Case comment

Contract and equity, forfeiture and phones

Cukurova Finance v Alfa Telecom [2013] UKPC 2


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INTRODUCTION

On authority, it is difficult to write about the law of mortgages without readers “losing the will to live”.¹ This journal’s readers are made of sterner (or stranger) stuff, such that adding in the law of leases and a novel EU remedy should merely enhance the attraction—even if the facts involve BVI company shares and a global telecoms battle. Many financial transactions are of course based on the law of leases and/or mortgages, such that it will always be necessary from time to time to trace back to land-law roots; Cukurova Finance International Ltd and anor v Alfa Telecom Turkey Ltd² is an excellent example, and provides the most thorough consideration for some time of the principles of forfeiture and relief from forfeiture, as well as illustrating “a fundamental division”³ in judicial approach.

BACKGROUND

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¹ Shearer and ors v Spring Capital Ltd and ors [2013] EWHC 3148 (Ch), per Daniel Alexander Q.C. at [277]

² [2013] UKPC 2 and [2013] UKPC 20; the second of these is now reported as [2013] 4 All E.R. 936.
The Cukurova case has been aptly described as being like a popular “horror film” in having “an inexhaustible supply of sequels.” It cuts a complex story and corporate structure short. In 2005, a Turkish group, Cukurova, had a controlling stake in Turkey’s largest provider of mobile-phone services, Turkcell. Cukurova needed cash, and was willing to sell some of its shares in Turkcell, but did not want anyone else to gain control. Therefore, Cukurova entered into a set of agreements with a Russian group, Alfa, by which Cukurova sold some of its holding in Turkcell to Alfa, and, under a Facility Agreement, borrowed US$1.352 billion from Alfa, to be repaid in four instalments, with compound interest at a standard rate of LIBOR plus 8% and default interest at LIBOR plus 11.5%. As these rates suggest, Cukurova’s intention, known to Alfa, was always to refinance the loan as soon as possible. The loan was secured by charges over Cukurova’s shares in its subsidiaries which owned its retained shares in Turkcell. Both subsidiaries are British Virgin Islands companies, but the charges were expressly governed by English law.

On the face of it, the charges were by way of equitable mortgage, with Alfa holding the share certificates and transfers executed in blank. However, the charges were expressly subject to the Financial Collateral Arrangements (No 2) Regulations 2003 (‘the Regulations’) and the powers it grants lenders “to appropriate” a security.

3 Shearer at [128].
5 Space precludes a list of all the judgments in this case; and, since [2013] UKPC 20, see [2013] UKPC 25, [2013] 4 All E.R. 989.
7 Cukurova [2013] UKPC 2 at [3]-[4]; Cukurova Finance International Ltd and ors v Alfa Telecom Turkey Ltd [2012] UKPC 20 (sic) at [2], [15], and “Turkcell Structure Chart” at end. [NOTE TO COPY EDITOR: Yes, there is a [2012] UKPC 20 as well as a [2013] UKPC 20.]
9 There was a second set of charges by way of equitable mortgage governed by BVI law, but these appear to have dropped out of the picture: see Cukurova Finance International Ltd and ors v Alfa Telecom Turkey Ltd [2009] UKPC 19, [2009] Bus L.R. 1613 at [1].
11 Cukurova [2013] UKPC 2 at [15]-[16]
The Regulations gave effect to European Directive 2002/47/EC, and in both the Directive and the Regulations the concept of ‘appropriation’ as a remedy for the lender on default by the borrower is central; yet in neither was ‘appropriation’ defined.\textsuperscript{11} On \textit{Cukurova}’s first visit to the Privy Council, in 2009, Lord Walker noted, with admirable restraint, that the Treasury draftsmen seemed to have been labouring under the misapprehension “that appropriation was already a self-help remedy known to the law of England and Wales. ... Had the Treasury realised that appropriation was a novel remedy in English law, the terms of [the Regulations] might have been more expansive.”\textsuperscript{12}

