IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

CAUSE No. 555 of 2005
CONSOLIDATED WITH CAUSE No. 80 of 2007
CIVIL APPEAL (Application) No. 6 of 2009

BETWEEN:

YAHYA MURAT DEMIREL

Proposed Appellant/ 6th Defendant

TASARRUF MEDUATI SIGORTA FONU

Proposed Respondent/ Plaintiff

BEFORE: **THE RT. HON. SIR JOHN CHADWICK, P.**
THE HON. MR. JUSTICE MOTTLEY, J.A.
THE HON. MR. JUSTICE VOS, J.A.

Appearances: Mr Nigel Meeson Q.C., instructed by Mr Stephen Leontsinis of Conyers Dill & Pearman for the 6th Defendant, Mr Demirel. Mr Stephen Moverley-Smith Q.C. instructed by Mr Christopher Russell of Ogier for the Plaintiff.

Heard: 3rd September, 2009. Judgment given: 9th September, 2009

CAYMAN ISLANDS COURT OF APPEAL

Judgment

Sir John Chadwick, President:

1. This is an application for leave to appeal from an order for summary judgment made on 30 April 2008 by the Chief Justice in proceedings brought by Tasarruf Mevduati Sigorta Fonu ("TMSF") against Merrill Lynch Bank and Trust Company (Cayman) Limited (now known as Merrill Lynch (Cayman) Limited and, hereafter, "MLCL"), Yahya Murat Demirel ("Mr Demirel") and others.

The underlying facts

2. TMSF is established by the Turkish State with power to bring in its own name proceedings for the recovery of losses sustained by banks carrying on (or formerly carrying on) business in Turkey the management and supervision of which have been transferred to it by the Turkish Treasury. Bank Ekspres AS is such a bank.

3. In September 1998, Bank Ekspres was controlled by Kormaz Yiğit ("Mr Yiğit"), an associate of Mr Demirel. Mr Demirel, himself, controlled a second bank, Edgebank AS. It is alleged in the proceedings that Mr Yiğit and Mr Demirel agreed that each would use his authority and influence within the bank which he controlled to procure that loans amounting to US$30 million were made by that bank to shell companies controlled by the other; that those loans would not be repaid; that the monies lent by Edgebank to the shell companies controlled by Mr Yiğit would find their way to him; and that the monies lent by Bank Ekspres to the shell companies controlled by Mr Demirel ("the Demirel shell companies") would find their way to Mr Demirel. It is further alleged that that fraudulent conspiracy was carried into effect in September 1998: in particular, that Bank Ekspres made loans (amounting in aggregate to US$30 million) to the four Demirel shell companies on 22 September 1998. It is said that the monies paid by Bank Ekspres in respect of those loans were "As Demirel at all time well knew . . . procured by Yiğit in his capacity as a director of Bank Ekspres in breach of Yiğit's Fiduciary Duty". In those circumstances TMSF asserts that the monies received by the Demirel shell companies were held by them on a constructive trust for Bank Ekspres.

4. On 22 September 1998, the monies received by each of the four Demirel shell companies were converted into Turkish Lire and paid into the accounts of those companies at Edgebank. On 24 September 1998 each of those companies instructed Edgebank to transfer the monies in its account to the account of Demyon Holding AS ("Demyon"), another company controlled by Mr Demirel, at Bank Ekspres. Between 25 and 29 September 1998 the monies which had been paid into Demyon's account, with accrued interest, were withdrawn in cash and paid into Mr Demirel's personal account at Edgebank. TMSF asserts that those monies (a sum of Turkish Lire 8,352,000,000,000) were subject to a constructive trust in favour of Bank Ekspres.

5. On 20 November 2001 TMSF obtained an *in personam* judgment ("the Turkish judgment") against Mr Demirel in the Istanbul Commercial Court in the sum of US$30 million on a claim based on the misappropriation of that sum from Bank Ekspres, together with attorney fees and costs. An appeal from that judgment was dismissed on procedural grounds.

The Cayman Trusts and the Cayman companies

6. MLCL, the first defendant, is trustee of three trusts of which Mr Demirel is the settlor. The first of those trusts was established in 1997 and the other two (known respectively as "the Dolphin Trust" and "the Mana Trust") were established by deeds dated 28 June 1999. The assets of those trusts include the shares in four companies, each incorporated and registered in the Cayman Islands, Kaffee Limited, Barla Finance Limited, Conur Cash Limited and Medro Limited (together "the Cayman companies"). The four Cayman companies are the second to fifth defendants. It is alleged in the proceedings that those companies were formed or acquired by MLCL for the purpose of holding monies provided to them by Mr Demirel; and that large sums of money were paid to those companies by Mr Demirel or on his behalf.

7. TMSF asserts in the proceedings that it is to be inferred that Mr Demirel was the source of all monies ever received by the Cayman companies; that the monies received by the Cayman companies represented, or were the proceeds of, the monies paid into Mr Demirel's account with Edgebank between 25 and 29 September 1999; and that the monies and assets now held by the Cayman companies represent, or are the proceeds of, those monies. Further, it is said (at paragraph 31 of the statement of claim) that Mr Demirel's purpose in creating the trusts and in causing MLCL to acquire and retain the Cayman companies was to prevent the proceeds of the monies unlawfully misappropriated from Bank Ekspres from being recovered by Bank Ekspres or TMSF. In those circumstances TMSF asserts that the monies and assets now held by the Cayman companies are held on trust for TMSF, as the entity now entitled in the right of Bank Ekspres.

