

**(1) Cukurova Finance International Limited
(2) Cukorova Holding AS**

Appellants

v.

Alfa Telecom Turkey Limited

Respondent

FROM

**THE COURT OF APPEAL OF
THE BRITISH VIRGIN ISLANDS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 5th May 2009

Present at the hearing:-

Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance

[Delivered by Lord Walker of Gestingthorpe]

1. This appeal from the British Virgin Islands (“BVI”) raises a novel issue as to how the rules of English law relating to equitable mortgages of shares have been affected by European Directive 2002/47/EC on financial collateral arrangements (“the Directive”). The issue happens to arise in an appeal from the BVI because shares in two companies incorporated under the BVI Business Companies Act 2004, Cukurova Finance International Ltd (“CFI”) and Cukurova Telecoms Holdings Ltd (“CTH”) were provided as security under two sets of equitable mortgages, one set (“the BVI share charges”) governed by BVI law and the other set (“the

English share charges”) governed by English law. CFI is the first appellant. The security was provided for repayment of a loan of US\$1,352,000,000 made to CFI by Alfa Telecom Turkey Ltd (“ATT”), the respondent to this appeal.

2. The appeal now before the Board is concerned with preliminary issues directed to be heard in two sets of proceedings which have been consolidated, that is a claim by ATT for (among other things) a declaration that the English share charges have been enforced by a valid appropriation, and a claim by CFI and CTH for the redemption of all the share charges (both BVI and English). It is the novel remedy of appropriation, introduced by the Directive, which lies at the heart of this appeal.

3. In the meantime litigation is continuing in the BVI courts on other issues not within the scope of the preliminary issues (in particular, whether or not default has occurred within the terms of the facility agreement between the parties under which the share charges were made). Their Lordships will not express any view on contentious issues which lie outside the scope of the preliminary issues.

The Directive

4. The Directive was made by the European Parliament and the Council of the European Union on 6 June 2002. Its purpose (described in no fewer than 22 recitals) is to improve the integration, efficiency and stability of financial markets by simplifying enforcement procedures, eliminating or reducing difficulties arising from the insolvency laws of different member states, and eliminating re-characterisation of repurchase arrangements (repos) as merely security interests. Recital (17) is particularly in point:

“This Directive provides for rapid and non-formalistic enforcement procedures in order to safeguard financial stability and limit contagion effects in case of a default of a party to a financial collateral arrangement. However, this Directive balances the latter objectives with the protection of the collateral provider and third parties by explicitly confirming the possibility for Member States to keep or introduce in their national legislation an *a posteriori* control which the Courts can exercise in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations. Such control should allow for the judicial authorities to verify that the realisation or

valuation has been conducted in a commercially reasonable manner.”

5. The Directive is concerned with financial collateral arrangements, divided into two mutually exclusive categories defined in Article 2.1(b) and (c):

“(b) ‘Title transfer financial collateral arrangement’ means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;

(c) ‘Security financial collateral arrangement’ means an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker, and where the full ownership of the financial collateral remains with the collateral provider when the security right is established.”

Some commentators (including Professor Sir Roy Goode, *Legal Problems of Credit and Security*, 3rd ed. (2003) para 6-38) have pointed out that the assumption that “full ownership” is with one party or the other does not easily apply to an English mortgage (whether legal or equitable) as each party has a proprietary interest in the collateral so long as the security is in place. But it is common ground that each of the English share charges must be regarded as a security financial collateral arrangement (“SFCA”).

6. Article 1.4 provides that financial collateral must consist of cash or financial instruments (widely defined in Article 2.1(e) so as to include shares, whether quoted or unquoted). Article 2.2 provides:

“References in this Directive to financial collateral being ‘provided’, or to the ‘provision’ of financial collateral, are to the financial collateral being delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker’s behalf. Any right of substitution or to withdraw excess financial collateral in favour of the collateral provider shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive.”

7. Article 4 (Enforcement of financial collateral arrangements) must be set out in full:

“1. Member States shall ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise in the following manners, any financial collateral provided under, and subject to the terms agreed in, a [SFCA]:

(a) financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations;

(b) cash by setting off the amount against or applying it in discharge of the relevant financial obligations.

2. Appropriation is possible only if:

(a) this has been agreed by the parties in the [SFCA];
and

(b) the parties have agreed in the [SFCA] on the valuation of the financial instruments.

3. Member States which do not allow appropriation on 27 June 2002 are not obliged to recognise it. If they make use of this option, Member States shall inform the Commission which in turn shall inform the other Member States thereof.

4. The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the [SFCA], be without any requirement to the effect that:

(a) prior notice of the intention to realise must have been given;

(b) the terms of the realisation be approved by any court, public officer or other person;

(c) the realisation be conducted by public auction or in any other prescribed manner; or

(d) any additional time period must have elapsed.

5. Member States shall ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker.

6. This Article and Articles 5, 6 and 7 shall be without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner.”

The Regulations

8. The Directive did not have direct effect as a matter of Community law. Member States were required to give effect to it by 27 December 2003 at latest. The United Kingdom gave effect to it by the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) (“the Regulations”) made by HM Treasury under section 2(2) of the European Communities Act 1972. The Regulations apply in Scotland and Northern Ireland as well as in England and Wales. They are significantly wider in their scope than the Directive required, since (by the effect of Article 1.2 and 1.3) its application was mandatory only in respect of transactions between public authorities, central banks, and institutions authorised to participate in financial markets (the precise terms as set out in Article 1.2(a) to (d)). Its application was optional if one party was a public authority or authorised institution and the other was an ordinary company (within Article 1.2(e)). The Treasury, after consultation, decided to include not only the optional case but also transactions between ordinary companies. In separate judicial review proceedings in England (*R (Cukurova Finance International Ltd) v HM Treasury* 29 September 2008 [2008] EWHC 2567 (Admin)) the appellants applied for leave to challenge the Regulations as being on this ground *ultra vires* section 2(2) of the European Communities Act 1972, but leave was refused on the ground of delay (Moses LJ also commented that the challenge was unlikely to have succeeded on its merits).

9. The Regulations contain (in Regulation 3) some definitions that call for mention. “SFCA” is defined as meaning:

“An agreement or arrangement, evidenced in writing, where—

(a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker;

(b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations;

- (c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute the equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and
- (d) the collateral-provider and the collateral-taker are both non-natural persons.”

The Regulations define “security interest” as:

“Any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security including—

- (a) a pledge;
- (b) a mortgage;
- (c) a fixed charge;
- (d) a charge created as a floating charge where the financial collateral charged is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; or
- (e) a lien.”

“Financial collateral” is defined as either cash or financial instruments, and the latter expression is widely defined as including shares in companies.

10. The most important part of the Regulations, for present purposes, is Part 4, consisting of Regulations 16-18. Regulation 16 deals with rights of use under a SFCA. Regulation 17 (No requirement to apply to court to appropriate financial collateral under a security financial collateral arrangement) provides:

“Where a legal or equitable mortgage is the security interest created or arising under a [SFCA] on terms that include a power for the collateral-taker to appropriate the collateral, the collateral-taker may exercise that power in accordance

with the terms of the [SFCA], without any order for foreclosure from the courts.”

Regulation 18 (Duty to value collateral and account for any difference in value on appropriation) provides:

“(1) Where a collateral-taker exercises a power contained in a [SFCA] to appropriate the financial collateral the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner.

(2) Where a collateral-taker exercises such a power and the value of the financial collateral appropriated differs from the amount of the relevant financial obligations, then as the case may be, either—

(a) the collateral-taker must account to the collateral-provider for the amount by which the value of the financial collateral exceeds the relevant financial obligations; or

(b) the collateral-provider will remain liable to the collateral-taker for any amount whereby the value of the financial collateral is less than the relevant financial obligations.”

11. Regulation 17 appears to reflect the Treasury’s view that appropriation was already a self-help remedy known to the law of England and Wales. Possibly it was in practice available in respect of charges on funds of cash payable on demand or on short-term deposits (see the discussion by Lord Hoffmann in *Re Bank of Credit & Commerce International SA (No 8)* [1998] AC 214, 226-227). But in relation to shares in a company (and especially unquoted shares which cannot easily be valued) the notion of appropriation by the unilateral act of the collateral-taker was a novel concept, as was agreed by both expert witnesses as to English law (Lord Millett and Professor, now Mr Justice, Cranston). Before the Directive it would have been open to attack not only as self-dealing but also as a clog on the equity of redemption, an old-established but not obsolete doctrine of equity (see *Jones v Morgan* [2001] Lloyd’s Rep Bank 323, mentioned in Professor Cranston’s expert report at para 102).

Appropriation as a self-help remedy

12. “Appropriation” is not defined either in the Directive or in the Regulations. The natural meaning (or one of the natural meanings) of the expression is “making property one’s own” (though in English law the statutory power of appropriation under section 41 of the Administration

of Estates Act 1925 is exercisable by personal representatives acting in a fiduciary capacity, and common law rights of appropriation of payments determine the character of payments by debtors to creditors, as between principal and interest, or as between one secured debt and another unsecured debt).

13. It is reasonably clear from Article 4(1), (2) and (4) of the Directive that appropriation is to be a self-help remedy available to a collateral-taker so long as the SFCA provides for it, and also contains provisions for valuation. If the power of appropriation is exercised the collateral-taker takes the collateral as his own property, at its value under the agreed mechanism, subject (if that value exceeds the secured debt) to a liability to pay the excess to the collateral-provider, and with a claim for the balance of the debt if the value is less than the secured debt. In these respects (as well as in not needing an application to the court) appropriation differs from the traditional (but now obsolescent) English remedy of foreclosure.

14. Had the Treasury realised that appropriation was a novel remedy in English law, the terms of Regulation 17 might have been more expansive. It may be that the language actually used in Regulation 17 singles out legal and equitable mortgages for mention because they are the only security interests under which the remedy of foreclosure might have been available, and so it was thought necessary to emphasise the self-help nature of the new remedy in relation to such mortgages. But their Lordships need not express any final view on that point, and do not do so.

The facts

15. The focus of this appeal is a 51% shareholding in Turkcell Iletisim Hizmetleri AS (“Turkcell”). Turkcell, a Turkish company, is the largest mobile phone operator in Turkey, and its shares are quoted on the New York and Istanbul stock exchanges. The 51% holding in Turkcell belongs to another Turkish company, Turkcell Holding AS (“TH”). CTH has a 52.9% holding in TH.

16. At this point ownership of the corporate structure becomes divided between the Alfa Group, a Russian group of which ATT is a member, and the Cukurova Group, a Turkish group of which CFI is a member. At the inception of the current dispute ATT had a 49% holding in CTH and CFI had a 51% shareholding in CTH. CFI is a wholly-owned subsidiary of Cukurova Holding AS, (“CH”), a Turkish company which is the second respondent to the appeal.

17. In September 2005 ATT agreed to loan US\$1.352bn to CFI under a written facility agreement dated 28 September 2005. The terms of the facility agreement are complex, including (in Clause 17) detailed provisions as to events of default which are at issue between the parties in proceedings in the BVI. But it is unnecessary to go into those for the purposes of this appeal.

18. The English share charge of CTH shares (made between CFI and ATT) was executed on the same day, 28 September 2005. The English share charge of CFI shares (made between CH and ATT) and the two BVI share charges were all executed on 25 November 2005. The loan was fully drawn down on 25 November 2005, and on the same day share certificates for the charged shares and transfers executed in blank were delivered to ATT's solicitors.

19. Each of the English share charges contains Clause 9.3 in the following terms:

“(a) To the extent that this Deed constitutes a ‘financial collateral arrangement’ (as defined in the [Regulations]) the Lender shall have the right (at any time after the Charges become enforceable) to appropriate any Charged Asset which constitutes ‘financial collateral’ (as defined in the Regulations) (‘financial collateral’) in or towards satisfaction of the Liabilities in accordance with the Regulations.

(b) Financial Collateral shall be valued at its Fair Price.”

20. By a letter dated 25 November 2005 CFI agreed with ATT that the definition of “Fair Price” in the English share charge of CTH shares should be varied so as to read:

“‘Fair Price’ means the value of the Shares calculated, on a look-through basis, based on the weighted average market value of publicly traded Turkcell shares over the previous sixty-day period as reported in the Istanbul Stock Exchange Bulletin (the ‘Turkcell Look-Through Value’), provided that in the event that the Lender had exercised its right of appropriation pursuant to Clause 9.3 of the Share Charge in respect of shares in [CTH] dated on or about the date of this Deed between the Lender and [CFI] or has otherwise enforced the charges created thereunder, the Turkcell Look-Through Value shall not be taken into account when calculating the Fair Price.”

The English share charge of CFI shares contained (in Clause 1.1) the same definition of “Fair Price”.

21. On 16 April 2007 ATT wrote to CFI alleging that CFI had committed several events of default (within the terms of the facility agreement), stating that these were incapable of remedy and that in consequence repayment of the loan was being accelerated. ATT demanded immediate repayment of the balance of the loan, with interest. CFI’s position is that none of the events of default has occurred.

22. Also on 16 April 2007, ATT commenced proceedings in the BVI (action 72) seeking repayment of the loan, and other proceedings in the BVI (action 73) seeking a mandatory order for it to be registered as holder of the charged shares. It claimed that it had presented the share certificates and transfers (completed as transfers to ATT itself) but that registration had been wrongfully refused.

23. The events of 27 April 2007 are described as follows in the statement of facts agreed between the parties for the purposes of the preliminary issues:

“23. At 3.50 pm on Friday, 27 April 2007, CH and CFI issued Stop Notices before the BVI Court Registry in relation to the Charged Shares. These Stop Notices were addressed to CFI and CTH respectively and directed that they not register any transfer of shares in the company or pay any dividends until the expiry of 14 days after notice having been given to CFI and CH that this was to be done.

24. At shortly after 4 pm on 27 April 2007, [ATT’s] solicitors faxed letters dated 27 April 2007 to (a) CFI’s registered agent in BVI and (b) CH. Each of these letters stated, among other things, as follows:

‘Under Clause 9.3 of the above-mentioned Share Charge, ATT has the right, at any time after the Charges have become enforceable, to appropriate the shares covered by the Share Charge pursuant to the [Regulations]. As a result of the Events of Default referred to above, the charges have become enforceable.

On behalf of ATT, we therefore give you notice that ATT is hereby exercising its right to appropriate the shares referred to in the Share Charge with immediate effect. We are currently undertaking the valuation exercise under Clause 9.3 of the Share Charge and will revert to you shortly in that regard . . .’

25. At approximately 4.30 pm on 27 April 2007, CFI and CH commenced an ex parte (but on notice to [ATT]) application to the BVI High Court for an injunction to restrain [ATT] from taking any steps to enforce its security.

26. At approximately 6.45 pm on 27 April, the BVI High Court granted an injunction against [ATT], without prejudice to [ATT’s] assertion that it had appropriated the Charged Shares.”

The proceedings below

24. On 22 June 2007 Madam Justice Joseph-Olivetti made an order consolidating action 72 with action 119 (the proceedings commenced by CFI and CH) and directed the hearing of preliminary issues (to be refined and redrafted by the parties). Her order directed the facts to be agreed (so far as possible) for the purposes of the preliminary issues. She also gave directions for oral evidence (including expert evidence).

25. Lord Millett was instructed as an expert witness for ATT and Professor Cranston was instructed as an expert witness for the Cukurova parties. Each delivered an expert’s report dated 7 September 2007, and the two experts together made a joint report on 17 September 2007, addressing the detailed questions formulated as preliminary issues. There was a large measure of agreement between the experts. They agreed that the Regulations were applicable and that the English share charges were within their scope. Each of those charges was an SFCA, and an “equitable mortgage”, for the purposes of the Regulations. They agreed (although for different reasons) that the English share charges validly incorporated a power of appropriation under Regulation 17.

26. The experts differed only as to whether the power of appropriation had been validly exercised. Professor Cranston’s position was that the power could not be exercised except by ATT becoming the registered holder of the charged shares, which had not happened. Lord Millett took the view that that was unnecessary. There was a three-day hearing before Madam Justice Joseph-Olivetti during the last week of September 2007,

at which both Lord Millett and Professor Cranston were cross-examined at length.

27. The judge handed down a lengthy judgment on 16 November 2007. She summarised the agreed facts and issues, the terms of the Directive and the Regulations, and the oral evidence of the expert witnesses. She recorded (as was common ground) that “appropriation” in the Directive must be given an autonomous Community meaning, and that the Regulations must be construed, so far as possible, to give effect to the Directive’s purposes. The judge stated at paras 57 and 58 of her judgment:

“What is clear from my perusal of these provisions in the Directive and the Regulations is that appropriation is a method of enforcing or realising the security and that it is to be exercised without any of the usual safeguards such as notice to the collateral provider or the ultimate safeguard—an order of the court.

The two methods envisaged by both the Directive and the Regulations for the realisation of financial collateral, here the Charged Shares, is by way of sale or appropriation. What can be inferred from that is that they are like remedies and that on sale or appropriation the collateral taker gets to deal with the financial instrument as his own property. In both methods the value of the financial collateral must be set off against or applied in discharge of the collateral provider’s financial obligations.”

Their Lordships agree that appropriation is much closer to sale than it is to foreclosure. It is in effect a sale by the collateral-taker to himself, at a price determined by an agreed valuation process.

28. After a good deal of discussion of the issue the judge concluded that ATT had not validly exercised its power of appropriation. Her reasons are to be found mainly in paras 72-77 of her judgment. Her main reason was that she accepted Professor Cranston’s view that effective appropriation requires “full ownership” and that that in turn requires registration in the share register of the company whose shares are charged. She held (contrary to Lord Millett’s opinion) that it was not enough to obtain full equitable ownership, free of any equity of redemption. This was supported by her reaction to ATT’s assertion that no overt act was needed for a valid appropriation (para 76):

“It strikes me as unacceptable that in the world of global commerce, a collateral-provider or lender could appropriate a security by just determining to do so which really amounts to an inner thought process, which is not required to be translated into any overt action. Such a state of affairs would not be commercially reasonable, acceptable or commercially effective especially when one recalls that under the Regulations a collateral-taker is not required to give notice.”

It is agreed that the judge’s reference to a collateral-provider should be to a collateral-taker.

29. ATT appealed to the Court of Appeal which on 22 April 2008 allowed the appeal in a judgment of Barrow JA in which Rawlins JA and Edwards JA (Ag) concurred. Barrow JA recorded that it was common ground that on appropriation the collateral-taker must become absolute owner of the collateral. He also recorded the agreed position as to the correct approach to construing the Directive and the Regulations.

30. Barrow JA considered that the judge had misapplied the notion of an autonomous Community meaning of “appropriation” as requiring uniformity throughout the Community, with the result that an English equitable mortgage (unknown in civil law jurisdictions) created a problem. Barrow JA did not see that problem as insoluble. He stated (para 28):

“Uniformity, it follows, does not justify the conclusion that appropriation cannot take effect in equity alone but that the legal title must also vest for appropriation to be effective. It was never stated as such but that conclusion really amounted to saying that an equitable mortgagee cannot appropriate.”