As eventually emerged, Alfa’s intention was always to find some way of ‘appropriating’ the charged shares so as to gain control of Turkcell. Cukurova fell into default when it was just about to obtain refinance and repay Alfa—as Alfa knew; so Alfa exercised the ‘appropriation’ provisions, on 27 April 2007.\textsuperscript{13} Cukurova maintained that, even if the ‘appropriation’ was effective, they were entitled to recover the shares by tendering the sum due including interest, whether by the doctrine of tender or by relief from forfeiture.\textsuperscript{14} Cukurova therefore paid US$1.5 billion into a separate account on 25 May 2007, where it remained until 25 May 2010.\textsuperscript{15} Meanwhile, the case went up to the Privy Council, back down to the BVI High Court, and back up again;\textsuperscript{16} it was not until the case returned to the Privy Council that the question of relief from forfeiture was given full consideration, for the first time.

\textsuperscript{11} \textit{Cukurova} [2009] Bus L.R. 1613 at [1] and [12].
\textsuperscript{13} \textit{Cukurova} [2009] Bus L.R. 1613; \textit{Cukurova} [2013] UKPC 2 at [40]-[62]
\textsuperscript{14} \textit{Cukurova} [2013] UKPC 2 at [27]-[28], [32].
\textsuperscript{15} \textit{Cukurova} [2013] UKPC 2 at [29]-[30], [125(g)].
Lords Neuberger, Mance, Kerr, Clarke, and Sumption gave a single, unanimous judgment. They recognised that, due to the novel situation created by the Regulations, the issue had to be considered from the ground up, starting with what ‘relief from forfeiture’ meant:

“The equitable relief sought is either (i) relief pursuant to the general equitable jurisdiction to relieve from forfeiture or (ii) relief pursuant to the particular equitable jurisdiction to revive a mortgagor’s equity of redemption after it has been destroyed, and to give the mortgagor a further opportunity to pay the debt and recover its property. ... [W]ether these two jurisdictions are separate, or whether the latter is merely a particular application of the former, is open to question, but this is of academic interest only in the present case.

For present purposes, it is convenient to refer to both heads of relief compendiously as relief from forfeiture.”

Relief from forfeiture in this broad sense “is available in principle” whenever three conditions are met:

1) “the primary object of the bargain is to secure a stated result which can be effectively attained when the matter comes before the court.”

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17 Cukurova [2013] UKPC 2 at [83]-[84].
2) “the forfeiture provision is added by way of security for the production of that result”,\textsuperscript{19} and

3) “what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights”.\textsuperscript{20}

The first two limbs are direct quotes from \textit{Shiloh Spinners v Harding},\textsuperscript{21} and the third draws on \textit{Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (‘The Scaptrade’)}\textsuperscript{22}. There is no additional restriction as to the type of property involved: “there is no principled basis upon which the jurisdiction can be limited to real property. Nor is there any authority for such a distinction.”\textsuperscript{23}

Having decided that ‘appropriation’ counted as forfeiture, such that relief from forfeiture was available in principle, the Board spent the remainder of the judgment considering whether, in the circumstances, Cukurova was entitled to relief, which “require[d] further examination of the nature of the jurisdiction”.\textsuperscript{24} The jurisdiction with regard to leases was examined, and the Board appeared to approve the statement in \textit{Woodfall} that there is “no inflexible rule to the effect that the tenant must make good the breach. In an appropriate case relief against forfeiture may be granted without requiring the tenant to make good the breach immediately or at all.”\textsuperscript{25} The Board also considered legislation regarding forfeiture of leases, from the Landlord

\textsuperscript{18} Cukurova [2013] UKPC 2 at [90]
\textsuperscript{19} Cukurova [2013] UKPC 2 at [90]
\textsuperscript{20} Cukurova [2013] UKPC 2 at [94]
\textsuperscript{21} [1973] A.C. 691 at 723G-H
\textsuperscript{22} [1983] 2 A.C. 694; Cukurova [2013] UKPC 2 at [89]
\textsuperscript{23} Cukurova [2013] UKPC 2 at [92]
\textsuperscript{24} Cukurova [2013] UKPC 2 at [116]
and Tenant Act 1730 to s.146(2) of the Law of Property Act 1925,\textsuperscript{26} and concluded, “The purpose of the various statutory interventions in the property field was self-evidently not to alter the court’s fundamental approach to the grant of relief against forfeiture.”\textsuperscript{27}