These proceedings

8. TMSF commenced proceedings on or about 1 December 2005 by the issue of a claim form in Cause No.555 of 2005. The defendants to those proceedings were MLCL and the four Cayman companies. On 5 December 2005 TMSF obtained orders retraining

the Cayman companies from removing from this jurisdiction any of their assets (up to a value of US$30 million) and from disposing of or dealing with their assets (whether within or without this jurisdiction and whether in their own names or not) up to the same value. Those orders were renewed at a hearing on 5 January 2006. In or about January 2007 TMSF commenced further proceedings (Cause No. 80 of 2007) against MCLC, the Cayman companies and Mr Demirel. On 23 February 2007 TMSF obtained a worldwide freezing order against Mr Demirel in respect of assets up to a value of US$45 million; and obtained orders for disclosure in the usual form. The proceedings in Cause No. 555 of 2005 and Cause No. 80 of 2007 were consolidated on 30 March 2007.

9. The claim made in the proceedings against Mr Demirel is for judgment in the amount of US$30 million, together with attorney fees and costs, and interest. The basis for that claim is set out in paragraphs 33 to 43 of the statement of claim. Paragraph 33 refers to the fact that the Turkish Judgment was obtained against him. Paragraphs 34 to 36 refer to the award of attorney fees and costs; set out the rates of interest said to be applicable to the sums awarded; and convert the sums claimed from Turkish Lire to New Turkish Lire. Paragraphs 37 to 39 are in these terms:

> "37. At the time when the proceedings that gave rise to the Judgment were served on Demirel, Demirel was voluntarily present in Turkey, and was a Turkish resident. Accordingly, the Turkish Courts had jurisdiction and were competent to hear and judge the claim against Demirel.
>
> 38. Further or alternatively, the Judgment was given after a trial on the merits of the claim at which Demirel was professionally represented and argued through his representatives that he was not liable in respect of the claim upon which the Judgment was given against him. Accordingly, Demirel submitted to the Turkish courts in respect of each of the claims giving rise to the Judgments, which are binding on him.
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> 39. The Judgment is final and conclusive, and for a sum certain as aforesaid."

Paragraph 40 asserts that TMSF has been unable to satisfy any part of the Turkish judgment, "which remains wholly unpaid". Paragraph 41 contains a claim to costs on an indemnity basis. Paragraph 42 is in these terms:

> "42. The Second to Fifth Defendants are mere repositories for the Sixth Defendant's assets. In the premises, the assets held by the Second to Fifth

Defendants, and assets held by or in the name of or on behalf of the First Defendant for the account of the Second to Fifth Defendants, are beneficially owned by or alternatively should be made available for execution in satisfaction of judgments obtained against the Sixth Defendant."

Paragraph 43 claims interest on the Turkish judgment at the rate of 6% from 20 November 2001 to the date of payment; alternatively interest on all sums due to it pursuant to the equitable jurisdiction of the court.

10. Mr Demirel's defence to the allegations pleaded against him in paragraphs 33 to 43 of the statement of claim is dated 30 April 2007. The Turkish judgment is admitted; but it is denied that TMSF are entitled to enforce that judgment. Three reasons are given: (i) that the Turkish judgment was not a final and conclusive judgement (paragraphs 5.a and 7.a to 7.d of the defence); (ii) that TMSF's entitlement to the US$30 million under the Turkish judgment and all other entitlements of TMSF "are public law entitlements and all claims and receivables of TMSF are public law claims and receivables" and "the Grand Court of the Cayman Islands will not, alternatively has no jurisdiction to, grant judgment on or enforce any public law claims of a foreign public authority such as TMSF" (paragraphs 5b. to 5.c of the defence); and (iii) that to enforce the Turkish judgment would be contrary to the public policy of the Cayman Islands.

11. Paragraph 7 of the defence is in these terms:

> "7 Paragraphs 37 and 38 [of the statement of claim] are denied.
>
> a. It is averred that at the stage proceedings were served and/or at the stage of the hearing of the action giving rise to the judgment of 20 November 2001 Mr Demirel was being held in Uncalar State Prison under the authority of a State Security Court order
>
> b. Further, Mr Demirel was not properly served with the judgment of 20 November 2001 and as a result his appeal of the judgment was wrongly dismissed by the Turkish Court of Appeal on the grounds that it was brought out of time.
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> c. As a result of his incarceration and/or the failure to properly serve the judgment of 20 November 2001 Mr Demirel was unable to properly defend himself and is presently pursuing an appeal to the European Court of Human Rights, which appeal has been assigned the reference application no. 7139/06. If Mr Demirel succeeds in his application to the European Court of Human Rights the action giving rise to the judgment of 20 November 2001 will have to be reheard pursuant to Article no. 445 of the Turkish Law of Civil Procedure.

d. In light of the matters set forth in paragraphs 7.a to 7.c above the judgment of 20 November 2001 is not a final and conclusive judgment under Turkish Law and/or should not be enforced as to do so would be contrary to the public policy of the Cayman Islands."