31. He went on to hold that a pragmatic interpretation was required (para 36):

“A pragmatic interpretation of appropriation requires a proper understanding of what is meant by ‘full ownership’ or ‘absolute ownership’. Lord Millett considered those terms to be capable of referring to full or absolute ownership of the beneficial interest. The judge could hardly have decided otherwise because, as the comparison with foreclosure established, it is a settled proposition in English law that an equitable mortgagee may foreclose and become the absolute

owner of the beneficial interest while the mortgagor continues to hold legal title. Therefore, the judge's view that it is an undesirable result that there should be a continued separation of the legal and equitable interest in the collateral after appropriation has occurred, is at odds with the legal principle that there can be foreclosure of the equitable interest without at the same time foreclosing the legal estate in collateral. I see no reason why the division of ownership interests in collateral which may continue after foreclosure cannot similarly continue after appropriation."

As authority for the proposition in the second sentence of this paragraph Barrow JA referred (as Lord Millett had) to observations by James LJ in *Marshall v Shrewsbury* (1875) LR 10 Ch 250, 254.

The requirements for a valid appropriation

32. In their Lordships' opinion the judge did rather overstate the importance of giving "appropriation" an autonomous Community meaning. Certainly the expression must be interpreted by reference to the general scheme and purpose of the Directive. But as already noted, the Directive did not have direct effect; member states were required to transpose it into national law so as to provide (among other things) the "rapid and non-formalistic enforcement procedures" referred to in recital (17) of the Directive. In doing so they would naturally refer to legal concepts familiar in their own systems of national law, so long as they did not depart from the general concept of appropriation embodied in the Directive (compare for instance *Gemeente Emmen v Belastingdienst Grote Ondernemingen* Case C-468/93 [1996] ECR I-1721, a case concerned with the transposition into Dutch law of the expression "building land" in the Sixth Directive on VAT). The curiosity of this case is that the United Kingdom Treasury seems to have thought that appropriation was already a familiar remedy in the United Kingdom, so that it was not necessary to define it or give any detailed guidance as to how a power of appropriation was to be exercised.

33. The courts below discussed at some length the meaning to be given to the expression "absolute ownership". That is an expression on which the expert witnesses agreed, although it is not used either in the Directive (which uses "full ownership" in a way that creates difficulty under English law) or in the Regulations. In English property law the expression "absolute ownership" has no single, precise meaning, but it is in general used to refer to the quantum of an owner's interest, rather than to its character as legal or equitable ownership. It is commonly used to mark the contrast with limited ownership such as a life interest under a

trust (it is used in that way in Schedule 2, paragraph (f) of the English share charges, to which attention was drawn in the course of argument).

34. Their Lordships do not agree with the whole of Barrow JA's reasoning (in particular, they do not agree with his observation, in para 37, that only the beneficial interest in the collateral was charged). Nevertheless they consider that Barrow JA was right in adopting what he called a pragmatic interpretation, and in concluding that it was not necessary, for a valid appropriation, for the collateral-taker to become registered holder of the shares. In many cases, where the registrars of charged shares had no reason to make difficulties about registration, it would be easy (and no doubt convenient) for the collateral-taker to become the registered owner either just before or soon after exercising its power of appropriation. But it is not necessary, for the reasons that Lord Millett gave in the course of his expert evidence. Any other interpretation of the Regulations would mean that the collateral-taker did not have the means of "rapid and non-formalistic enforcement" which the Directive calls for.

35. Their Lordships do not however accept Barrow JA's view (at para 41) that the collateral-taker can exercise a power of appropriation merely by taking thought (that is, without any overt act at all). Lord Millett had regarded this as a "moot point". Commercial practicalities require that there should be an overt act evincing the intention to exercise a power of appropriation, communicated to the collateral-provider. That is not inconsistent with Article 4.4(a) of the Directive, which refers to *prior* notice. In this case ATT's letter of 27 April 2007 was, as Barrow JA concluded, an effective exercise of ATT's power of appropriation (subject always to the dispute about an event of default, which is not part of the preliminary issues).

36. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed with costs.