Neutral Citation Number: [2021] EWHC [1098] (Ch)

Case No: HC-2016-002407

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29th April 2021

**Before**:

**THE HONOURABLE MR JUSTICE TROWER**

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**Between:**

**(1) KOZA LTD**
**(2) HAMDI AKIN IPEK**

**Claimants**

**- and -**

**KOZA ALTIN IŞLETMELERI AS**

**Defendant**

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**Siward Atkins QC** (instructed by **Latham & Watkins (London) LLP**) for the **Claimants**
**David Caplan** (instructed by **Mishcon de Reya LLP**) for the **Defendant**

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE TROWER

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 29th April 2021**

**Mr Justice Trower:**

1. This judgment is concerned with the costs of applications issued by Koza Altin on 7 December 2020 and 15 February 2021 (together "the applications"). I shall adopt the abbreviations I used in the judgment I handed down on 31 March 2021 ([2021] EWHC 786 (Ch) (the "March judgment")).

2. By the applications, Koza Altin sought injunctions:

   i) to restrain Koza from spending any sums or incurring any liabilities in connection with the costs of these proceedings and the New Authority Claim and to restrain Mr Ipek from causing Koza from doing so ("the legal costs applications"); and

   ii) to restrain Koza from committing US$9 million of its monies on the SAM project ("the SAM application").

3. The application notice issued on 7 December 2020 also sought the provision by Koza of financial information as to its assets ("the financial information application"). This relief was granted, anyway in part, by Mann J on 11 December 2020, when he made an order by consent but reserved the costs. At the hearing before me Koza Altin sought further relief pursuant to the financial information application.

4. For the reasons given in the March judgment, I granted the relief sought by the legal costs applications and the additional relief sought under the financial information application but refused to grant the relief sought by the SAM application. By paragraph 7 of the order I then made, I directed that the costs of the applications were to be dealt with in writing without a hearing and gave directions for the filing and service of written submissions and costs schedules.

5. Koza Altin submitted that Mr Ipek should pay its costs of the legal costs applications and the financial information application on the indemnity basis and seeks a payment on account of those costs in the sum of £140,000. It contended that it follows inexorably from the logic of the March judgment, and the earlier decisions referred to in the March judgment, that the order should be made against Mr Ipek alone and not Koza.

6. Mr Ipek did not dispute that he should pay the costs of the legal costs applications and the financial information application and that they should be subject to a detailed assessment. He resisted the application that they should be assessed on the indemnity basis and submitted that the amount to be paid on account should be £100,000 not £140,000.

7. In support of its argument that Mr Ipek should pay the costs on the indemnity basis Koza Altin relied on the following two factors as taking the case out of the norm in a way which justifies an order for indemnity costs (as that expression is used in *Excelsior Commercial and Industrial Holdings Ltd v. Salisbury Hammer Aspden & Johnson* [2002] CP Rep 67 at [31]):

i) the extraordinary level of legal expenditure which Mr Ipek caused Koza to incur and the conclusion that Mr Ipek's failure to contribute to the costs himself was almost certainly inconsistent with the legal costs principle and the ordinary and proper course of Koza's business; and

ii) the fact that the legal costs application had to be brought despite courts at every level having made quite clear that Mr Ipek should not be procuring Koza to pay the costs.

8. Mr Ipek's response was that no finding had been made that the points on which the legal costs applications (or the financial information application) succeeded were obviously correct and he denied that they were. He said that the court had taken a different view, and that he acted at all times in good faith on legal advice and in what he considered to be the best interests of Koza. As to this Koza Altin said that, even if the legal advice had been disclosed (which it had not), that could not of itself protect against an award for indemnity costs and that Mr Ipek's good faith was in doubt in circumstances in which he had made no contribution to the costs and had allowed Koza to bear the full burden notwithstanding the legal costs principle.

9. Mr Ipek also relied on the conduct of the Trustees. He said that the Snowden order and the Asplin order were agreed in terms which plainly presupposed that Koza would be incurring substantial costs on the litigation. He said that Koza Altin then suggested that it should not be doing so by letter dated 19 January 2017, approximately one month after the Asplin order was made, but it then took the Trustees nearly four years to procure Koza Altin to issue an application to resolve the issue. During the course of that four-year period, the Trustees did nothing, even though they understood that Koza was playing an active part in the proceedings and incurring substantial costs.

10. Mr Ipek also submitted that the first time that this issue was raised in any meaningful (albeit so he submitted oblique) manner was in the Trustees' costs submissions to the Supreme Court in August 2019, when it was raised in the context of who should bear the costs ordered to be paid to Koza Altin. Mr Ipek said that the oblique way in which the issue was raised by the Trustees, both before the Supreme Court and subsequently before Mr Cousins QC and the Court of Appeal on the ICSID funding application and appeal, meant that the question had to be revisited in the legal costs application, which would not have been necessary if the issue had been fairly and squarely put on the table at an earlier stage.

11. For the reasons I gave in the March Judgment, the fact that Koza Altin did not take steps to enforce the legal costs principle by making some form of legal costs application for four years did not provide an answer to the submission that an injunction to restrain its continued breach should not be granted. That does not of itself prevent Mr Ipek from relying on the delay as indicative of the fact that he thought that Koza Altin had dropped the point raised in the January 2017 letter. What becomes more relevant is whether resisting the application once it was made was so out of the norm that it justified an order for indemnity costs to be made.

12. As to that, it seems to me that any inherent weakness in Mr Ipek's case, irrespective of when Koza Altin's application was eventually made, has the potential to be more significant. I said in response to Mr Bloch QC's application for permission to appeal

that I did not think that a challenge to my characterisation of the dispute as in substance a dispute between shareholders had any real prospect of success. I remain of that view. In my judgment any defence to the legal costs applications based on the proposition that this was wrong is out of the norm, not just because the argument was inconsistent with decisions of the Supreme Court, the Court of Appeal and Mr Cousins QC, but also because the shareholder party (Mr Ipek), who on any view had a direct interest in the outcome of the proceeding in that capacity, had himself made no contribution to the costs at all.

13. In these circumstances I think that Mr Ipek should pay the costs of the legal costs applications on the indemnity basis. I do not, however, consider that the same should follow in relation to the financial information application. No grounds to justify an order to that effect have been advanced or established and the financial information sought and ordered to be disclosed goes to the dispute and the policing of the Asplin order more generally, rather than the legal costs applications per se. The order will therefore be that Mr Ipek should pay the costs of the financial information application on the standard basis.

14. As to the application for a payment on account in respect of the costs of the legal costs applications and the financial information application, both parties accept that a detailed assessment is appropriate, and therefore that CPR 44.2(8) is engaged: "*Where the 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*." Mr Ipek did not submit that there was good reason not to order a payment on account in the present case. The outstanding question, therefore, is what constitutes "a reasonable sum".

15. Guidance as to this was given by Clarke LJ (sitting at first instance) in *Excalibur Ventures LLC v. Texas Keystone Inc* [2015] EWHC (Comm) 566 at [22] and [23]. A reasonable sum is not the irreducible minimum, but will depend on all the circumstances and will often be an estimate of the likely level of recovery, subject to an appropriate margin to allow for error in the estimation.

16. Koza Altin has produced a schedule of costs in support of its application for a payment on account which totals £283,225. These are its costs of the legal costs application and the financial information application. It seeks a payment on account of £140,000, i.e. just under 50% of the costs it incurred. As I have said, Mr Ipek did not say that a payment on account was inappropriate, but he submitted that the basis for the apportionment of costs as between the legal costs application and the SAM application had not been explained, that the court should take a cautious view and that a figure of £100,000 rather than £140,000 was the right amount.

