

BVI Court considers enforcement issues in *Alfa v Cukurova*

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After some extensive litigation on preliminary issues of law which involved hearings before the Privy Council (summarised in [this note](#)) and the English High Court (seeking judicial review as to whether the same Regulations were ultra vires and thus void as a matter of English law), the Commercial Division of the British Virgin Islands High Court finally heard the substantive action in the long running *Alfa v Cukurova* action.

The procedural aspects of the case are considered in our [litigation update](#). The decision itself largely turned upon the facts, and Bannister J held decisively in favour of Cukurova finding that no event of default had occurred, and that accordingly it was not open to Alfa to enforce its security. However, for commercial lawyers in the British Virgin Islands two legal points arose which were of interest.

The court was happy to accept that a key payment into one of the Cukurova companies from a group company was a capital contribution, even though no shares were in fact issued, rebutting the presumption of a loan. Although many lawyers in the British Virgin Islands have held the view that it was possible for shareholders to contribute capital other than by way of loan without shares being issued, they lacked judicial support for this view – judicial support which this case now provides. The support is not wholly unequivocal: when referring to the injection of the funds the court indicated “if [the payment was] not technically capital (because the legal formalities of appropriating the payments to capital had not been undertaken) [it] was for all practical purposes to be treated as capital.” But it is clear (and was central to the case) that such funds are not funds which the company treats as debt, or is obligated to repay other than as a distribution.

The other notable feature of the judgment was that Cukurova made extensive submissions to the effect that Alfa had from the outset been acting for an improper purpose and with ulterior motives, ie. to foreclose upon the collateral pledged rather than receive repayment of its loan. However the court had little enthusiasm for those arguments, broadly stating the court was less concerned about people’s motives than about legal rights - stressing that those rights were freely given at arm’s length in a negotiated commercial transaction. Bannister J stated: “I have already found that Alfa’s intention from

the outset was to use the power of appropriation (or its ability to procure a pre-pack receivership) in order to acquire the shares ... [I]ts attempts to do so were ... no more than unsuccessful attempts to exploit commercial advantages which Cukurova had freely agreed to as a matter of contract and were unaided by bad faith.”

If you have any questions about the subject of this article please contact our BVI Banking & Finance Head Colin Riegels (colin.riegels@harneys.com).

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