The Board held that Cukurova was entitled to relief, due to “a combination of unusual features”,\textsuperscript{28} essentially that, despite “the transaction [being] structured to preserve [Cukurova’s] control over Turkcell”,\textsuperscript{29} Alfa had aimed and acted throughout not to protect its “financial interests as lender” but to obtain the controlling shares.\textsuperscript{30} Then, however, there was the question of the terms on which relief should be granted; this was deferred to a later hearing, with instructions as to “[t]he points on which the Board requires particular assistance” being “annexed to this judgment.”\textsuperscript{31} That Annex included three different possible views of “the conceptual basis of relief against forfeiture” and invited “submissions on these and any other possible analyses and their consequences” and, “in particular, [on] the historical basis on which equity operates”.\textsuperscript{32}

In one sense, the matter was simple: the parties differed solely as to the amount of interest Cukurova should be obliged to pay as a term of relief. But— due to the size of the principal, the high rate of default interest, the fact that six years had elapsed, and the effect of compounding—that difference amounted to nearly US$1.5 billion.\textsuperscript{33}

\textsuperscript{26} Cukurova [2013] UKPC 2 at [119]-[124]
\textsuperscript{27} Cukurova [2013] UKPC 2 at [124]
\textsuperscript{28} Cukurova [2013] UKPC 2 at [125]
\textsuperscript{29} Cukurova [2013] UKPC 2 at [125(b)]
\textsuperscript{30} Cukurova [2013] UKPC 2 at [125(c)-(d)], [125(f)].
\textsuperscript{31} Cukurova [2013] UKPC 2 at [126]
\textsuperscript{32} Cukurova [2013] UKPC 2 at Annex [2]-[4]
Remarkably, when the case returned, the Board was unanimous as to the result but sharply disputed the reasoning, with the minority describing the majority’s analysis as “completely contrary to ... fundamental principles”.  

The majority

Lord Mance, in whose judgment Lords Kerr and Clarke concurred, first explained that the Directive, the Regulations, and the express wording of the charges meant that “[t]he appropriation of the shares on 27th April 2007 satisfied in law the outstanding debt then due.” Appropriation’ was thus radically different from “forfeiture of a common-law mortgage”, which “left the debt unpaid and running at law”.  

Lord Mance then summarised the parties’ positions. Alfa submitted that the Board was required to treat the Facility Agreement “as retrospectively revived and outstanding,” such that “interest must be treated as accruing to date at the default contractual rate”; the court had discretion only to impose additional terms. Cukurova submitted that the court’s discretion was not so limited: the court should require “payment of the amount of the debt, together with appropriate interest and costs”, but “what is appropriate” was a matter for consideration in all the circumstances. “It follows that there are two main issues”: first, whether relief could only be granted on terms in “which the loan is to be treated as having remained unpaid from [the date of ‘appropriation’] until today or whether a discretion exists to adopt a different
approach if required by exceptional circumstances”; and, second, “the effect of the circumstances” in this case.37

As to the first, Lord Mance accepted “that in the ordinary course relief in equity will only be granted on the basis of conditions requiring performance, albeit late, of the contract in accordance with its terms”,38 the question was whether this was “an entirely inflexible rule”.39 With an ordinary mortgage, equity would naturally take very seriously the fact “that obligations will have continued to fall due for performance and actually remained unperformed.”40 But his Lordship emphasised, again, that the charges in this case were different from ordinary mortgages: this was not “a situation where an extension of time to redeem is being sought while a loan remains outstanding”.41 “[T]he position governing leases at common law” was a far better analogy: forfeiture of a lease ended the obligations under the lease, just as, in this case, ‘appropriation’ of the charged shares ended Cukurova’s obligations under the Facility Agreement.42

As there have been statutory provisions regarding relief from forfeiture of leases in England since 1730, there is little authority concerning the original equitable jurisdiction. But the Board had already held, in its previous, unanimous, judgment, that “the various statutory interventions” had not “alter[ed] the court’s fundamental approach”, and in particular that “the breadth and flexibility of the equitable discretion to grant relief against forfeiture are ... as great outside the scope of section 146(2) [Law of Property Act 1925, and its predecessors] as it is within it.”43

