



Neutral Citation Number: [2020] EWCA Civ 1263

Case No: A3/2020/0647

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JEREMY COUSINS QC
[2020] EWHC 654 (Ch)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 09/10/2020

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

Between :

(1) KOZA LIMITED
(2) HAMDİ AKIN IPEK

**Claimants/
Appellants**

- and -

KOZA ALTIN ISLETMELERİ AS

**Defendant/
Respondent**

Stephen Innes (instructed by **Latham & Watkins (London) LLP**) for the
Claimants/Appellants
Neil Kitchener QC and David Caplan (instructed by **Mishcon de Reya LLP**) for the
Defendant/Respondent

Written submissions dated 21 August and 4, 11, and 22 September 2020

Approved Judgment

Covid-19 Protocol:

This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk).
The date and time for hand-down is deemed to be 10:30am on Friday, 9 October 2020.

Lord Justice Poplewell :

Introduction

1. This judgment addresses arguments on the costs order to be made following dismissal of the appeal brought by Koza Limited and Mr Ipek against the injunction granted in favour of Koza Altin Isletmeleri AS (“Koza Altin”): [2020] EWCA Civ 1018.
2. Koza Altin seeks an order for the costs of the appeal against Mr Ipek alone, to be assessed forthwith, and a payment on account of costs of £175,000. The appellants contend that the costs should be reserved, alternatively Koza Altin should recover only one third of its costs; any costs order should additionally be made against Koza Ltd jointly and severally with Mr Ipek, not against Mr Ipek alone; there should be a set-off against a previous order made by this court in favour of Koza Ltd; there should not be an assessment “forthwith”; and if there is a payment on account of costs it should be for only £75,000.

Incidence of costs

3. Koza Altin was the successful party in the appeal and costs should follow the event.
4. The appellants rely on the judgment of Neuberger J in *Picnic at Ascot Inc v Derigs* [2001] FSR 2 as establishing a principle that where an applicant obtains an interlocutory judgment on the balance of convenience, the court should reserve costs. However Neuberger J’s judgment was not to the effect that there is a general rule applicable in all such cases and there is no invariable practice as is illustrated by *Albon v Naza Motor Trading SDN BHD* [2007] CLC 782. Neuberger J’s reasoning was that an interlocutory injunction was normally to hold the ring until trial, and the resolution of the issues at trial would often cast light upon the merits of the respondent having resisted the interim injunction at the earlier stage. In this case, however, the injunction is not of a holding the ring type, and the issues which were ventilated upon the application will not be revisited as part of the substantive dispute. That was the very complaint which underpinned the appellants’ resistance to the application. Moreover we are concerned with the costs of an appeal, not of the application at first instance. The appeal involved the appellants re-running the same arguments and failing on them. Koza Altin is entitled to the costs of that exercise which we have decided was not justified by the arguments the appellants chose to advance on the appeal.
5. The alternative argument is that because of the extent of overlap and duplication in the evidence and argument on the Funding Application and the Injunction Proceedings, which could have been avoided had Koza Altin sought the injunction in the Funding Application, Koza Altin should recover only a proportion of its costs; although the majority held that this was not an abuse, nevertheless it is a legitimate discretionary factor in allocating the costs.
6. The difficulty with this argument is that the majority finding on abuse was that it could not be said that Koza Altin should have pursued an injunction application as part of the Funding Application, notwithstanding that it could have done so. It

would therefore be unfair to penalise Koza Altin on the basis that there was an unnecessary duplication of costs as a result of something for which the court has held Koza Altin is not to be blamed. Koza Altin's conduct of the proceedings was found by the majority to have been reasonable; it should recover its costs in full in the usual way.

Costs against Mr Ipek alone

7. The appellants do not argue that a costs order should not be made against Mr Ipek. The argument is that it should also be made on a joint and several basis against Koza Ltd, who made common cause against Koza Altin with Mr Ipek, and whose interests were equally if not more affected by the outcome of the appeal.
8. However I would accept the argument on behalf of Koza Altin that Koza Ltd was the *object* of the application, just as control of Koza Ltd is the object of the litigation. The issue in the application was whether Koza Ltd rather than Mr Ipek should be permitted to make the funding. It would be inconsistent with the objective underpinning the grant of the injunction, designed to prevent dissipation of Koza Ltd's assets, that Koza Ltd should pay the costs of the application which obtained that very relief.
9. There is also force in a number of the further submissions made by Koza Altin on this issue. Koza Altin will remain 100% shareholder of Koza Ltd whatever the outcome of the litigation; accordingly any order that Koza Ltd bear the costs is in substance an order that Koza Altin will bear the costs itself through diminution in the value of its shareholding in Koza Ltd. Moreover, the appellants' argument involves Koza Ltd inviting the court to impose a liability on itself, which it plainly would not ask the court to do but for Mr Ipek's control; this illustrates that the imposition of such costs liability is sought solely for the benefit of Mr Ipek, not the company. Further the effect of the order sought is to insulate Mr Ipek from the result of his litigation decisions; the correspondence gives rise to a legitimate inference that Koza Ltd rather than Mr Ipek is in fact funding all the costs of the proceedings, and will pay the costs order if made against it. The application was brought in relation to funding which would be of immediate and primary benefit to Mr Ipek and his family rather than Koza Ltd, albeit that the decision of this court in the Funding Application recognised that it might also consequentially benefit Koza Ltd to some unquantifiable extent which was sufficient to bring it within the "ordinary and proper course of its business".
10. This outcome is consistent with the decision of the Supreme Court on costs following the appeal on jurisdiction in which Mr Ipek and Koza Ltd lost on the authority issue, albeit that the Supreme Court declined to give reasons. Mr Ipek alone was ordered to bear the costs, following similar rival submissions as those made in the current context.

Set off

11. The previous costs order was made in favour of Koza Ltd. The costs order we are making will be made against Mr Ipek alone. The appellants argue that there is jurisdiction to grant set-off of an order in favour of one party against an order against another. We do not need to express a view on whether this may be so in an

