

Eastern Caribbean Court of Appeal considers enforcement issues in *Alfa v Cukurova*

On 20 July 2011 the Eastern Caribbean Court of Appeal (“ECCA”) handed down the latest decision in the long running case of *Alfa Telecom Turkey Limited v Cukurova Finance International Limited and Cukurova Holdings AS*.

At the trial of the substantive action, the trial judge 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. Alfa appealed the decision and the ECCA subsequently ruled in its favour and set aside the judgment of the trial judge.

The case itself raises several matters of law but there are two main points of note for commercial lawyers in the British Virgin Islands.

Firstly, Justice Gordon held that the trial judge erred in concluding that an acceleration letter served on Cukurova by Alfa on 16 April 2007 was vitiated because its reliance on invalid acts of default constituted a fundamental breach of contract. Justice Gordon stated: “Service by a lender of a demand letter relying on acts of default which are disputed by the borrower and subsequently not made out cannot constitute a breach of contract unless there is an express or implied duty to rely on valid acts of default in the relevant lending agreement.¹ While there may have been an implied duty for the appellant to assert acts of default in good faith, there is no justification for construing the Facilities Agreement as containing an implied term that the lender would only assert such acts of default which might, if disputed by the borrower, be either agreed to be valid, or determined by a competent court to be valid”.

This finding clearly fits with the common sense approach that a lender cannot be expected to refrain from instituting enforcement proceedings against a borrower purely on the basis that, despite the fact that it feels that an event of default has taken place under the relevant facility agreement, it has niggling concerns that the borrower or a court may disagree and that the lender may find the tables turned and that it may itself be deemed to be in breach of contract.

The ECCA found that Cukurova had committed various acts of default under the Facilities Agreement, and that the English share charges were enforced by a

¹ *Concord Trust v The Law Debenture Corpn plc* [2005] 1 W.L.R. 1591 quoted

valid appropriation of shares, as referred to in a letter from Alfa's BVI counsel to Cukurova on 27 April 2007.

This is not to say that a lender can seek to accelerate a loan for breach of contract on the basis of frivolous claims; which brings us on to the second issue of a lender's obligation to act in good faith and/or not in bad faith.

The ECCA upheld the trial judge's findings that Cukurova's extensive submissions to the effect that Alfa had from the outset been acting for an improper purpose and with ulterior motives (i.e. to appropriate the collateral pledged, rather than receive repayment of the loan), were largely irrelevant, and that the court was less concerned about people's motives than about legal rights. The ECCA stressed that those rights were freely given at arm's length in a negotiated commercial transaction. Justice Gordon stated: "...the appellant and the respondent were large companies playing in a cut-throat world of high finance. It would be naïve for a court to expect, or indeed insist, that sympathy rather than reliance on strict legal rights would or ought to rule the day."

Cukurova had also asserted, along the same bad faith argument, that despite Alfa being well aware that Cukurova was making efforts to progress a refinancing of its loan, Alfa had not proffered its intention to accelerate the loan as it wished to proceed with the acceleration at a time that suit Alfa, notwithstanding that this may affect Cukurova's opportunity to obtain a re-financing deal. Justice Gordon responded to this assertion by stating that he found "...no evidence of 'bad faith' where a mortgagee or lender awaits the optimum time to exercise its rights, rights fully negotiated between the parties, who the trial judge found, were well advised by professionals."

A lender is not obligated to take pains to ensure that the timing of an enforcement action suits both parties. Ultimately a lender is entitled to act in what is its own best commercial interest, and doing so will not automatically amount to the lender acting in bad faith.

A final appeal to the Privy Council is likely.

Further Information

The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

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