The affidavit evidence

12. On 7 August 2007 Mr Demirel swore an affidavit (his fifth affidavit) in the consolidated proceedings. The purpose of that affidavit (as appears from paragraph 2) was to support his applications, by amended summonses dated 6 August 2007, for orders that the claims in Causes No. 555 of 2005 and No. 80 of 2007 be dismissed and the worldwide freezing orders obtained on 5 January 2006 and 23 February 2007 (to which we have already referred) be discharged or varied. Paragraphs 67 to 69 of that affidavit – which are relied upon in the present appeal – are in a section headed "Applications in Cause No. 80 of 2007: Good arguable Grounds of Defence to claim in Cause 80 of 2007". They are in these terms:

> "67. In any event I have good arguable grounds of defence to the claim. The judgment of the Istanbul Commercial Court dated 20 November 2001 for US$30 million obtained against me by TMSF arose from Claim No. 2000/729 filed in the Istanbul Commercial Court on 5 June 2000. I have already set out some of the details of the manner in which I was treated at the hands of the Turkish State following my unlawful arrest and imprisonment by the State Security Court. The judgement should be viewed within the context of that treatment. Even though the claim was served on me and I was at various times during the proceedings represented by lawyers, I was deprived of any proper opportunity to defend the claim.
>
> 68. I have no access to the documents which contained the evidence on which the presentation of my case relied, as these were seized by TMSF who failed to make them available to me or my lawyers in order that my case could be properly presented. For almost the entire time whilst the case proceeded I was imprisoned. I was taken into custody on 28 September 2000 and not released until 13 September 2002. I was held in solitary confinement for most of this period. I was physically and psychologically tortured. I had very limited access to my lawyers who could only visit me with the authority of the Public Prosecutor. My ability to instruct my lawyers was severely restricted and I was deprived of the means of funding my legal representation as all my assets had been confiscated at the instance of TMSF. I was faced with multiple criminal offences all of which I had to be defending at the same time while this civil case proceeded. No form of financial assistance was provided to me by the State to defend the civil claim. Such resources as were made available to me for the purpose of legal representation were used to fund my fight for my freedom in the criminal cases. I was represented by a series of lawyers many of whom resigned from the case due to my inability to fund the case and

the difficulties to obtain instructions from me or to gain access to the evidence needed to prepare my defence. I was not permitted to give evidence at my trial. As a result of the rather extraordinary laws by which TMSF was created, TMSF was placed at a significant advantage and I was placed at a significant disadvantage throughout the proceedings. Most significantly, the burden of proof was place on me. I can provide detailed evidence, including expert evidence, to support this if it becomes necessary. No judgment obtained in such circumstances should be recognised or enforced by any court in a civilised jurisdiction.

69. I was denied my basic human right to a fair trial and my attempt to appeal was dismissed on the purely technical grounds. Under Turkish law a judgment is required to be served before it is regarded as finalised. In this case the judgment was served on the father of the lawyer who appeared on my behalf at the trial. The father was not a member of the lawyer's staff or in any way connected to her legal practice. The judgment was never brought to the attention of the lawyer nor to my attention. The Court of Appeal ruled that the appeal was out of time, which I denied since, as was argued on my behalf before the Court of Appeal the judgment was never properly served in accordance with Turkish law. I was not permitted to present my appeal on its merits. . . . The manner in which the case was conducted is now the subject of an application filed on my behalf to the European Court of Human Rights (ECHR). . . . If my application to the ECHR is successful the judgment of the Turkish Court is liable to be overturned and a retrial ordered. I propose to adduce expert evidence to this effect if it becomes necessary."

13. Mr Demirel's applications by amended summonses dated 6 August 2007 were listed for hearing before the Grand Court on 21 January 2008. On 4 January 2008 TMSF issued a summons seeking summary judgment against Mr Demirel on the claim made against him in paragraphs 33 to 43 of the statement of claim. On 17 January 2008 Ahmet Yilmaz, Group Coordinator responsible for the Foreign Litigation Team at TMSF and a Turkish lawyer, swore an affidavit in response to Mr Demirel's fifth affidavit. Mr Yilmaz's affidavit was stated (at paragraph 2) to be made (i) in opposition to Mr Demirel's applications that TMSF's claims be dismissed and the freezing orders discharged and (ii) in support of TMSF's application for summary judgment. Paragraphs 32 to 51 of that affidavit appear in a section headed "Application to dismiss the claim against the Trustee and the Cayman Companies and for the discharge or variation of the Worldwide freezing Order in Cause No.80 of 2007": paragraphs 52 to 68 in a section headed "Application for summary judgment in Cause No 80 of 2007".

14. At paragraphs 36 to 44 of his affidavit, Mr Yilmaz addressed the points made by Mr Demirel at paragraphs 68 and 69 of his fifth affidavit. Mr Yilmaz said this:

> "36. At paragraph 68 of his fifth affidavit, Mr Demirel concludes '*No judgment obtained in such circumstances should be recognised or enforced by any court in a civilised jurisdiction.*' Mr Demirel does not deny, however, that the judgment obtained against him was 'final' (him having exhausted the appeal process in Turkey). He does not deny that he contested every aspect of the claim against him before the Commercial Court in Istanbul, and he does not deny that at all times he was legally represented in those proceedings by experienced Turkish lawyers and yet judgment was entered against him. Mr Demirel improperly seeks to relitigate this case in the Cayman Islands in order to have it dismissed. However the Turkish courts have issued a judgment in this matter which is final and binding between the Plaintiff and Mr Demirel, as described in the expert report of Ilhan Yilmaz, filed in these proceedings.
>
> 37. . . .
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> 38. Mr Demirel says that TMSF seized the documents which contain the evidence on which his case relies. This is not true: Mr Demirel appears to have retained his personal documents and, in any event, what he alleges is questionable since he previously said (paragraph 6 of his third affidavit) that his documents were seized by the Turkish court. I refer to paragraphs 13 to 16 above. Furthermore, Mr Demirel does not identify the documents on which his case relies; nor did he raise this point at any time in the Turkish proceedings.
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> 39. . . .
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> 40. Mr Demirel says he was physically and psychologically tortured. I have commented on this allegation above and I would add here that I know of no evidence to corroborate this story and Mr Demirel does not say that the alleged torture rendered him incapable of giving instructions to his Turkish lawyers. . . . At every stage of the Bank Ekspres case he was represented by his Turkish lawyers.
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> 41. Mr Demirel says he had limited access to his lawyers. As I have said above, that is untrue. He had access to and engaged very experienced lawyers on the civil case which was decided against him. He also had access to funds in Turkey for his defence lawyers.
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> 42. . . .
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> 43. Mr Demirel says he was not permitted to attend or give evidence at the trial. That is entirely untrue. His lawyers could have called Mr Demirel to give evidence in the civil proceedings to which the final judgment of US$30 million relates: they did not do so.
>
> 44. At paragraph 69 of his fifth affidavit, Mr Demirel repeats his assertion that he was denied the basic human right to a fair trial and appeal. . . . The allegation is entirely untrue and is, in any event, the subject of an application to the European Court of Human Rights."

15. At paragraph 41 of his affidavit Mr Yilmaz refers to statements which he has made earlier in that affidavit. At paragraph 24, in a section headed "Application to discharge the Worldwide Freezing Injunction in Cause No 555 of 2005, he had said this:

> "I deny that Mr Demirel was held in prison without access to proper representation and without access to his documents. I am informed by the lawyers within TMSF who had conduct of the civil proceedings leading up to the judgment of US$30 million that Mr Demirel was at all times legally represented in those proceedings: the trial records of the Turkish Court also affirm this point. Further, I personally saw Mr Demirel, with his legal representatives and (I infer) taking advice from them and/or giving instructions to them, whilst he was imprisoned in Turkey. Mr Demirel says that he was not allowed to attend his trial of the proceedings which led to the US$30 million judgment but that is nonsense. Mr Demirel could have attended the trial if his lawyers had required him to be there, simply by having his lawyers ask the judge for a direction that he be transported to the Courthouse. They did not do so and that is the only reason why Mr Demirel was not in attendance. Despite the fact that Mr Demirel was represented throughout the proceedings, the learned judge found against Mr Demirel."

16. As we have said, the paragraphs of Mr Yilmaz's affidavit which we have set out do not appear in the section of that affidavit which is said to relate to TMSF's application for summary judgment. In that section, Mr Yilmaz identifies four issues as "the real issues in this action". Those issues are: (i) whether TMSF has an enforceable final judgment under Turkish law for US$ 30 million (paragraph 53); (ii) whether the final judgment results from a "public law" in Turkey (paragraph 55); (iii) whether the final judgment has been satisfied from assets recovered by TMSF (paragraph 59); and (iv) whether Mr Yiğit has agreed to pay Mr Demirel's debts. Mr Yilmaz does not treat as an issue relevant to the application for summary judgment the question whether Mr Demirel had a fair trial in the Istanbul Commercial Court.

17. Mr Demirel did not swear an affidavit in response to TMSF's application for summary judgment: in particular he did not swear even a formal affidavit stating that he relied on the evidence in his fifth affidavit in opposition to the application for summary judgment.

The application to the European Court of Human Rights

18. The application to the European Court of Human Rights ("ECtHR"), to which reference is made by Mr Demirel in paragraph 7.c of his defence and in paragraph 69 of his fifth affidavit, was filed on 26 December 2005: that is to say, shortly after the freezing orders had been obtained in Cause No. 555 of 2005; some four years or more after the Turkish judgment; and more than two and a half years after the appeal from that judgment had been dismissed. Section II of the application contains a statement of the facts relied on. After referring to the proceedings in Turkey for the recovery of US$30 million, that section continued in these terms;

> "On 20.11.2001;
>
> The lawsuit was accepted by the 7th Commercial Court of First Instance of Istanbul, provided that the right to apply to the Court of Appeals is reserved.
>
> The said decision was notified to the representative of Yahya Murat Demirel improperly, but despite this fact, the decision of the court was finalized on the grounds that there was no appeal within the due appeal period.
>
> The local court's decision was notified to the father of Yahya Murat Demirel's representative at that time by hand delivery on 30.04.2002, and in a way contrary to the 17th Article of the Notification Law No. 7201.
>
> The person, to whom the improper notification was served, father Latif Çelik, does not work in the office of her lawyer daughter . . .
>
> On 19.12.2002;
>
> The Local Court's decision was appealed.
>
> On 26.05.2003;
>
> 11th Law Office of the Court of Appeal decided to reject our appeal on the grounds that the appeal was not filed during its due period.
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> Our appeal was rejected by considering the time aspect, but the decision should have been to reject the notification on the grounds that it was contrary to law, to the provisions of the notification regulations, and to the objective rules of good faith and fairness, and to decide that the notification was improperly served, and, consequently, to assume that our right of appeal was used during its due period, and our defense as to the matter of the lawsuit should have been evaluated by the Supreme Court and decided accordingly.
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> . . .
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> If it had been accepted that our appeal was made within its due period, many of our reasons for appeal such as prescription, passive hostility objection, pending objection, giving a judgment without investigating the companies to which credits are extended, and which are held outside the lawsuit, giving a judgment as if the notifications for calculations was served to Yahya Murat

Demirel, when in fact it was not, that the transactions related to the furnishing of the credit are done in accordance with banking principles and procedures, and consequently the supreme Court would have repealed the decision, to our opinion.

. . .

Yahya Murat Demirel, whose right to a fair trial was denied at every stage of the trial, most recently by the Higher Court, a rejection was made because of procedures, a decision on our request for legal aid and other request could not be rendered."

19. Section III of the application contains a statement of the alleged violation of the Convention which is the subject of the appeal to the ECtHR. It is this:

> "We are appealing the decision by the Higher Court reading as 'rejection of the appeal on the grounds that it was not made within its legal period'.
>
> According to the 6th Article of the Convention, the 'Right to fair trial' has been violated
>
> Right of defense has been violated.
>
> The property right, arranged by the Annex 1 Protocol, has been violated.
>
> . . ."

20. We note, first, that the application to the ECtHR is not, itself, by way of appeal from the Turkish judgment of 20 November 2001: rather, it is by way of appeal from the decision of the Higher Court (the 11th Law Office of the Court of Appeal) to reject an appeal from the judgment of 20 November 2001 on the grounds that it was out of time. Second, there is no complaint in the application to the ECtHR – other than the passing reference to Mr Demirel's "right to a fair trial [being] denied at every stage of the trial" – to the conduct of the trial in the Istanbul Commercial Court. In particular, there is no reference to any of the matters advanced by Mr Demirel in his fifth affidavit. Third, the matters which, it is said, would have been advanced on an appeal to the Higher Court and which would have entitled Mr Demirel to succeed in that court -

> " . . . prescription, passive hostility objection, pending objection, giving a judgment without investigating the companies to which credits are extended, and which are held outside the lawsuit, giving a judgment as if the notifications for calculations was served to Yahya Murat Demirel, when in

fact it was not, that the transactions related to the furnishing of the credit are done in accordance with banking principles and procedures, . . ."

do not, (at first sight) include complaints as to the conduct of the trial. It is not said, for example, that – had his appeal not been rejected on procedural grounds - Mr Demirel would have raised before the Higher Court in Turkey the contention that he did not have a fair trial in the court below because he was not allowed to attend the trial, was not allowed to give evidence, or was unable to give proper instructions to his lawyers.

The hearings before the Chief Justice

21. Mr Demirel's applications to dismiss the actions and discharge the freezing orders and TMSF's application for summary judgment came before the Chief Justice on 21 January 2008. Mr Demirel's applications were heard and dismissed. The application for summary judgment was adjourned to 18 March 2008. On 30 April 2008 the Chief Justice gave judgment against Mr Demirel for the principal sum claimed, attorney fees and costs and interest. His reasons were set out in the Ruling which he delivered on 22 May 2008.

22. The Chief Justice identified, at paragraph 19 of his Ruling, the two points which were taken before him by counsel on behalf of Mr Demirel in opposition to the application for summary judgment. He described those as "the public policy point" and "the finality point" : expressions which he derived from the statement of the general rule as to the recognition of foreign judgments set out in *Dicey, Morris and Collins: The Conflict of Laws (14th edition)* as Rule 35(1);

> "35(1) . . . a foreign judgment *in personam* which
> (a) is not impeachable on the grounds
> (i) of lack of jurisdiction of the foreign court in which it was given;
> (ii) of fraud;
> (iii)that recognition is contrary to public policy;
> (iv)that the proceedings in which it was obtained were opposed to natural justice; and
> (b) is for a debt or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
> (c) is final and conclusive;
> may be enforced by a claim for the amount due under it."

23. The Chief Justice rejected the submissions based on lack of finality. The point is not pursued in this Court; and it is unnecessary to say more about it.

24. The Chief Justice described the public policy point argued before him at paragraph 56 of his Ruling:

> "56 Here it is argued on behalf of Mr Demirel (citing Dicey Rule 35(1)(a)(iii) above) that the TMSF judgment is impeachable as a judgment for public receivables, whose recognition and enforcement by this Court would be contrary to public policy as it would involve allowing the sovereign authority of another country (Turkey) to take effect in this jurisdiction."

As he observed, that argument was based on Rule 3 of Dicey:

> "3 English Courts have no jurisdiction to entertain an action;
> (1) for the enforcement, either directly or indirectly, of a penal, revenue or public law of a foreign state; or
> (2) founded upon an act of state."

After a careful analysis of the authorities – including the judgment of Mr Justice Lawrence Collins (as he then was) in an action brought in the High Court of England and Wales to enforce the same Turkish judgment: *TMSF v Demirel and another* [2005] 2 All ER 815 – the Chief Justice rejected the submissions on that point also. Again, that point is not pursued in this Court; and it is unnecessary to say more about it.

