of the Registrar.
3. The application for stay of execution of the said judgment of this Court pending the appeal is granted in the following terms:
 - (i) Paragraphs (7C), (7D) and 8 of the reliefs granted to the on Claim No. BVIHC (COM) 2007/072 are suspended pending the appeal;

(ii) UPON the condition that the appellants/applicants pay into Court within 90 days of the date hereof the sum of US\$1,446,824,709.42 which was previously tendered by the appellants/applicants to the respondent in payment or part payment of the loan, the respondent is hereby restrained, whether acting by its directors, officers, servants, agents or otherwise howsoever from:

- (a) exercising or purporting to exercise any of the rights attaching to or derived from the Charged Shares;
- (b) causing or permitting or assisting Cukurova Telecom Holding to dispose of charge or otherwise deal with its shareholding in Turkcell Holding A.S. ("Turkcell Holding");
- (c) causing or permitting or assisting Turkcell Holding to dispose of, charge or otherwise deal with its shareholding in Turkcell Hettism Hizmetleri A.S. ("Turkcell");
- (d) causing or permitting or supporting any change to the composition of the board of directors of Cukurova Telecom Holding, Turkcell Holding or Turkcell without the written consent of the first appellant/applicant;
- (e) causing or permitting or supporting any change in the memorandum and /or articles of association of Cukurova Telecom Holding , the articles of association of Turkcell Holding or the articles of association of Turkcell, without the written consent of the first appellant/applicant;
- (f) causing or permitting or supporting any change in the authorized share capital of Cukurova Telecom Holding, Turkcell Holding or Turkcell (or the issue of any shares or securities convertible or exchangeable into shares or the right to subscribe for shares in Cukurova Telecom Holding or Turkcell Holding or Turkcell without the written consent of the first appellant/applicant;
- (g) causing or permitting or assisting Turkcell to dispose of, charge or otherwise deal with its shareholding in any of its subsidiaries, without the written consent of the first appellant/applicant; and

(h) causing or permitting or assisting (a) Cukurova Telecom Holding or Turkcell, (b) the respective boards of directors or shareholders or shareholders' meetings of such companies or (c) the respondent's nominees or representatives on the boards of directors or at shareholders' meetings of such companies, to take any action or make any decision in respect of any of the matters specified in Schedule 1 to the shareholders agreement dated 20 September, 2005 between the respondent, the first appellant/applicant and Cukurova Telecom Holdings, without the unanimous prior approval, confirmation or endorsement of either the board of directors of Cukurova Telecom Holding or a general meeting of the shareholders of Cukurova Telecom Holding.

4. The costs of the application for conditional leave to appeal be costs in the appeal.
5. The costs in the application for stay be costs to the respondent to be paid by the appellants/applicants and if not agreed, to be assessed.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice M. Pereira
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal