EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO: BVIHC (COM) 2011/0119

BETWEEN:

SONERA HOLDING B.V.

Applicant/Claimant

And

CUKUROVA HOLDING A.S.

Respondent/Defendant

Appearances:

Mr John Carrington QC and Mr Ben Valentin for the Applicant/Claimant

Mr Kenneth MacLean QC and with him Ms Arabella di Iorio, Mr James Nadin and Mr David Caplan for the Respondent/Defendant

Mr Ewan Mc Quater QC and with him Mr Richard Evans and Mr Adam Hinks for the Interested Party, Ziraat Bankasi A.S.

Application by judgment creditor to enforce final charging order by sale of stock – CPR 48.11 – whether applicant entitled to order for sale - whether court has jurisdiction to make order – whether court's discretion should be exercised to make order – whether applicant estopped from making application because of partial award of second Geneva arbitral tribunal dismissing preliminary issue of res judicata and finding of excess of jurisdiction of first Geneva arbitral tribunal when making final award – whether applicant estopped by

contract or by Article 43 (6) of the ICC Rules 2012 from enforcing judgment – whether making order would be contrary to public policy – whether entitlement to recognition of partial award of second arbitral tribunal under New York Convention and Arbitration Act 2013 is a bar to court making order for sale – whether there is sufficient evidence of value of the stock – protection of third party's first priority security interest in stock - whether court ought to make comprehensive order for sale of the stock or make suspended order conditional on parties agreeing terms including minimum price

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2015 December 16, 17;

2016 February 23

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JUDGMENT

Application for Sale of Shares

[1] **FARARA J (Ag)** The Applicant, Sonera Holding B.V. ("Sonera Holding"), applied pursuant to CPR 48.11 for (i) the sale by auction of all the stock of Cukurova Holding A.S. ("the Respondent" or "Cukurova Holding") in Cukurova Finance International Limited ("CFI"), a company incorporated in the BVI ("the CFI shares"); (ii) for the sale proceeds to be applied towards satisfaction of the judgment entered by this Court on 24 October 2011 in favour of the Applicant, which judgment remains wholly unsatisfied; and (iii) for the Respondent to disclose its other assets worldwide pursuant to the Court's inherent jurisdiction.[1]

[1] See Tab 1

[2] In support of the application for sale, the Applicant filed the Twelfth and Fourteenth Affidavits of John Louis Hardiman[2] and the Respondent filed the Sixth Affidavit of John Simon Reynolds.[3] The Third Party, T.C. Ziraat Bankasi, A.S. ("Ziraat") relies on the First and Second Affidavits of Clive Bryan Ransome.[4]

Background

[3] The factual history of this matter may be briefly stated as follows:

(1) On 1 September 2011 the Applicant obtained a final award ("the Final Award")[5] in ICC arbitration proceedings against the Defendant for the sum of US$932 million in damages plus interest and costs. These arbitration proceedings ("the LA Arbitration") were brought pursuant to an arbitration clause in a Letter Agreement between the Applicant and the Respondent dated 24 March 2005.

(2) By order of this Court made on 24 October 2011 ("the enforcement order") the Applicant was granted permission to enforce the Final Award in the said principal sum plus interest as a judgment of the High Court of Justice in the Virgin Islands.[6] At that time the award had grown with interest to US$1,033,809,033 and judgment was entered for that sum plus interest ("the judgment").

(3) The Defendant's attempt to set aside the Final Award before the Swiss Federal Supreme Court failed in May 2012.

(4) Between 2011 and 2014 the Defendant applied to set aside the enforcement order principally on the ground that the LA Arbitral Tribunal lacked jurisdiction to make the award. This application was rejected by

[2] See B1 Tabs 4 and 6
[3] See B1 Tab 5
[4] B1 Tabs 7 and 8
[5] See E Tab21 page 887 - 955
[6] See D Tab 15

Bannister J, the Court of Appeal and the Privy Council. The decision of the Privy Council dismissing the Respondent's appeal was handed down on 13 May 2014.

(5) On 31 July 2014 Justice Bannister made a provisional charging order in respect of the Respondent's beneficial interests in the CFI shares and the shares held by CFI in Cukurova Telecom Holdings Limited ("CTH"); and the Respondent's beneficial interest in any dividends received by CFI and CTH, including any amounts derived from the undistributed profits of Turkcell.[7]

(6) A final charging order and stop notice ("the Final Charging Order") was made by Bannister J on 4 November 2014 over and in respect of the CFI shares and the provisional charging order was discharged[8].

(7) The Final Charging Order and stop notice was expressly made subject to the undertaking by the Applicant that it will not contend that (a) the final charging order 'affects in any way the mortgaging or charging of the legal and beneficial interest in the stock of Cukurova Telecom Holdings Limited (CTH) and related rights under the CTH Share Mortgage to the full extent provided in that security'; and (b) CFI was unable to or did not validly mortgage or charge the beneficial interest in the stock of CTH and related rights under the CTH Share Mortgage.

(8) Paragraph 4 of the Final Charging Order expressly provides that the order and stop notice shall not prejudice in any way the rights and interests of the Third Party, Ziraat in its capacity as Lender and/or Agent and/or Security Agent as defined under and pursuant to a Facility Agreement dated 25 July 2014, an equitable first fixed charge ("the CFI Share

[7] See D Tab 19
[8] See D Tab 20

Charge")[9] and a legal mortgage dated 25 July 2014 over the CFI's shares in CTH ("the CTH Share Mortgage").[10]

(9) Also, by paragraph 5 of the Final Charging Order-

> "For the avoidance of doubt, the interests granted to [the Applicant] under the Final Charging Order shall rank in priority behind the rights and interests granted under the CFI Share Charge and CTH Share Mortgage."

The Partial Award in the DSPA Arbitration

[4] On 10 April 2012, the Respondent commenced a second ICC arbitration in Geneva, Switzerland ("the DSPA Arbitration") against the Applicant.[11] By the DSPA Arbitration the Respondent seeks a declaration that it never entered into the Share Purchase Agreement pertaining to the B shares in Turkcell Holding S.A., and for an order that the Applicant pays to it 'damages in an amount to be established but not less than any amount paid by [the Respondent] to [the Applicant] pursuant to the Final Award ...or further to any 'decision enforcing this award up to USD932 million plus interest...'

[5] In the DSPA Arbitration the Applicant filed preliminary objections to the effect that the arbitration proceedings were an abuse of process and the decision of the LA Tribunal (the Final Award) had *res judicata* effect as the Final Award was final and binding on the parties. These preliminary objections were on 12 May 2014 dismissed by the DSPA Tribunal in its Partial Award.[12] In doing so, the DSPA Tribunal ruled, *inter alia* –

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[9] See E Tab 21 page 1038
[10] See E Tab 21 page 1064
[11] See Vol2 Tab 32 page 327
[12] See Vol3 Tab 24 pages 4 to 83

"2. The Arbitral Tribunal has exclusive jurisdiction over all disputes arising out of the Draft Share Purchase Agreement dated 19 April 2005 (the "DSPA") and falling within the scope of the DSPA's arbitration clause pursuant to which this Tribunal was constituted (Article 12.8 of the DSPA)."

[6] They also opined that the Letter Agreement and the draft Share Purchase Agreement were separate and distinct agreements, their respective arbitration clauses did not overlap, and the Respondent's obligation to transfer the shares and or to pay damages to the Applicant fell under the DSPA arbitration clause.

[7] At paragraph 129 of the Partial Award the DSPA Tribunal made this finding:-

"129. Accordingly, as a consequence of the LA Tribunal's excess of jurisdiction, the LA Awards cannot be recognised or given effect by this Arbitral Tribunal in the present proceedings by reference to article V(1)(c) of the New York Convention; and their *res judicata* effects are denied..."

[8] And at paragraph 136 -

"136. In other words, the LA Tribunal, rather than addressing the issue of damages for breach of the [Letter Agreement], which presently is not at stake in this arbitration, awarded damages on the basis of a breach of the SPA by [the Respondent], an issue which, on the face of it and so far as pleaded, falls within the exclusive scope of the DSPA Arbitration Clause. In doing so this Tribunal considers that the LA Tribunal crossed the line between the arbitration clause in the LA and the DSPA, as alleged by [the Respondent]."

[9] The Applicant has appealed a decision of Bannister J refusing to grant an injunction preventing the Respondent from pursuing the DSPA Arbitration. The appeal was heard in July 2015 and the decision thereon is pending.

Ziraat's Security Interest - the CFI Share Charge and CTH Share Mortgage

[10] It is common ground that Ziraat, a Turkish bank, holds a first priority equitable charge over the CFI shares and a legal mortgage over the CTH shares. These security interests rank in priority to the judgment debt and Final Charging Order. Accordingly, Ziraat is entitled to be paid first out of the proceeds of any sale of the CFI shares. Its security is as a result of a loan made by Ziraat to the Respondent in July 2014 as part of the refinancing which enabled the Respondent to pay Alfa Telecom Turkey Limited ("ATT"), a BVI company, the price for redeeming the CFI shares. The amount outstanding on the Ziraat loan as of 11 December 2015 is US$1.761 billion.

[11] Pursuant to the terms of the Ziraat security documents, it is entitled to sell the CFI shares if an 'Event of Default' occurs, and to be paid first out of the proceeds of any sale. An Event of Default would include an application for a charging order over the CFI shares and this application to sell the CFI shares. Ziraat also has the right to enforce its security by appropriating the CFI shares. Accordingly, Ziraat is now entitled to sell or appropriate the CFI shares outside of this court process and notwithstanding the Final Charging Order of this Court.

The LCIA Arbitration

[12] In addition, there are currently on foot two arbitration proceedings before the London Court of International Arbitration ("the LCIA Arbitration") between CFI and Ziraat as claimants and ATT, a BVI company as respondent.[13] In this dispute, Cukurova Finance and Ziraat (as claimants) allege that certain 'Material Defaults' have occurred respectively under the Articles of Association of CTH and the

[13] See two requests for arbitration dated 30 December 2014 (updated 24 April 2015) at B4 Tab 38 and 39

Shareholders' Agreement dated 20 September 2005, triggering the 'Buy-Out' provisions in the SHA. In exercise of their rights, the claimants issued no fewer than three Buy-Out Notices[14] to purchase all of the CTH shares held by ATT at the 'Buy-Out Price'. ATT (the respondent in the LCIA Arbitration proceedings) also alleges that a 'deadlock' within the meaning of clause 8.1 of the SHA and Regulation 16.1 of the Articles of Association, has arisen on the Board of CTH with respect to which it issued two 'deadlock option notices' on 13 March 2015 offering to purchase the CTH shares held by Cukurova Finance and Ziraat for US$54,902,000 per share (approximately US$2.8 billion).

