

Neutral Citation Number: [2023]



EWHC 3178 (Ch)

Case No: HC-2016-002407

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1/12/2023

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

(1) KOZA LIMITED

Claimants

(2) HAMDI AKIN IPEK

- and -

KOZA ALTIN ISLETMELERI AS

Defendant

Branch Austin McCormick LLP for the claimants
Mr David Caplan (instructed by Mishcon de Reya LLP) for the defendant

Approved Judgment

This judgment was handed down remotely at 10.30 am Friday 1 December 2023 and sent to the parties and to the National Archives

HHJ JARMAN KC

1. This the latest of several judgments which I've given in this case. It relates to fairly narrow points in complex litigation, namely, which party should pay reserved costs of four interim applications made in 2022, resulting in orders made in June, July and November that year, which I shall refer to by those months, or collectively, by the year.
2. The litigation concerns who is or should be in control of the first claimant (Koza Ltd), its sole director, the second claimant (Mr Ipek), as he asserts, or its 100% ordinary shareholder, Koza Altin, as it asserts. Soon after proceedings were commenced in 2016, orders were obtained in August and December of that year which put into place an interim management regime for Koza Ltd, whereby it could continue to conduct its ordinary course of business, subject to giving advance notice of expenditure above a specified amount, or on new projects, and whereby Mr Ipek could continue as director.
3. For a time this regime worked fairly smoothly. However, in 2018 Koza Ltd notified Koza Altin of its intention to pursue a gold mining project in Alaska through a joint venture company called SAM Alaska LLC, which required US\$ 18 million of funding from Koza Ltd. The legal and financial arrangements for this project were complex. In November 2020, a further US\$ 9 million was notified. In March 2021 Koza Altin applied for an order restraining that funding, on what it described as a speculative mining project. This was dismissed, on the basis that there was no evidence that such expenditure would not be in the ordinary course of business.
4. In July 2021, this court concluded that the claimants' claim, that those in control of Koza Altin should not be recognised in this jurisdiction so that it could not exercise

any rights as shareholder, had no reasonable prospect of success and dismissed it. The injunction restraining Koza Altin from exercising its shareholder rights continued pending the claimants' appeal, which was heard in June 2022 and judgment reserved (and subsequently dismissed in October of that year. An application for permission to appeal to the Supreme Court was also dismissed). What remains to be decided in the substantive claim is the claimants' assertion that Koza Altin's decision to remove Mr Ipek as its director was invalid without his consent or that of the other A shareholder (his brother).

5. It was in this context that the applications for the 2022 orders were made. The June order, on a without notice basis, restrained the claimants from dealing with non-liquid assets of Koza Ltd other than in the ordinary course of business. That was continued on notice by the July order, which also imposed restraints on the claimant's expenditure of the liquid assets. By the November order, consented to shortly before the hearing, the claimants were required to make further disclosure. In December, the claimants applied for permission to make certain expenditure.
6. Issues of continuation or variation of the 2022 orders came on for hearing before me on the 26th of January 2023. It seemed to me that by the morning of the hearing, there was not a great deal of difference between the parties on these issues and after giving them more time, they were able to agree such continuation and/or variations sought by Koza Altin and compromised the December application. They were not able to agree all of the issues of costs, hence this further judgment.
7. Koza Altin have filed written submissions on the incidence of the costs of the applications leading to the 2022 orders as follows:

(i) Mr Ipek should pay its costs to be subject to detailed assessment on the standard basis if not agreed, save that it concedes that there should be no order as to costs of the December application as the outcome was mixed.

(ii) Mr Ipek should pay Koza Altin £212,250 on account of those costs within 14 days of the court order.