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Lord Mance therefore applied *Hyman v Rose*,\(^{44}\) in which the tenants had asked for relief on terms less onerous than strict compliance with the covenants, failed before all lower courts, but won in the House of Lords. The majority in the Court of Appeal were adamant that “[t]he Court cannot vary the contract between the parties” or “free the contracting party from the obligations imposed upon him”.\(^{45}\) The House of Lords, however, unanimously took a different view:

> “The Court is to consider all the circumstances and the conduct of the parties. ... I do not doubt that the rules enunciated by [the majority in the Court of Appeal] are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded.”\(^{46}\)

Amongst the potentially relevant circumstances must be “events subsequent to a forfeiture”, as the object was “to put the lessor (as well as the lessee) back in the position in which he would have been if there had been no forfeiture”,\(^{47}\) approving *Bland v Ingrams Estates Ltd (No 2)*.\(^{48}\) If there had been no ‘appropriation’, Cukurova would have repaid the loan in May 2007; Alfa had exercised the ‘appropriation’ provisions to try to prevent repayment and then resisted relief on any terms, for six years. “[C]onsiderations of equity [and] unconscionability” required that these facts

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\(^{44}\) [1911] 2 K.B. 234 and [1912] A.C. 623

\(^{45}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [23], quoting *Hyman* [1911] 2 K.B. 234 at 246


\(^{47}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [26]

\(^{48}\) [2002] Ch 177
be taken into account in deciding what interest Cukurova should pay Alfa as a term of relief.\textsuperscript{49}

Lord Mance then, in the alternative, considered the analogy to mortgages, reviewing a number of cases in which mortgagors had been relieved, “on equitable rather than legal grounds”, of contractual obligations to pay interest or costs.\textsuperscript{50} These authorities showed clearly “that equity can and should respond by a special order as to interest or costs in exceptional situations where the mortgagee has by words or conduct rejected, made impossible or delayed repayment of the mortgage debt”.\textsuperscript{51} Therefore, whether one applied the analogy to leases or the analogy to mortgages, the court has a discretion to grant relief on terms of paying less in interest and costs than required by any contractual terms.

Lord Mance emphasised that the majority was “very conscious” of “the importance of certainty”.\textsuperscript{52} In this case, Alfa “had and rejected the opportunity on 25th May 2007 to receive payment in full”, with all contractual interest; that sum was kept in a separate account, unavailable to Cukurova but available at any time to repay Alfa, for three years; and Cukurova had the use of the money thereafter but only remained in default due to Alfa’s refusal to accept payment. It was therefore “both inequitable and unconscionable”\textsuperscript{53} to impose terms for relief which would require Cukurova to pay interest at the default rate from 25 May 2007; Cukurova should not be required to pay any interest for the period 25 May 2007 to 25 May 2010, and the rate of interest thereafter should be the standard contractual rate.\textsuperscript{54}

\textsuperscript{49} Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [26]-[27]
\textsuperscript{50} Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [30]
\textsuperscript{51} Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [42]
\textsuperscript{52} Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [43]-[44]
\textsuperscript{53} Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [44]
\textsuperscript{54} Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [48]
The minority

Lord Neuberger gave the leading judgment for the minority; Lord Sumption added a judgment expressly adopting Lord Neuberger’s analysis but being “more trenchant in expression”.55

In considering the first question, “the basic principles” of relief,56 Lord Neuberger recalled that the Board in its previous judgment had said it was unnecessary in the present case to decide whether there were any fundamental difference between “the general equitable jurisdiction to relieve from forfeiture” and “the particular equitable jurisdiction to revive a mortgagor’s equity of redemption”.57 Nonetheless, Lord Neuberger said, in Cukurova’s case “most property lawyers would more naturally” draw the analogy to a mortgage.58 He characterised the court’s powers in relation to a mortgagor’s application for relief as strictly limited, approving Lewison J’s statement in Law Debenture Trust Corporation Plc v Concord Trust:59

“The essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, but late ... Apart from time stipulations, I do not consider that the court, in exercise of its equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor.”60

55 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [180] and [175].
56 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [67]
58 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [70]
59 [2007] EWHC 1380 (Ch)
Next, Lord Neuberger characterised the analogy to relief from forfeiture of a lease as “misleading”, on two grounds. 61 First, in common law, a lease came to an end on forfeiture, 62 whereas foreclosure involved “no destruction of, or change in, any legal estate, because” the mortgagee was normally the legal owner of the property from the time the mortgage was created; the latter “is close to what happened in this case, where [Alfa] could have become the registered proprietor of the shares at any time after the contract was entered into, by filling in the transfers and becoming the registered proprietors.” 63 Second, he insisted, despite the Board’s previous decision, that the court’s “broad and general discretion ... to grant relief from forfeiture of a lease” was statutory. 64 He said the decision in Hyman 65 had been “expressly based on the wording of” the relevant statute and referred to the Court of Appeal’s judgments in Billson v Residential Apartments Ltd 66 as describing “the distinction between the equitable and statutory powers to grant relief from forfeiture”. 67 Further, “I know of no case where a lessee has been granted relief from forfeiture on terms which involve its liabilities to the lessor being less onerous than they were under the original lease”. 68

Lord Neuberger therefore concluded that, “subject to any other specific point in this case, ... the terms of [the Facility Agreement] with regard to the payment of interest must apply until [Cukurova] pay the whole of what is due.” He then spent 23 paragraphs defending this conclusion and criticising the majority’s analysis—describing the latter as “inconsistent with principle”, 69 unsupported by any of a long

61 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [85]
63 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [90]
64 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [91]
65 [1912] A.C. 623
66 [1992] 1 A.C. 494
68 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [87]-[93], [94]; cf per Lord Sumption at [183].
list of authorities and academic work relied on by the majority,\(^{70}\) and having consequences which were “bizarre”,\(^ {71}\) “little short of absurd”,\(^ {72}\) and “positively perverse”\(^ {73}\)—before coming to the same result as the majority via two steps. First, his Lordship relied on authority saying that, if a mortgagor tenders all that is owed to the mortgagee, the mortgagee refuses the tender, and the mortgagor nonetheless sets aside the amount tendered, this will stop interest running for so long as the amount is set aside. The authority centrally relied on is *Bank of New South Wales v O’Connor*.\(^ {74}\)

The second step is taken swiftly and briefly: in Cukurova’s case, after the relevant sum ceased to be set aside, the applicable rate of interest was the standard rather than default rate “simply as a matter of interpretation of the contract.”\(^ {75}\)

As the minority themselves recognised, “One might think that a theoretical difference with no practical impact on the result in this case was hardly worth” such extensive dissent.\(^ {76}\) The explanation is that, whereas the majority view the discretion involved in their analysis as a time-honoured, indeed authoritatively required, means of achieving justice in unusual circumstances, and “the tension between certainty and justice” as being manageable for this discretion as in many other aspects of law,\(^ {77}\) the minority view this discretion as liable to cause injustice. Lord Neuberger and Lord Sumption made the same point in almost the same words:

\(^{70}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [114]-[118]; cf per Lord Sumption at [183].

\(^{71}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [100].

\(^{72}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [101].

\(^{73}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [102].

\(^{74}\) (1889) 14 App Cas 273; referred to by Lord Neuberger in *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [130], [131], [137], [144], [147]-[148], [150], [152]-[153], [155], [159], [161], [167], and [173]. Lord Sumption, summarising the same point, does not mention *O’Connor* (or any other authority): *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [186].

\(^{75}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [163].

\(^{76}\) *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [176].

\(^{77}\) Cf *Cukurova* [2013] UKPC 20; [2013] 4 All E.R. 936 at [43]-[44].
“[T]he contract must be retrospectively revived ... Otherwise, it would mean that the court could, for instance, grant such relief on terms that [the debtor] would not have to pay the whole of the principal”. 78

“[I]f ... the terms on which the debtor is required to repay the loan as a condition of being relieved depend on the discretion of the court ... the court could grant relief from forfeiture without requiring the debtor to pay the full amount of the outstanding principal”. 79

This would obviously be unjust, as, returning to Lord Neuberger, it “would ... involve the lessee or mortgagor profiting from its own wrong”. 80 The underlying assumption is that judicial discretion is necessarily radically unpredictable. Lord Neuberger repeatedly said the majority’s reasoning “risks leaving the law in a state of uncertainty”, 81 while for Lord Sumption the risk has eventuated: the majority’s judgment “undermines the certainty of the law”. 82

Analysis

The majority’s reasoning seems, with the greatest respect to both sides, plainly right. A charge incorporating the Regulations is like an ordinary mortgage for most purposes. But the dispute before the Board engaged the one aspect of such a charge

78 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [100]
81 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [111], cf at [122]
82 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [186]
which is strikingly different from an ordinary mortgage and similar to a lease. Further, the majority, and the Board’s previous judgment, were right to say that the original equitable discretion regarding relief from forfeiture of leases was at least as broad as subsequent statutory discretions—and Billson supports the majority—such that Hyman is squarely relevant. By contrast, as Lord Mance noted, in O’Connor the plaintiff claimed damages against his bank for allegedly retaining his deeds in breach of contract, and the Privy Council’s ratio was that there could be no such action at law; the minority in Cukurova were relying on one line of obiter to get them from their preferred reasoning to what they, like the majority, viewed as the just result in this case.

Nonetheless, it would have been helpful to have considered authority on the closest available analogy with regard to leases. The best comparator would of course be cases in which the forfeited lease contained express terms as to interest on sums due and unpaid, terms common at least in present-day leases; but unfortunately there do not appear to be any such judgments in the public domain. Express terms as to payment of the landlord’s costs of proceedings against the tenant are however clearly analogous: both interest and costs are secondary liabilities, triggered by breach of a primary obligation. As above, the majority considered it “relevant to note the modern position concerning costs due under the terms of a mortgage as summarised in ... Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)” but did not consider any

84 [1992] 1 A.C. 494 at 510-519, 520-522, and 525-531
85 Cukurova [2013] UKPC 2 at [124]
86 Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [37]; O’Connor (1889) 14 App Cas 273 at 284-285
87 See e.g. Encyclopaedia of Forms and Precedents, online edition (as at 27/10/2013), Vol 22(1), ‘Landlord and tenant (business tenancies)’ at [205].
similar cases regarding leases, while the minority dismissed Gomba as irrelevant because it was about costs and about “the court’s statutory discretion on costs”.  

The earliest authority involving a covenant in a lease providing for costs appears to be *Church Commissioners for England v Ibrahim*.  The Court of Appeal found in favour of the landlord, but their ratio was that the landlord could “be deprived of his contractual rights to costs where ... there is good reason to do so”, specifically in relation to the landlord’s conduct; they simply found no such reason in that case.  Then, in *Forcelux Ltd v Binnie*, the Court of Appeal granted relief on less onerous terms as to costs than were required by the terms of the lease, due to the landlord’s unreasonable conduct in resisting relief. Both of these, though, were decided in the context of the court’s powers under s.51(1) of the Supreme Court (now ‘Senior Courts’) Act 1981. The question therefore is whether the statutory discretion on costs is broader than the equitable discretion, as the minority in *Cukurova* clearly assumed.

In *Woodtrek Ltd v Jezek*, the landlord argued the court was obliged to “follow the practice of the old Courts of Chancery” and that this meant relief could only be granted on terms that the tenant paid all the landlord’s costs. Stuart-Smith J rejected the second part of the argument, granting relief on terms of paying the arrears plus only a small part of the landlord’s costs, due to the landlord’s conduct with regard to the claim. Stuart-Smith J relied not on the statutory discretion but on *Croft

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80 [1997] 1 EGLR 13
81 *Ibrahim* [1997] 1 EGLR 13 at 14
82 [2009] 5 Costs LR 825
83 *Forcelux* [2009] 5 Costs LR 825 at [16], cf [3] and [19].
84 [1982] 1 EGLR 45
85 *Woodtrek* [1982] 1 EGLR 45 at 47
86 *Woodtrek* [1982] 1 EGLR 45 at 47
The tenant had been granted relief on terms of payment only of the arrears and none of the landlord’s costs. On appeal, the landlord relied on s.210 Common Law Procedure Act 1852, which said expressly that the tenant could not be granted relief “in law or equity” “without paying the rent and arrears, together with full costs”. Brett MR and Cotton and Lindley LJJ unanimously rejected that argument, holding that the landlord was rightly deprived of his costs due to his conduct and that the Act did “not limit the discretion of the Court”.