[13] By definition the 'Buy-Out Price' means the value of the CTH shares calculated on a look-through basis "based on the weighted average market value of publically traded Turkcell shares over the previous 60 day period, as reported on the Istanbul Stock Exchange Bulletin, plus a premium of 20 per cent."[15]

[14] I was informed by counsel for the Respondent during the hearing, that the claim in the LCIA Arbitration was due to be heard in about 12 weeks. Should CFI be successful, it would mean that the underlying CTH shares, which give value to the CFI shares, could be sold rendering the CFI shares of no value.

The Buy-Out rights under the CTH Shareholders' Agreement

[15] Pursuant to clause 14.1(D) of the CTH Shareholders' Agreement, it is a 'buy-out event' if a third party acquires a controlling interest in ATT or CFI. Thus, if the CFI shares were sold to a third party this would trigger the buy-out provisions in the CTH Shareholders' Agreement entitling ATT to acquire the CFI shares in CTH at the 'Buy-Out Price', which is said to be around US$1.4 billion. This raises the important question as to whether any third party purchaser would prudently offer to pay more than the 'Buy-Out Price' for the CFI shares.

[14] Dated 25 November and 29 December 2014 and 20 February 2015 respectively
[15] SHA clause 1.1 - B2 page 2040

The Joint Venture Agreement

[16] Clause 10 of Schedule 5 to the Joint Venture Agreement[16] entered into on 11 November 2009 between ATT and the Applicant and others, provides for a revenue sharing mechanism under which the majority of any proceeds of sale of the CFI shares would be paid to ATT, and not the Applicant. Although, the Applicant's case is that the Joint Venture Agreement terminated in July 2012, clause 10 is one of the provisions which survives termination. The net effect of this provision is that, were the CFI shares to be sold for a price in excess of the Ziraat indebtedness, the first US$150 million of the excess sum would be distributed to ATT. Of the second US$150 million, 80% would go to ATT and 20% to the Applicant; of the third $150 million, 70% would go to ATT and 30% to the Applicant; and any remaining sum would then be split 50/50 between ATT and the Applicant.

The Privy Council's decision on Jurisdiction

[17] The Privy Council in its decision in **Cukurova Holding AS v Sonera Holding BV** [2015] 2 AER 1061 (rendered 13 May 2014) upheld the decisions of both Bannister J and the Court of Appeal on the issue of the jurisdiction of the LA Arbitral Tribunal to make the Final Award, on the salutary basis that it made 'good commercial sense' to treat the Letter Agreement and the draft Share Purchase Agreement as part of the same transaction. This case concerned the Respondent's application to set aside the enforcement order on the basis, *inter alia*, that the LA Tribunal lacked jurisdiction to make the Final Award. The Privy Council found explicitly that the component parts of the transaction between the Applicant and the Respondent amounted to 'a single, seamless transaction.' They held that it could not be assumed that the parties to the Letter Agreement and the Share Purchase Agreement intended to divide the transaction into several component parts, as this would be too costly and inefficient and not make good commercial sense.

[16] See B3 Tab 25 page 3372

[18] Specifically on the issue of jurisdiction, Lord Clarke, giving the opinion of the Board, concluded at paragraph [27]:-

> "This is an unusual case and the Board sees no reason to interfere with the conclusions reached by the judge and the Court of Appeal. On the contrary, their conclusions seem to the Board to make good sense. As already stated, the clauses in the two contracts were very similar indeed. There is no dispute that, in the circumstances prevailing in May 2005, Sonera was entitled to commence arbitration proceedings under the Letter Agreement. As it is put on behalf of Sonera, the issue is whether the parties intended that, if the Tribunal found, as it did, that the Letter Agreement had been breached, the Tribunal was obliged to draw stumps, requiring Sonera to commence a fresh arbitration under the Final SPA. The Board agrees that there is nothing to suggest that the parties intended such a result. It would make no commercial sense. Contrary to submissions made on behalf of Cukurova, like the judge and the Court of Appeal, the Board takes the view that, by way of contrast with the position in *The Football Case*, the agreements here were component parts of a single transaction."

[19] It is undoubtedly the position that the question of jurisdiction is a matter for the court and not the arbitral tribunal to decide. Indeed, this is confirmed by Lord Clarke at paragraph [25] of the opinion of the Board. At paragraph [29] the Board concludes:-

> "In all the circumstances, the Board is of the opinion that the judge was correct to hold that the [LA] Tribunal had jurisdiction to make the award it did in this case and the Court of Appeal was right to dismiss Cukurova's appeal on this ground. It follows that the Board answers the first question posed in para (3) above, namely whether the [LA] Tribunal had jurisdiction

to grant the relief in the Final Award, in the affirmative. It follows that Cukurova's appeal on jurisdiction should be dismissed."

[20] Following this decision of the Privy Council, Justice Bannister, in an *ex tempore* ruling on 6 June 2014 dismissing the Applicant's application for a court appointed receiver, stated obiter-

> "The validity of the award was upheld by the Privy Council, although an insurgent group of arbitrators has recently risen up to declare that the original award is a nullity - the tribunal having been without the jurisdiction to make it. The expression of that opinion does not, of course, affect the validity of Sonera's judgment, which cannot be impeached in this jurisdiction."[17]

CPR 48.11

[21] CPR 48.11 states-

> (1) "If a judgment creditor wishes to enforce a charging order of stock or personal property by sale, the judgment creditor may apply to the court for an order for the sale of the stock or personal property.
>
> (2) The application must be supported by evidence on affidavit.
>
> (3) Notice must be served on the judgment debtor.
>
> (4) The court may give such directions as seems appropriate to secure the expeditious sale of the stock or property charged at a price that is fair to both creditor and judgment debtor."

[17] See Vol 2 Tab 6 para 2

[22] This provision does not make it mandatory for the court to grant an application for sale nor does it speak to the factors which a court must or may take into account in deciding whether to make an order for sale of stock or property. The court clearly has a discretion under sub paragraph (4) as to the terms or conditions under which the sale is to be conducted in order to ensure, as far as practicable, an expeditious sale of the stock or property, and to achieve a price which is fair to both the judgment creditor and the judgment debtor. This is in contrast to achieving the highest price or even 'market price', implicit in which is a consideration of market conditions affecting the price of the stock or property.

[23] Mr MacLean QC, learned counsel for the Respondent, submitted that the Court has a discretion under CPR 48.11 whether to grant or to refuse an application for sale of stock. He referred, to a number of English first instance authorities, including **Packman Lucas Ltd v Mentmore Towers Ltd** [2010] EWHC 1037[18] and **Forrester Ketley & Co v Brent & Palette** [2009] EWHC 3441.[19]

[24] However, the comparable provision in the English CPR (Part 73.10) expressly states that the court 'may' order the sale of property subject to a final charging order. This provision clearly confers on the court a discretion whether to make the order for sale, and is therefore not on all fours with the provisions of Part 48.11 of our CPR, which does not in its language expressly confer such a discretion. This notwithstanding, in my view, this Court must have a discretion under CPR 48.11 whether to make an order for sale of stock or property the subject of a final charging order, the necessity, efficacy or justice of which will vary from circumstances to circumstances. However, such discretion must be exercised invariably in favour of making the order, unless the circumstances and the justice of the case warrant the order not being made or the order being postponed or suspended. In its consideration of these matters, the court must take into account and give full weight to the entitlement of a judgment creditor to have its judgment

[18] See Per Coulson J at para 10, 27 and 52
[19] See Per Vos J at paras 27, 28, 52 and 53

satisfied, especially in circumstances where the judgment debtor has been dilatory in his efforts to make payment, or is deliberately not paying the judgment debt.

[25] It is the case for the Respondent that the circumstances of this matter are unique and unprecedented. They find no parallel or precedent in English case law and the application ought to be dismissed on jurisdictional and discretionary grounds. On the other hand, the Applicant contends that it is entitled, as chargee, to an order for sale of the CFI shares upon such terms as the court considers just, taking full account of the first priority security interests of Ziraat over the CFI shares.

Ought the Application to be dismissed on jurisdictional grounds?

[26] The gravamen of the Respondent's objection on this ground is that the parties have voluntarily participated in and have accepted that the DSPA Tribunal has jurisdiction over their dispute relating to the Share Purchase Agreement. Accordingly, the Applicant is bound by the Partial Award of the DSPA Tribunal to the effect that the LA Tribunal did not have jurisdiction to enter upon a consideration of whether to award damages to the Applicant based upon the draft Share Purchase Agreement, and in doing so, it exceeded its jurisdiction in making the Final Award. The Respondent also contends that the Applicant is contractually bound to accept the findings in Partial Award of the DSPA Tribunal that the LA Tribunal did not have jurisdiction to make the Final Award. Accordingly, the Applicant is estopped from relying in these proceedings on the Final Award. Furthermore, the DSPA Partial Award is a convention award, and is entitled to be recognised in BVI pursuant to the provisions of the New York Convention and the Arbitration Act 2013.

[27] It is worth noting that, at this stage, this Court is not concerned with whether to recognise the LA Final Award, but with the enforcement of an unimpeachable judgment of this Court. The issues concerning and objections to recognition of the Final Award, have already been fully aired and dealt with by this Court, the Court of Appeal and the Privy Council, and have been dismissed. Furthermore, CPR

48.11 is concerned with enforcement of a judgment of this court by sale of stock or property. It is not concerned with objections to recognition of an arbitral award on grounds of lack of jurisdiction in the arbitral tribunal.

[28] The Partial Award of the DSPA Tribunal is confined to the question of whether the Final Award in the LA Arbitration gave rise to a *res judicata,* so as to disentitle the DSPA Tribunal from considering and determining the dispute before them. The DSPA Tribunal found that it did not because, in their view, the LA Tribunal had exceeded its jurisdiction in that it had crossed the line between the Letter Agreement and the Share Purchase Agreement. The DSPA Tribunal did not, and could not, set aside the Final Award of the LA Tribunal, nor have they made any order preventing or restraining the Applicant from enforcing the Final Award in BVI or elsewhere. In fact, the DSPA Tribunal, at paragraph 26 of its Partial Award, expressly recognised the continuing efficacy of the Final Award and its enforceability as a judgment in BVI, in these terms:-

> "In the circumstances, the Arbitral Tribunal accepts that CUKUROVA's appeal to the Privy Council will be formally dismissed within the coming months, thereby making final within the BVI the order for the enforcement of the Final Award issued in ICC Case No. 13856. The Arbitral Tribunal also accepts that these several court decisions (all one way) form a persuasive body of materials favouring SONERA's case in these arbitration proceedings."

[29] And at paragraph 94:–

> "The issue triggered by the SONERA's preliminary objections do not, therefore, relate to the enforcement of the LA Awards or its judicial recognition in the sense given to the term under the New York Convention – or for this matter Article 192(2) SPILA which will be addressed below – but **rather to the effects to be given in these proceedings to the LA**

Awards, which were issued by a different arbitral tribunal under a different arbitration agreement in a different arbitration, in permitting this Tribunal to decide whether the LA Awards are *res judicata* on claims within the scope of the DSPA Arbitration ..." (emphasis added)

[30] Likewise, the issue of whether the Final Charging Order ought to be set aside on grounds that the LA Tribunal had exceeded its jurisdiction by making an award under the Share Purchase Agreement was, as far as this jurisdiction and this Court is concerned, finally determined by the Privy Council, which agreed with the approach taken by both Justice Bannister and the Court of Appeal.

[31] I am entirely in agreement with the view of Bannister J expressed in a ruling subsequent to the decision of the Privy Council, that the judgment of this court is unimpeachable in this jurisdiction. The decision of the DSPA Tribunal on the question of *res judicata* does not and cannot affect the enforceability of the judgment of this court (based on the Final Award), in circumstances where recognition of the Final Award has not been set aside, and all previous challenges based on jurisdiction have been swept aside up to the level of the Privy Council. In my judgment, the Applicant is not prevented from proceeding with enforcement of the judgment of this court on the ground that a second arbitral tribunal has, in determining whether the dispute before it is *res judicata,* expressed a different opinion or came to a different conclusion on the jurisdiction of the first arbitral tribunal, sometime after the ruling on jurisdiction by this court, the Court of Appeal and the Privy Council.

[32] For these reasons, I do not agree with the submissions of learned counsel for the Respondent that I ought to dismiss the application on grounds of jurisdiction or lack thereof based on the Partial Award in the DSPA Arbitration. I do not accept that this Court is prevented by the findings in the Partial Award on the issue of the jurisdiction of the LA Tribunal, from making an order for sale of the CFI shares.

[33] As to whether the Applicant is bound, as a matter of contract or the ICC Rules 2012, to accept the ruling in the DSPA Arbitration, Mr MacLean QC for the Respondent relied on a passage at paragraph 9 of the opinion of Lord Hobhouse in **Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich** [2003] 1 WLR 1041 regarding the binding effect of declarations made by an arbitral tribunal concerning the rights and liabilities of parties to an arbitration. The soundness of these principles is not in doubt. However, the Partial Award in the DSPA Arbitration relates to a preliminary objection to jurisdiction based on principles of *res judicata* and nothing more, as is recognised by the DSPA Tribunal itself. Accordingly, the Applicant would, in my opinion, be estopped from denying, on principles of *res judicata,* that the DSPA Tribunal has the jurisdiction to determine the dispute between the parties under the Share Purchase Agreement. This is materially different from a question as to whether the Applicant is entitled to continue to rely on the Final Award and, more importantly, to seek to enforce an unimpeachable judgment of this court for a liquidated sum. As to issue estoppel, the decision of the Privy Council in **Associated Electric and Gas Insurance Services v European Reinsurance Co of Zurich,** relied on by the Respondent, is ample authority for the proposition that the Respondent may be estopped from denying the validity and findings in the Final Award, in any subsequent arbitration proceeding concerning the same issues.[20] Furthermore, to date no steps have been taken by the Respondent to have the Partial Award in the DSPA Arbitration formally recognised in the BVI.

[34] For these reasons, I do not accept Mr MacLean's submissions that the Applicant is prevented or estopped, either by contract or by Article 43(6) of the ICC Rules 2012, from enforcing the judgment of this court. Neither is this court precluded, under the recognition provisions in the Arbitration Act 2013, from enforcing its judgment by the findings or ruling of the DSPA Tribunal on the jurisdiction of the LA Tribunal to make the Final Award. I now go on to consider whether, as the

[20] See per Lord Hobhouse at para 15

Respondent contends, this court ought to dismiss the application on discretionary grounds.

Ought the Application to be dismissed on discretionary grounds?

[35] The Respondent addresses these matters at paragraph 120 onwards of its skeleton argument. It submits that an order for sale is an 'extreme sanction', it should only be resorted to in 'extreme cases', and a judgment creditor who has obtained a charging order will not automatically obtain an order for sale. Reliance is placed on the decisions of the English courts in **Packman Lucas Ltd v Mentmore Towers Ltd** [2010] EWHC 1037 (TCC), **Royal Oak v Iktilat** [2008] EWHC 1703 (Ch) and **Forrester Ketley & Co v Brent & Parlette** [2009] EWHC 3441.

[36] These are all first instance decisions and, as mentioned above, they are based on a provision in the English CPR not on all fours with CPR 48.11. While I do not doubt the soundness of these principles, particularly under English law, in my view the scope of the discretion of this court under CPR 48.11 is somewhat narrower. This is not meant to convey that there is no discretion at all as to whether to make an order for sale. An applicant must satisfy the court, on affidavit evidence, that it is proper and just that the order for sale ought to be made. For instance, in circumstances where the stock or property sought to be sold in satisfaction of a judgment is encumbered by a security interest which ranks in priority to that of an applicant, and the realizable value of the stock or property is clearly insufficient to enable the judgment creditor to receive any payment towards satisfaction of his judgment debt, the court may not grant the order for sale, as to do so would be pointless and ineffective. It would merely be bringing about the premature sale of the asset or property and payment and discharge of the security interest.

[37] I accept, as a matter of principle, that the burden is on an applicant for an order for sale under CPR 48.11 to satisfy the court as to the value of the stock or other

property to be sold, and that the sale would, in all the circumstances, provide a return to the judgment creditor on its judgment debt. In short, the court will not allow itself to be used as a 'sledgehammer to crack a nut', and it must be satisfied that an order for sale will be economically worthwhile - **Walker and Buckley, Charging Orders Against Land: Law, Procedure and Precedents** 2nd edition at page 116. Further, pursuant to CPR 48.11(4), the Court is to be concerned with securing '*the expeditious sale of the stock or property charged at a price that is fair to both the creditor and judgment debtor.*" The presumption is that the stock or property is of sufficient realisable value to provide some substantial payment towards the discharge of the judgment debt. In this matter, of much significance is the existence of the Ziraat security interest in the CFI shares, and the current balance of US$1,761 billion under the loan secured by the CFI Share Charge and the CTH Share Mortgage.

The DSPA Arbitration

[38] The first matter relied on by the Respondent to dissuade the court from making an order for sale in the exercise of its discretion, is the existence of the DSPA Arbitration and the Partial Award and its binding effect on the Applicant. Mr. MacLean notes that the DSPA Arbitration has been running for some 3 years, that a hearing on the merits was held on 13 November 2015, and a decision is expected that may be determinative of all matters in dispute. Accordingly, it is submitted, that it would be absurd for this Court to make an order for sale at this time when a tribunal with jurisdiction may soon be pronouncing on the matters in dispute.

[39] For the reasons already stated, I do not regard the existence of the DSPA Arbitration or its Partial Award to be a matter which ought to lead this Court to decline to make an order for sale. The Applicant is the beneficiary of a judgment of this Court, and all issues concerning setting aside the Final Charging Order have been disposed of in its favour up to the Privy Council. Accordingly, the Applicant is

prima facie entitled to an order for sale of the CFI shares, which apparently are the only asset of the Respondent.

The Buy-Out LCIA Arbitration

[40] The Respondent also relies on what it categorizes as 'external factors'. The first of these concern the Buy-Out Arbitration before the LCIA. It is submitted that it is not clear whether CFI will be entitled to 100 (if it succeeds) or 0 per cent (if Alfa succeeds) of CTH in the Buy-Out Arbitration. CFI currently holds 51 per cent of CTH, which in turn holds 52.91% of Turkcell Holding, the controlling shareholder of Turkcell. It is suggested that no one apart from Alfa will want to bid on the CFI shares in these circumstances.

[41] In my view, it is not for this Court to speculate as to the outcome of the Buy-Out Arbitration. I do not regard any uncertainty surrounding the outcome of those proceedings as justification for not making an order for sale at this stage.

Ziraat's Priority Interest

[42] The Respondent also relies on the priority interest of Ziraat, which was expressly recognised in the Final Charging Order made by Bannister J. The interest of Ziraat has been ably represented in these proceedings by learned Queens Counsel, Mr McQuater, and I am duty bound to take their views and submissions into account in making my decision on the application for an order for sale of the CFI shares, over which Ziraat hold a first priority security interest. I deal with the Third Party's submissions in more detail later on in this judgment.

Alfa's Buy-Out Rights – Clause 14(D) CTH Shareholders' Agreement

[43] The next matter relied on by the Respondent is Alfa's Buy-Out rights under clause 14.1(D) of the CTH Shareholders' Agreement. A buy-out is triggered in

circumstances where a third party has acquired a controlling interest in ATT or CFI. As the argument goes, if the CFI shares are sold to a third party pursuant to an order for sale made by this Court, resulting in that third party acquiring a controlling interest in CFI, Alfa would have the right under the CTH Shareholders' Agreement to acquire CFI's Shares in CTH for the Buy-Out Price. Accordingly, no rational third party would, upon a court ordered sale, pay more for the CFI shares than the Buy-Out Price, which stands at approximately US$1.4 billion. The reason is that a third party buyer would run the risk of Alfa acquiring the CTH shares from CFI at that price, which is significantly lower than fair market value, leaving CFI as an empty shell, and with a loss of the difference between the price paid by the third party for the CFI shares and the Buy-Out Price.

[44] While this possibility is a real one, in my view this ought not to be a bar to making an order for sale of the CFI shares. If this were the case, it would mean that neither the Applicant, nor Ziraat as a secured creditor, could take steps to sell the CFI shares in satisfaction of the judgment debt or the loan respectively, for fear that in doing so no third party would be prepared to offer a sum more that the potential Buy-Out Price under the CTH Shareholders' Agreement. The effect of this would be to make the Respondent virtually judgment proof. The current legal position is that the CFI shares are subject first to the priority security interest of Ziraat which entitles it, independently of these proceedings, to sell the CFI shares in satisfaction of its loan and, secondly, to the judgment debt owed to the Applicant. Furthermore, there is no other asset or property of the Respondent which is available to satisfy the judgment debt, and no payment has been made towards satisfaction of the judgment debt by the Respondent. Accordingly, the Applicant's only means of obtaining payment of the judgment debt, short of the Respondent paying it, is by the sale of the CFI shares.

Revenue Sharing Mechanism - Clause 10 Schedule 5 of Joint Venture Agreement

[45] The Respondent also prays in aid the provisions of the Joint Venture Agreement. It is said that Alfa is in an advantageous position as against any other bidder in the sale of the CFI shares, because of the revenue sharing mechanism in clause 10 of Schedule 5, which provision survives any termination of the Joint Venture Agreement. By this provision, the majority of any money to be paid over to the Applicant from a sale of the CFI shares, would go to Alfa and not the Applicant.

[46] In my view, there is no merit in this submission. The making of an order for sale of the property of a judgment debtor is in or towards satisfaction of the judgment debt. It matters not whether the judgment creditor has made a separate arrangement whereby some or even all of the proceeds realized from the enforcement of its judgment, will ultimately end up, not in its pocket, but in the pocket of a third party. The simple fact is that any sum realised by the Applicant from the sale of the CFI shares, after payment of expenses and the full discharge of Ziraat's priority security interest, will be applied in reduction or extinguishment of the judgment debt owed by the Respondent. It is therefore entirely incorrect to assert, as does the Respondent, that because there is a likelihood that the Applicant will not, pursuant to its agreement with Alfa, receive any money or will receive only a small portion of any money coming to it from the sale of the CFI shares, this court ought not to now make an order for sale of those shares. In my view, the more relevant consideration is whether, upon a sale of the CFI shares, it is unlikely that the Applicant will receive or be entitled to any money on account of the judgment debt, after Ziraat has been paid in full.

The position of Ziraat on the Application for Sale

[47] The position taken by Ziraat with regard to the application is a commendable one. Notwithstanding its clear contractual (and perhaps statutory) rights as lender, and its first priority security interest in the CFI shares, which rights include, but are not

limited to its entitlement to sell the CFI shares independently of these proceedings, Ziraat does not in principle oppose an order for sale. Its main concern is the full protection of its rights and interest as set out in the security documents (the CFI Share Charge and CTH Share Mortgage), and as recognized by the terms of the Final Charging Order. It is concerned particularly with ensuring that the value of the asset itself, the CFI shares, is not diminished or adversely affected by the provisions of any order for sale, the terms of which must be carefully worked out and crafted with its participation and approval; and ultimately, that it is paid in full before the sale is concluded. In its submission, if the rights and interest of Ziraat will be prejudiced, then an order for sale ought not to be made.

[48] The outstanding amount due to Ziraat as at 11 December 2015 was US$1.761 billion. Mr McQuater QC informed the Court that Ziraat does not expect CFI to default on its loan, and to thereby cause an event of default such as would entitle Ziraat to exercise its rights under the CFI Share Charge and CTH Share Mortgage. He submitted that any order for sale (i) must protect Ziraat's rights and state expressly that it is without prejudice to its rights; (ii) preserve Ziraat's rights under its security documents to proceed to realise its security or any other rights granted to it in an event of default; (iii) must provide unconditionally and unreservedly that Ziraat will be paid in full and first and before completion of the sale; and (iv) the sales process must be such that it does not prejudice Ziraat's interest - it must ensure there will be no deterioration in the value of the CFI shares in the market, as these shares are a complex and unique asset. With these factors, I am entirely in agreement.

[49] It is also the submission of Mr McQuater that, were the court not to accede to the objections of the Respondent and is minded to make an order for sale, Ziraat's preference is for one comprehensive order covering all terms and conditions of the sale. This approach would involve the Court not having the order for sale immediately drawn up, but to require the parties, including Ziraat, to work out the terms of the order within a specified period, to include all aspects of the sales

process. If they are unable to agree, then the final terms of the order will be settled by the Court. This approach may be useful, particularly in light of the concessions made and assurances given by Mr Valentin on behalf of the Applicant during the hearing.