25. It is important to note that, although the Chief Justice addressed submissions based on lack of finality and public policy - grounds relied upon in paragraph 7.d of the defence – he did not address the matters which had been relied upon in paragraphs 7.a to 7.c of that defence. In particular, he did not address an argument based on the failure to serve the Turkish judgment, the rejection of Mr Demirel's appeal by the Turkish Court of Appeals or the application to the ECtHR; and he did not address a public policy argument based on an allegation that Mr Demirel was unable to defend himself in the Istanbul Commercial Court. It is plain that the reason that he did not do so was that those arguments were not advanced at the hearing on 18 March 2008. Further, although the evidence in Mr Demirel's fifth affidavit had been before the Chief Justice on 21 January 2008 – in connection with Mr Demirel's application to dismiss the actions and discharge the freezing orders – there was nothing in the affidavits sworn in relation to the summary judgment application (and, in particular, there was

no affidavit from Mr Demirel in opposition to that application) to suggest that Mr Demirel was intending to rely on his fifth affidavit.

The applications for leave to appeal

26. As we have said, the order granting summary judgment was dated 30 April 2008. The Chief Justice set out his reasons in a Ruling delivered on 22 May 2008. But, for whatever reason, the order was not filed until 1 September 2008. On 11 September 2008 the attorneys then acting for Mr Demirel issued a summons seeking leave to appeal the order of 30 April 2008. No grounds of appeal were filed or served with that summons. By 5 February 2009, Mr Demirel had instructed new attorneys; and notice of change was filed. On 8 June 2009 the Chief Justice heard the application for leave to appeal made the summons of 11 September 2008. He refused that application for reasons given in a judgment delivered on 9 June 2009. On 17 June 2009 Mr Demirel made application to this Court, under the new Rule 21A of the Court of Appeal Rules, for leave to appeal from the order of 30 April 2009. That is the application which is now before us.

27. The application is accompanied by a Notice of Appeal and draft Grounds of Appeal. The Notice of Appeal is dated June 2009; and it is common ground that the draft grounds were settled at or about the same time. Paragraph 1 of those grounds is in these terms:

> "1. The decision of the learned judge to grant summary judgment ought to be reversed to enable the following issues to be tried:
>
> (i) Whether the Grand Court of the Cayman Islands will enforce a judgment in respect of which there is a pending application to the European Court of Human Rights ('ECHR') on the ground that the judgment was obtained in breach of the judgment debtor's right to a fair trial under Article 6 of the European Convention on Human Rights ('Article 6') or whether the grand Court will stay recognition and enforcement until the ECHR has given judgment.
>
> (ii) Whether if the facts alleged in paragraphs 40 to 57 and 67 to 69 of the fifth affidavit of [Mr Demirel] are true, the Grand Court of the Cayman Islands would enforce the Turkish judgment.
>
> (iii) Whether the facts alleged in paragraphs 40 to 57 and 67 to 69 of the fifth affidavit of [Mr Demirel] are true."

28. It is acknowledged, in paragraph 2 of the draft grounds, that those issues were not raised in argument before the Chief Justice on 18 March 2008. But it is said "they are important issues of public policy and fairness and justice requires that they be considered on their merits". In particular, it is said, the first two issues are important questions of law which have not previously been considered by the Cayman Islands Courts; and the third issue is a triable issue of fact which arises from the evidence in the fifth affidavit of Mr Demirel.

29. In the skeleton argument relied upon in support of Mr Demirel's application for leave to appeal, counsel sought to explain why the issues now raised were not raised before the Chief Justice on the hearing of the application for summary judgment in March 2008. It is said that:

> "5. Without wishing to waive attorney and client privilege, the reason the present arguments were not raised before the learned judge appears to have been the result of a misunderstanding between Mr Demirel and his former attorneys as to how the case was to be conducted. Mr Demirel does not speak English, is subject to a travel ban and his instructions come through intermediaries and it is very difficult to obtain clear instructions.
>
> 6. The evidential material was before the Court, but the argument was not made by the previous attorneys, although Mr Demirel's instructions are that had intended the argument to have been made. There appears to have been a communication breakdown, or a misunderstanding as to what was to be argued."

No doubt counsel now instructed by Mr Demirel were doing their best to inform the Court; but we find it significant (i) that there is no affidavit from Mr Demirel explaining what advice he received from his former attorneys, or what instructions he gave to them; (ii) that there is no affidavit from the former attorneys to support the assertion that there was "a communication breakdown, or a misunderstanding as to what was to be argued"; and (iii) that there is no explanation why that evidence (obviously relevant to the application now made) is lacking.

30. We are not, of course, hearing an appeal from the refusal of the Chief Justice to grant leave to appeal on 9 June 2009. No appeal could lie from that decision. The application to this Court is an original application. Nevertheless, it is pertinent to examine how the matter appeared to the Chief Justice when he gave his judgment on the application which was before him. After explaining that, in his Ruling of 22 May

2008, he had rejected "the finality point" and "the public policy point" argued at the hearing of the application for summary judgment, he went on:

> "4. . . . The application for leave is confined to the finality point and a new public policy point; no challenge being any longer made to the enforceability of the judgment on the basis that it was one seeking the recovery of 'public receivables', as that concept is regarded at private international law."

He then addressed the submissions made to him on the finality point; and concluded that an appeal on that ground had no prospect of success. That ground is not pursued on the application before us. He then turned to what he described as "the new public policy point". He referred to the allegations in Mr Demirel's fifth affidavit; and observed:

> 20. Such atrocities, if true, require of the strongest condemnation and there would be no doubt that any judgment obtained in a foreign court as the result of such treatment could never be obliged by its recognition and enforcement by this Court".

We agree.