What discretion was that? Although statute has since 1278 provided the jurisdiction to award costs in law, the equitable jurisdiction on costs is “essentially different” and much broader, not derived from “any statutory or delegated authority” but from “conscience” and “entirely discretionary”. The equitable jurisdiction on costs remained relevant long after 1875, and the broad discretion given by s.51 of the 1981 Act can be seen as the end of a long evolution whereby the statutory provisions on costs finally achieved something close to the breadth of the discretion in equity. The relationship between statute and equity is thus the same for costs as it is for relief from forfeiture of leases: where the question concerns the minimum breadth of the equitable discretion, authorities involving the statutory discretion are relevant even where the statute does not apply. Where the court is considering payment of the landlord’s costs as a term of relief from forfeiture, but the landlord has behaved improperly or unreasonably in relation to the forfeiture, equity would certainly deny the landlord some or all its costs where modern statute would do so.

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97 (1885) 14 QB 347
98 Croft (1885) 14 QB 347 at 348 and fn 1.
99 Croft (1885) 14 QB 347 at 349 per Brett MR
101 Andrews v Barnes (1888) 39 Ch. D. 133 at 137; and see O’Connor (1889) 14 App Cas 273 at 283-284.
102 Andrews (1888) 39 Ch. D. 133; R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 W.L.R. 2600 at [62]-[64].
Should the result be different if the issue is interest and there is an express term in the lease? To answer that question, we should reflect on forfeiture itself. Whether or not a landlord has the right to forfeit a lease has always been a contractual matter; as Megarry & Wade puts it, “[t]his entitlement must arise under the terms of the lease”, whether due to an express forfeiture clause or to the breached obligation in the lease being, on proper construction, a condition.\(^{103}\) In other words, forfeiture itself is a contractual right, but a secondary right, arising only on breach of a primary contractual obligation; and so are express terms as to costs and interest. It would be unprincipled for equity not to deal with all three of these in the same way: overriding such terms when and to the extent necessary to do justice, while naturally recognising that justice includes performance of or compensation for breach of the primary obligation.\(^{104}\) On authority regarding leases, forfeiture and express terms as to costs have both been dealt with in this way; and there appears to be no authority to prevent express terms as to interest being treated in the same way.

Lord Neuberger actually identified the fundamental reason why interest in particular must be dealt with in this way. As noted above, he and Lord Sumption raised the spectre of relief being granted on payment of less than the principal debt, and Lord Neuberger pointed out that this would be unjust, because the party granted relief would be “profiting from its own wrong”.\(^{105}\) Yet this is of course why no court would exercise its discretion in that way, and shows why the court must have the power to override express terms as to interest in appropriate cases, and simultaneously defines such cases. No forfeiting party should be permitted to profit from its own wrong either—let alone, as in Alfa’s case, to the tune of billions of dollars.

\(^{103}\) Megarry & Wade, 8th ed (2012), at [18-006] and [18-011]-[18-012].
\(^{104}\) Cf, with regard to forfeiture alone, L. Smith, ‘Relief against forfeiture: a restatement’ [2001] CLJ 178, making the same sort of point in more detail and in the language of ‘expectation interest’.
\(^{105}\) Cukurova [2013] UKPC 20; [2013] 4 All E.R. 936 at [111]
CONCLUSION

*Cukurova* is therefore useful for land lawyers even though, with regard to land, most of the relevant territory has long been covered by statute. In particular, the majority’s reasoning makes clear that, when they refer to the court departing from contractual terms where it would be ‘inequitable or unconscionable’ not to do so, they mean inequitable or unconscionable as between the parties and with reference to the behaviour of the forfeiting party in relation to the forfeiture. Doctrinally, therefore, the unanimous judgment in [2013] UKPC 2 and the majority judgment in [2013] UKPC 20 make the law more certain, by focusing attention on the principles which must guide the court’s discretion.106