Evidence of Value

[50] This brings me to what evidence there is of the value of the CFI shares. The upshot is that the Applicant has provided no expert evidence of the value of the CFI shares in support of its application for sale. This is so notwithstanding this statement at paragraph 27 of Mr Hardiman's Twelfth Affidavit: "If and to the extent that there is any dispute about the value of the CFI stock, [the Applicant] will seek permission to adduce supportive expert valuation evidence."[21] Further, at paragraph 24, Mr Hardiman alludes to a value of US$1.86 million for the CFI shares using a method based on 'the volume-weighted daily average price of Turkcell stock over the last 60 calendar days' on the NYSE. However, he contends that this is an understated value in light of a statement by Mr Mehmet Karamehmet, in evidence filed in March 2013, giving a value in excess of US$2 billion. Mr Hardiman, concludes, for what it is worth, that the value of the CFI stock "will satisfy a substantial portion of [the Applicant's] outstanding judgment", even taking into account Ziraat's interest which must be paid out first.

[51] Lord Sumption, in his opinion in the Privy Council in ***Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd (Nos 3 and 5)*** [2015] 2 WLR 875[22], considered the CFI shares to be "worth considerably more than the amount owing by [the Respondent] and CFI to ATT." He also opined-

> "If [the Respondent] were able to redeem its appropriated shares in CFI, but still failed to pay its outstanding indebtedness to [the Applicant], their

[21] See Vol 1 Tab B4 page 10
[22] See page 966

excess value would still in the ordinary course be available as security and be realisable subject to the prior charge and the first two words of the adage "redeem up, foreclose down."[23]

[52] The importance of the court having cogent evidence of the value of the asset or property, the subject of an application for sale, cannot be understated. It behoves an applicant to put before the court such evidence in support of its application. This evidence is of critical importance to the discharge of the court's duty to ensure that the upset price or floor price in any order for sale is one which is "fair to both creditor and judgment debtor."[24] Such evidence is even more critical where one is concerned with the sale of a unique asset, such as the CFI shares, which requires careful consideration and assessment of its value at a given point in time, mindful of the pay-out sum that would be due to Ziraat.

[53] The only evidence of how valuable the CFI Shares are or may be is Alfa's buy-out offer of approximately US$2.8 billion made 13 March 2015 (some 11 months ago) for CFI's shares in CTH.[25] In a letter dated 12 October 2015, Maples and Calder, on behalf of the Respondent, stated –

> "However, in the interest of progressing matters, we are willing to agree that expert evidence as to value of the CFI shares is not put before the Court provided that it is agreed that any order for sale will include a minimum price of US$2.8 billion. As you have stated that "the fact that Alfa is prepared to exercise its right to buy the CTH at that price is the clearest possible evidence of the true value of the CFI shares", we trust this is uncontroversial."

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[23] See page 967A
[24] See CPR 48.11(4)
[25] See B4 Tab 79

Conclusions

[54] For the reasons given above, I reject the grounds of objection relied on by the Respondent in opposition to the making of an order for sale. In my judgment, the Applicant is *prima facie* entitled to an order for sale of the CFI shares owned by the Respondent. However, because of the absence of expert evidence as to the value of the CFI shares, this court can only rely on the buy-out offer price of US$2.8 billion made by Alfa for CTH, on which both the Applicant and Respondent have placed some reliance if not acceptance, as cogent evidence of the fair value of the CFI Shares. At this price the proceeds of sale would be sufficient to satisfy in full the current indebtedness to Ziraat (which as of 11 December 2015 stood at $1.761 billion) and have sufficient excess substantially to pay down, if not satisfy in full, the judgment debt to the Applicant. It would also ensure that the minimum or floor price set by the court is fair to both the Applicant, as judgment creditor, and the Respondent as judgment debtor.

[55] I am not attracted to a two-step or piecemeal approach, whereby the Court would make any order for sale and immediately suspend its effect to allow the parties to try to achieve a consensus on the sales process. In my view, it would not be a proper exercise of the court's powers and discretion to adopt this approach, as any order for sale which does not provide in a comprehensive way for the timely sale of this unique asset, could run the risk of having a detrimental or negative effect on the current value of the CFI shares.

[56] Accordingly, the application for an order for sale of the CFI shares in or towards satisfaction of the judgment debt owed by the Respondent to the Applicant is granted.

[57] The minimum or floor price is set at US$2.8 billion, with liberty to all parties, including Ziraat, to apply to reduce the minimum price as circumstances may dictate or as may be advised. The sale shall be by public auction or private treaty

to be conducted by an independent and reputable international firm to be selected by the Applicant, the Respondent and the Third Party within 21 calendar days from today. If the parties are unable to agree on such a firm or agency, the final decision on this aspect shall be made by the Third Party, Ziraat.

[58] The terms and conditions of sale shall provide for Ziraat to be paid out first and in priority to the Applicant.

[59] The order for sale is to be expressly made without prejudice to Ziraat's rights as lender under the Facility Agreement, the CFI Share Charge and the CTH Share Mortgage, including but not limited to its right to sell the CFI Shares independent of this order for sale or to expropriate the CFI Shares in realization of its security.

[60] No formal order for sale is to be immediately drawn up and entered as the parties, including Ziraat, shall have 21 calendar days within which to agree the terms of a comprehensive order for approval by the Court, failing which the terms of the order shall be settled by the Court. The order for sale shall be effective as of the date it is settled and entered by the Court.

[61] As regards costs, the Applicant has succeeded in its application and is entitled, on the usual principles, to its costs. Accordingly, the Respondent is to pay to the Applicant its costs of this Application to be assessed if not agreed.

Gerard St.C Farara QC
Commercial Court Judge (Ag)