8. In respect of the other 2022 orders, Koza Altin submits that it was the successful party in applying for the relief set out in those orders, and although they were consent orders, that consent came late, and the applications had to be made.
9. The claimants, in their written submissions, in the first place say that the reserved costs should not be determined until after the court has determined the substantive claim, when the court will have further information which may impact upon the reserved costs. I do not accept that. Such costs are those of interim applications, now made well over year ago and which have been determined.
10. Alternatively, they say that they should have their costs of these applications, which they say should not have been made. Evidence and disclosure subsequently provided by Mr Ipek showed that the claimants were not unjustifiably dissipating assets but were operating in the ordinary course of business, as they had undertaken to the court to do as far back as 2016. They agreed to most of the relief because they had no intention so to dissipate. The only reason the July hearing was necessary was because Koza Altin would not agree to reasonable conditions proposed by the claimants and wanted to assume control of Koza Ltd. The claimants rely upon the finding in March 2021 that the SAM Alaska funding was in the ordinary course of business, and submit that the applications for the June/July orders sought similar relief in respect of further SAM Alaska funding.

11. On the other hand, Koza Altin points to the fact that in March 2021, it also obtained an injunction, with costs, to prevent Mr Ipek from using assets of Koza Ltd to fund the litigation, which he continued to do, despite being warned by various courts in the course of the litigation that he should not do so.
12. Another fact relied on by Koza Altin, was that Mr Ipek had caused Koza Ltd to transfer its interest in SAM Alaska for nominal consideration to a subsidiary incorporated in the USA, a possibility which the claimants say they gave notice of in November 2018.
13. Dealing with these costs, I bear in mind the principles set out in CPR Part 44. In my judgment, the 2022 orders represented substantial success for Koza Altin, albeit, late in the day, consensual. The starting point is that it is entitled to its costs of applying for them. Its conduct is not such as to justify any other order. Although the legitimacy of the then SAM Alaska funding had been established in 2021, in my judgment it was reasonable for the view to be taken that further substantial funding may show a real risk of dissipation of assets, especially in the context where Mr Ipek had been using Koza Ltd's assets to fund the litigation. Moreover, as the claimants accept in their written submissions, after referring to the consent orders, "Mr Ipek *subsequently* provided detailed evidence..., including disclosure as to the purpose of the Assignments, which made it clear that there was no real risk of dissipation of assets by removing them abroad" (emphasis added). The assignments referred to were of Koza Ltd's interest in SAM Alaska to its US subsidiary.
14. The next issue is who should pay the costs. Koza Altin submits that this should be Mr Ipek, as it was he who decided how to deal with Koza Ltd's assets, and it would be

unjust to order Koza Ltd, Koza Altin's 100% subsidiary, and the object of the litigation, to do so. I agree.

15. The next issue is the question of payment on account of costs. I can see no good reason why such an order should not be made. Koza Altin set out in its written submissions, dated 12 September, its total of the reserved costs, accepting that there is some overlap with other costs orders, and so apportioned the costs and seeks just under 50% of those on account, namely £212, 250.
16. In the claimants written submissions, dated 20 September 2023, no submissions were made as to quantum, on the basis that their solicitors understood that their submissions should be confined to incidence of costs. This is despite the provision of CPR 44.2(8), that where a court orders a party to pay costs subject to detailed assessment "it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so." The claimants initially filed no further written submissions in response to those of Koza Altin as to payment on account.
17. In those circumstances, I indicated in a draft of this judgment sent to the parties that I would order the payment on account as requested, unless within 3 days of notice of this judgment in draft, the claimants file and served further written submissions on this issue, in which event the issue would be reconsidered on the basis of those submissions.
18. What was filed, purportedly in compliance with that proviso, were further written submissions dated 22 November 2023 on behalf of Mr Ipek by counsel previously instructed, that is prior to the claimants written submissions dated 20 September 2023. The September 2023 submissions on their face were made by solicitors then instructed by the claimants.

19. In fact, the November 2023 submissions sought to reopen the substantive costs issues, or to seek an adjournment to allow submissions on permission to appeal, an extension of time to do so, and a stay of execution in the meantime. Alternatively, they set out why it is said that there are good reasons for not ordering payment on account. I do not accept that these amount to good reasons.
20. Apart from the fact that these applications were not in due form but made purportedly, but not in reality, by way of further submissions permitted on a very narrow point only, I refuse each of them. It would fall foul of the overriding objective to grant any of them, and in particular it would not be expeditious or fair to do so.
21. The 23 November 2023 submissions do not engage with the reasons set out in Koza Altin's submissions as to why a payment on account should be made and the amount of that payment. I accept Koza Altin's submissions and order the payment on account therein requested.