31. The Chief Justice then went on, as he said, "to look critically at what it is that Mr Demirel now proposes as his basis for leave to appeal against the summary judgment of 22 May 2008 which recognised the Turkish judgment". He said this:

> "22. In the first place, it must be noted that the foregoing allegations of persecution and torture, although contained in his 5th Affidavit filed with the Court, were not relied upon for the purpose of opposing the grant of summary judgment. As already noted above, the grounds of opposition were the finality point and the public receivables point. Nor were these allegations relied upon in Mr Demirel's defence filed in the action.
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> 23. Instead, there it is pleaded that paragraph 7 (traversing paragraphs 37 and 38 of the Statement of Claim in then Cause 80 of 2007) that the Turkish Judgment had been obtained irregularly in that Mr Demirel had not been duly and properly served with the process by which TMSF obtained that judgment, as he was then being held in State Prison.
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> 24. Further, that the judgment having been obtained, TMSF failed to serve it properly upon him within the time frame allowed for the filing of his appeal, causing his appeal to be wrongly dismissed by the Turkish Court of Appeal on grounds that it was brought out of time.
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> 25. In paragraph 25 of his Defence, Mr Demirel also cites the fact that he has appealed to the European Court of Human Rights ('ECHR') against the

Turkish Judgment on similar grounds of lack of due process which appeal, if successful, would give rise to the action in Turkey having to be reheard.

26. It is for these reasons cited in his Defence, that his Defence also avers at paragraph [7.d] that the Turkish Judgment is not a final and conclusive judgment under Turkish Law and/or should not be enforced, as to do so would be contrary to the public policy of the Cayman Islands.

27. Remarkably absent from the Defence, is any reference to the allegations of torture, contained in Mr Demirel's 5th affidavit. Having seen his pleadings before the ECHR against the Turkish Judgment, I note that those allegations are also remarkably absent from those proceedings too.

28. These allegations are, it seems therefore, truly to be relied upon in opposition outside of Turkey to the Turkish Judgment, for the very first time before the Court of Appeal; should leave be given to appeal against the summary judgment of 22 May 2008.

29. I am invited by Mr Meeson QC to accept that this is because Mourant, who previously represented Mr Demirel, somehow failed in their arguments on his behalf to rely upon these allegations in support of the public policy objection to recognition of the Turkish Judgment. I am invited to assume that there was a communication problem between Mourant and their client Mr Demirel in this regard.

30. I do not consider it is open to me to proceed in that way.

31 All I think I need say in this regard, is that there is no evidence whatsoever before to support such a proposition – one which is all the more troubling because it is apparently raised without notice to Mourant."

We observe that – given the observations of the Chief Justice in paragraph 31of his judgment of 9 June 2009 – it is even more troubling (and a matter of some surprise) that the suggestion that there was a breakdown of a communication between Mr Demirel and his former attorneys is advanced in this Court without evidence from Mr Demirel or (it seems) an opportunity for Mourant to comment.

32. The Chief Justice took the view, in his judgment of 9 June 2009, that Mr Demirel could not succeed on an appeal on the new public policy point unless he could show that he should be allowed to adduce, as new evidence, the evidence in his fifth affidavit. He held, in effect, that – in relation to that evidence - Mr Demirel had no prospect of satisfying the requirements in *Ladd v Marshall* [1954] 1 WLR 278. Accordingly, there was no realistic prospect of success on an appeal "on the allegations of torture raised for the first time now".

33. Although, as we have said, we are not hearing an appeal from the Chief Justice's decision on 9 June 2009, we think we should say that we do not think the present application can be refused on *Ladd v Marshall* grounds. The evidence on which Mr Demirel needs to rely cannot, as it seems to us, be treated as new evidence. It has been evidence in these proceedings since 7 August 2007. The real issue is whether – given that that evidence was not deployed or relied upon in opposition to the summary judgment in March 2008 – it can now be introduced on an appeal on a new ground.

The approach in this Court

34. We were urged to take the view that the points which Mr Demirel seeks to advance in this Court are "pure points of law"; and that the practice is for an appellate court to allow such points to be taken before it notwithstanding that they were not taken in the court below. In support of that latter proposition we were referred to the decision of the Court of Appeal in England in *Pittalis and another v Grant and another*[1989] 1 WLR 605. The context in which the question arose appears in the judgment of the Court, delivered by Lord Justice Nourse, at page 611C:

> ". . . we are of opinion, first, that the substantive question is a pure question of law which does not depend on evidence as the actual state of the property at the material date; and, secondly, that if it is open to the landlords to raise it in this court, it ought to be decided in their favour."

The Court then went on to say this:

> "The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *Macdougall v Knight* (1889) 14 App Cas 194 and *The Tasmania* (1890) 15 App Cas 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 ChD 419, 429, *per* Sir George Jessel MR:
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> > 'the rule is that, if a point was not taken before the tribunal which heard the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'
>
> Even if the point is a pure point of law, an appellate court retains a discretion to exclude it. But when we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can adequately be protected in costs, our usual practice is to allow a pure point of law to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

35. With that guidance in mind, we approach the present application on the basis that we should ask ourselves, first, whether (i) TMSF has had opportunity enough to meet the new points that Mr Demirel now seeks to take or (ii) has acted to its detriment on the faith of the omission to raise that point at the proper time; second, whether, if the new points were taken, Mr Demirel would have any real prospect of succeeding on those points; and, third, if so, whether the risk of injustice in denying Mr Demirel that prospect of success outweighs the risk of injustice to TMSF in denying it the finality to which it is entitled, having succeeded on the points which were argued in the court below and are now abandoned. We think it right to emphasise that, in the interests of an orderly administration of justice, a party should not be permitted deliberately to keep back a point which should be argued at first instance in order to rely upon that point for the first time on an appeal.