17. In my view Koza Altin is correct in its submission as to amount. There is an explanation as to the way in which apportionment has been carried out at the beginning of the schedule which appears in broad terms to be reasonable. The total sum claimed is substantial, but I consider that a reduction of the full figure by 50% is a fair way of estimating the likely level of recovery with an appropriate margin to allow for error in the estimation. That margin for error is in my view sufficiently substantial to take account of differences in view as to the precise apportionment of the costs of evidence preparation and other pre-hearing costs as between the

applications. The interim payment on account of costs to be paid by Mr Ipek to Koza Altin will therefore be £140,000.

18. As to the costs of the SAM application, Koza submitted that Koza Altin should be required to pay its costs of the SAM application, and Koza Altin did not oppose that as a matter of principle. Koza served a schedule of costs said to relate to the SAM application totalling £576,826 and initially submitted that I should assess the costs summarily and make an order in that amount. Koza Altin submitted that the amount of costs sought was astonishing and a yet further demonstration of what it described as the "rampant abuse" that has been going on when it comes to costs. It said that Koza was only permitted by the Asplin Order to spend a "reasonable sum on legal advice and representation" and that there was nothing reasonable about the sum incurred by Koza in relation to the SAM application.

19. In its reply submissions, Koza accepted that a detailed assessment of these costs was appropriate but sought a payment on account of £300,000. Koza Altin said that, if a payment on account was to be ordered (which it pointed out had not been sought at the outset because Koza initially sought a summary assessment), a reasonable sum was difficult to ascertain but was unlikely to be more than £100,000.

20. It also submitted that the order should be for the payment to be made to Koza itself on the grounds that it followed from the March Judgment that its solicitors had already received much that should have been paid by Mr Ipek not Koza and that paying Koza directly would go a small way towards redressing the misuse of its funds to date. In making that submission, I did not understand Koza Altin to contend that paragraph 1 of the March order extended to restrain the payment of fees already incurred (albeit not paid).

21. I agree that it is difficult to ascertain a reasonable sum to be paid on account of Koza's costs of the SAM application. In part this is due to the limited extent of the information provided by its costs' schedule and in part it is because of the difficulty in assessing the validity of the apportionment of the costs as between the applications. Nonetheless, I do not think that the difficulty is such as to amount to good reason (within CPR 44.2(8)) not to make an order for payment on account at all. It simply means that I need to adopt an approach to the estimation and the margin of error which reflects these considerations.

22. Doing the best I can, and having regard to what I accept became an evidence-heavy application, I think that the figure of £100,000 suggested by Koza Altin is too low. In my view the right figure is £190,000 which is just under one third of the amount claimed. This is materially more than the amount I have awarded Koza Altin on account of its costs of the legal costs applications and the financial information application (although it is reached by taking a lower percentage of the amount claimed). This difference reflects in part what I consider likely to have been the greater amount of time and work required from Koza's lawyers to defend the SAM application than was required by Koza Altin's lawyers to make the legal costs application and the financial information application.

23. In my view it is inappropriate for me to make any special order as to how the sums to be paid by Koza Altin to Koza should be applied on receipt. Arguments as to this go beyond questions that fall to be decided in accordance with paragraph 7 of the March

order and this aspect of paragraph 1 of that order was not a matter on which I heard submissions and has not been fully ventilated in the written submissions put in by the parties in their applications for costs.

24. If Koza Altin wishes to argue that the way in which Koza is to apply any sums received pursuant to the order for a payment on account is restricted by the March order (or should now be restricted), or if Koza wishes to argue that the application of those sums in any particular manner (whether by payment on to its solicitors or otherwise) is or should be sanctioned by the court, a proper application identifying the form of relief sought and its grounds must be issued. The order for payment on account will simply be for payment to Koza in the usual way, without further reference to how that payment can or should be applied.

25. The parties should agree an order which reflects this judgment and submit it to my clerk for approval.