Neutral Citation Number: [2023] EWHC 629 (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: 24/03/2023

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**

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Mr Siward Atkin KC and Ms Edlyn Livesey and Mr Hammad Baig (instructed by **Oakstead Solicitors**) for the **claimants**
Mr David Caplan (instructed by **Mishcon de Raya LLP**) for the **defendant**

Hearing dates: 25-26 January 2023
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This judgment was handed down remotely at 10.30am on Friday 24 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

1. This is my decision as to who should pay the costs of the application by the defendant (Koza Altin) dated 2 December 2022 to vary paragraph 1 of the interim order of Mrs Justice Asplin (as she then was) dated 21 December 2016. The effect of that paragraph was to continue the control, on an interim basis, of the first claimant (Koza) by the second claimant (Mr Ipek) who claimed to be its lawful director, rather than the appointed directors of Koza Altin as its parent company. I heard detailed submissions from the parties over two days on 25 and 26 January 2023 as to whether I should vary the order so as to give effective control of Koza to Koza Altin. At the outset, it appeared that the parties had agreed to resolve applications to vary other interim orders, or were close to doing so, and I gave them further time to finalise those. They were able to come to a settlement in respect of those other issues, with costs reserved. At the end of the hearing I reserved judgment on the outstanding variation.

2. The only ground on which the claimants resisted that application was that they had a pending application for permission to appeal to the Supreme Court from a decision of the Court of Appeal in the present proceedings ([2022] EWCA Civ 1284). In that decision, Sir Julian Flaux, Chancellor of the High Court, giving the lead judgment, rejected arguments by the claimants that the courts of this jurisdiction should not recognise the present directors of Koza Altin, because they had been appointed pursuant to a corrupt judgment in a Turkish Court. The Chancellor did not consider that there were serious issues to be tried, because the authority of present directors of Koza Altin does not arguably derive from the allegedly corrupt judgment, but from acts of the Turkish legislature and/or executive. Moreover, that judgment was not arguably corrupt in the light of subsequent decisions of the Turkish Constitutional Court and/or the ECtHR. The Court of Appeal refused permission to appeal, and so the claimants applied for permission from the Supreme Court.

3. Mr Atkin KC submitted before me that the grounds of the application to the Supreme Court were novel and complex and had, at least, a realistic prospect of success, and so that I should not in the meantime grant the application to vary. Just over a week after I reserved judgment, the Supreme Court refused permission to appeal. The claimants then realistically conceded that they no longer had a tenable basis for resisting the variation, and consented to it. The parties could not agree on who should bear the costs of the December 2022 application and other applications and so I directed that they should make written submissions on costs and I would then determine what order to make on the basis of those submissions. Each side filed written submissions accordingly, which I have read and take into account. In short, the claimants submit that Koza Altin should pay their costs, or that costs should be reserved, or that there should be no order as to costs. At the other end of the spectrum, Koza Altin submits that Mr Ipek should pay its costs on an indemnity basis.

4. The bases on which the claimants make their submissions are as follows: First the December 2022 application to vary was premature, otiose and an abuse of process of the court as it was issued at a time when the claimants' application to the Supreme Court for permission to appeal was already pending. Second, the two day hearing listed for January 2023 was to deal with other applications which in the event were resolved and the defendant asked for the December 2022 application to be heard as the same on the basis that the time estimate would not be affected. Third, much of the evidence filed for the hearing dealt with the issue of whether there was a real risk of

unjustified dissipation of assets and or trading other than in the ordinary course of Koza's mining business by the claimants, although evidence filed by Koza Altin came from its solicitor who accepted that he had no expertise in that business. Fourth, the costs of the issues subsequently resolved were reserved. Fifth, there is no judgment or finding of the court upon which Koza Altin can assert an entitlement to costs. Sixth, after the Court of Appeal decision, the claimants agreed to consent to the variations dependent upon the outcome of the application to the Supreme Court.

5. Koza Altin submits that because the outstanding variation has now been agreed to, it has won (or inevitably would have won) and should get its costs in the usual way. The refusal of permission by the Supreme Court was on the basis that the grounds did not raise an arguable point of law and the claimants should not have opposed the variation and should not have attempted to maintain the December 2016 order beyond the Court of Appeal's decision. This court heard the December 2022 application at length and is in a good position to come to a view on who would have won. It had won at first instance and in the Court of Appeal, but was being shut out of control of its subsidiary, Koza, which remained in the sole control of Mr Ipek, and in respect of whom there were significant concerns about his misuse of Koza's asset, not least to fund these proceedings. Such was the unchallenged finding of Trower J at a previous stage of these proceedings, who saw no justification in Koza spending substantial sums of money in this way without any proportionate contribution by Mr Ipek ([2021] EWHC 786 (Ch), paragraph 130).

6. As for prematurity, Koza Altin submits that the Supreme Court lead times for permissions to appeal available at the time of the December 2022 application were in the order of a year or more. Koza Altin needed to regain control of its subsidiary from Mr Ipek in light of his misconduct and also because the claimants themselves were contending that there were urgent and important decisions that needed to be made in respect of a major Koza project, SAM Alaska, which was at risk of being lost. There was no justification for Mr Ipek retaining control following the Court of Appeal's decision, which he seemed to recognise soon thereafter, but then changed his mind for reasons which are not entirely clear.

7. I have regard to the provisions in CPR Part 44.2 as to the court's discretion regarding costs. In my judgment, the submissions of Koza Altin as to who should pay costs are to be preferred. Once the Court of Appeal had rejected the claimants' arguments and had refused permission to appeal, it was reasonable for Koza Altin to make the December 2022 application, especially in light of the finding that Mr Ipek was using Koza's assets to fund these proceedings and of the important decisions which needed to be made in respect of the SAM Alaska project. In those circumstances, Koza Altin was entitled to take the view that it was not appropriate to await the decision of the Supreme Court on the permission to appeal application, which might well have taken somewhat longer to determine than in the event it did.

8. Moreover, it my judgment the claimants faced an uphill struggle to persuade the High Court to determine that the grounds of the application for permission had realistic prospects of success when the Court of Appeal had already determined that permission should not be granted. In those circumstances it is likely that the December 2022 application would have succeeded if it had been determined. In respect of the other applications, these were eventually resolved by consent, but only finally in some respects on the morning of the hearing. I accept that most of the

evidence filed was in relation to those applications, but in my judgment the costs of Koza Altin should include the costs incurred in those other applications. There was much common background and overlap in respect of all the applications in question.

9. In my judgment, Mr Ipek should personally pay those costs. He has been in control of Koza in respect of the applications in question.

10. On behalf of Koza Altin, it is submitted that the costs should be paid on the indemnity basis, essentially because Mr Ipek had sought to cling to power even after the Court of Appeal has refused permissions, and because of his misconducted in funding the proceedings from Koza's assets. In my judgment these matters are not sufficient to take the proceedings out of the norm so as to justify indemnity costs. The costs will be assessed if not agreed on the standard basis.

11. I would be grateful if a draft order could be filed to reflect this determination.