Should leave to appeal be granted in this case?

36. We are satisfied that the application for leave in relation to first ground of appeal fails the second of the three tests which we have set out. We are not persuaded that Mr Demirel has any real prospect of success on that point. First, we have in mind that the issue actually before the ECtHR is whether to interfere with the interpretation and application by the Turkish Court of Appeal of its own rules of procedure. The ECtHR has not been asked to consider whether Mr Demirel had a fair trial before the Istanbul Commercial Court. We find it difficult to think that the ECtHR will find any violation of a Convention right. But, be that as it may, it seems to us that the most that the ECtHR has been asked to do is to set aside the decision of the Turkish Court of Appeal not to accept an appeal from the judgment of the Istanbul Commercial Court. It has not been, and could not have been on the material put before it, asked to set aside the Turkish judgment. If the application to the ECtHR were to succeed, that would remain a matter for the Turkish Court of Appeal.

37. Second, as will appear from the judgment which we are about to deliver on TMSF's appeal from the refusal of the Chief Justice to order equitable execution against the assets of the Cayman Island companies, the Grand Court is not about to enforce the Turkish judgment. So far as we are aware, Mr Demirel has no assets within this jurisdiction against which that judgment could be enforced. That position might change – for example, it is (just) conceivable that assets might be made available to

him from the Cayman trusts. If that were to happen, the matter could be reviewed in the light of the circumstances as they then were: including, perhaps, information as to the outcome (or, at least, the progress made) in the ECtHR application. At this stage, all that the Grand Court has been asked to do is to recognise the Turkish judgment as a proper foundation for a judgment of its own. We do not see how that can be said to contravene the rights under Article 6 of the Convention which Mr Demirel is asserting before the ECtHR.

38. We are satisfied, also, that the application for leave to appeal in relation to the second ground of appeal fails the third of the three tests which we have set out. Mr Demirel has left the Court with too many unanswered questions. There is no explanation why the matters on which he now wishes to rely were not put before the ECtHR *by his Turkish lawyers*. They must be assumed to have known of the allegations which Mr Demirel now wishes to make; unless, of course, he had not then made those allegations. They must be assumed to have been in a far better position than his Cayman Island attorneys – or this Court – to assess the strength of those allegations. In particular, if they were not the lawyers who acted for Mr Demirel at the trial before the Istanbul Commercial Court (as to which there is no evidence) they must be assumed to have been in a position to ask those who did represent him whether a case that the trial was unfair – or in denial of Mr Demirel's Convention rights – could properly be advanced. This Court know, only, that a case based on violation of Mr Demirel's Article 6 rights *at the trial* was not advanced before the ECtHR: this Court does not know why that case was not advanced. And it does not know that because Mr Demirel has not chosen to put that evidence before it.

39. Further, there is no explanation why the contention which Mr Demirel now wishes to advance on the basis of the material in his fifth affidavit was not advanced either in his defence to these proceedings or at the hearing before the Chief Justice in March 2008. It must be assumed that the attorneys then acting for him were aware of that material. The Court does not know why they decided not to deploy it. And, again, the Court does not know that because Mr Demirel has not chosen to put that evidence before it. He could, if he had wished, have waived client privilege so as to enable his former attorneys to do so. In those circumstances it is impossible to discount the possibility that this is a case in which there was a deliberate decision not to run the

new public policy point before the Chief Justice in March 2008. If so, Mr Demirel should not be allowed to run the point for the first time on an appeal.

40. We should add that, even if the new public policy point had been run before the Chief Justice in opposition to the application for summary judgment, we are not persuaded that it would have had more than an outside chance of success. There are many difficulties – to some of which the Chief Justice referred in his judgment of June 2009 – in relating the allegations of torture which Mr Demirel makes to his ability to instruct lawyers in the conduct of the civil proceedings; or to attend and take part in those proceedings. And it is stretching credulity to assert that all of the lawyers who were representing him in the civil proceedings were content to proceed on the basis that they could not obtain proper instructions without raising the matter with the judge. Again, there is nothing from Mr Demirel's own Turkish lawyers to support his assertions; and, given the serious nature of those assertions and the flat contradiction which they receive in Mr Yilmaz's affidavit, some confirmation that they might be true could be expected, even on an application for summary judgment.

41. We are, of course, very conscious that it is no part of the court's function on an application for summary judgment to seek to determine issues of fact on the basis of affidavit evidence. If we had thought it necessary to determine whether the allegations in Mr Demirel's fifth affidavit were true, we would have given leave to appeal and allowed the appeal. As it is, however, we do not think it right to take that course. Accepting that some, at least, of the allegations might be true, we have to ask whether which of those facts would support a case that Mr Demirel did not receive a fair trial; and we have to ask, in relation to those facts, whether – without the corroboration from third parties for which they clearly call – there is a real risk of injustice to Mr Demirel if the matter does not proceed to a trial on those facts.

42. This, in our view, is a case in which it has not been shown that the risk of injustice in denying Mr Demirel such prospect of success as he might have on the new public policy point outweighs the risk of injustice to TMSF in denying it the finality to which it is entitled.

Conclusion

43. We refuse permission to appeal from the order of 30 April 2008.

Chadwick, P.

Mottley, J.A.

Vos, J.A.