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Client Alert

Court of Appeal upholds injunction against funding of ICSID arbitration amidst abuse of process claims

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In the recent case of Koza Ltd and Anor v Koza Altin Isletmeleri AS [2020] EWCA Civ 1018, the Court of Appeal upheld an injunction granted by the High Court which prevented an English company from funding its affiliate's pursuit of ICSID arbitration proceedings. The injunction was granted, and was upheld, on the basis that the funding was likely to breach a prior undertaking given to the Court by the appellants, even though that question (whether the undertaking would be breached or not) was never going to be decided.

The Court of Appeal's judgment, which was handed down remotely on 31 July 2020, demonstrates the Court's expansive jurisdiction to grant interim relief, including to support an existing injunction rather than an underlying claim. However, it also serves as a cautionary reminder that an attempt to raise points and claim remedies that should have been raised earlier in proceedings may well be denied on the grounds of abuse of process.

Background

The proceedings

The underlying proceedings relate to a dispute concerning the control of Koza Ltd ("**KL**"), an English mining company, which is part of the Turkish Koza Group (the "**English Proceedings**").

Koza Altin Isletmeleri AS ("**KA**") is KL's parent company, and Mr Ipek is a director of KL. During the English Proceedings, KL and Mr Ipek provided certain undertakings to the Court, including that KL would not deal with its funds other than in the ordinary and proper course of its business (the "**Course of Business Exception**").

In March 2017, Ipek Investment Limited ("**IIL**"), an English company, commenced ICSID proceedings against the Republic of Turkey. The jurisdiction for those proceedings (and IIL's connection to the Koza Group) was said to be founded on a SPA pursuant to which the Ipek family's shares in the Koza Group's holding company were sold to IIL in return for IIL issuing shares to the Ipek family, thus creating the transnational element required for the ICSID jurisdiction to bite. KA (in the English Proceedings) and the Republic of Turkey (in the ICSID arbitration) both alleged that the SPA was a fraudulent document.

The Funding Application

In June 2017, KL applied for a positive declaration in the English Proceedings that its funding of IIL in the ICSID arbitration would fall within the Course of Business Exception, or alternatively for a variation of the undertaking (the "**Funding Application**").

The High Court denied the application, holding that the funding was not permitted by the undertaking because: (i) the SPA's authenticity was open to very serious doubt; (ii) the evidence did not show that IIL had no alternative source of funding; and (iii) even if the SPA was authentic, it did not confer jurisdiction on the ICSID tribunal.[1] The High Court also refused to vary the undertaking because it determined that there had been no material change of circumstance. Therefore, the High Court issued a negative declaration that the funding was not within the Course of Business Exception.

On appeal, [2] the Court of Appeal found that the critical issue was the SPA's authenticity, and it agreed with the High Court that this was open to very serious doubt. However, the Court of Appeal found, on the basis of the evidence before it, that it could make neither a negative nor a positive declaration as to whether funding the arbitration would breach the undertaking.[3] The Court of Appeal discharged the negative declaration granted by the High Court stating, instead, that if KL funded the ICSID arbitration "*it will do so at their own risk*".[4]

The Injunction Application

Following the decision of the Court of Appeal in the Funding Application, KA's solicitors sought assurances from KL that it would provide advance notice if it intended to fund the ICSID arbitration. When satisfactory assurances were not forthcoming, KA applied for an injunction restraining: (i) KL from funding the arbitration and (ii) Mr Ipek from causing KL to take such steps (the "**Injunction Application**").

The High Court, in its judgment of 23 March 2020, granted the injunction.[5] It held that there had been no abuse of process by KA's failure to seek an injunction as part of the Funding Application proceedings, and that an injunction could properly be granted as an ancillary order to ensure the effectiveness of the earlier undertaking. Despite the additional evidence before it, the High Court found that there were still reasons to very seriously doubt the authenticity of the SPA, and, applying the balance of convenience test, held that there was a far greater risk of irremediable injustice if the injunction were refused.

The Court of Appeal's decision

KL and Mr Ipek appealed the High Court's decision in the Injunction Application. In reaching its finding, the Court of Appeal considered four issues:

1. Whether the Injunction Application was an abuse of process either (i) because it could and should have been brought as a cross-application in the Funding Application ("**Henderson Abuse**");[6] or (ii) because it was a collateral attack on the Court of Appeal's prior decision that KL's funding of the arbitration would be at its own risk ("**Hunter Abuse**").[7]

[1] Koza Ltd & Anor v Akcil & Ors [2017] EWHC 2889 (Ch).
[2] The appeal was limited to the issue of the negative declaration, rather than the variation issue as well.
[3] Koza Ltd & Anor v Akcil & Ors [2019] EWCA Civ 891.
[4] Ibid at [48].
[5] Koza Ltd, Hamdi Akin Ipek v Koza Altin Isletmeleri AS [2020] EWHC 654 (Ch).
[6] Applying the principles in Henderson v Henderson (1845) 3 Hare 100.
[7] Applying the principles in Hunter v Chief Constable of the West Midlands [1982] AC 529.

2. Whether the injunction could be granted in circumstances where the question of whether or not funding the arbitration would breach the undertaking would never be definitively decided in a forum binding on the parties.[8]

3. Whether KA had a sufficient underlying claim to support the grant of the injunction.

4. Whether the High Court had correctly exercised its discretion in granting the injunction.

Abuse of Process

The Court of Appeal,[9] having analysed the case law on Henderson Abuse and Hunter Abuse, noted that there was an overlap between these types of abuse and that both may be engaged in the same case. It found that the principles prohibiting abuse of process applied equally to interim applications as they did to final hearings, and that where a point should (rather than could) have been taken in an earlier interim application but was not, a "*significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive*".[10] On the facts, the Court of Appeal held that there was no doubt that KA could have brought the Injunction Application as a cross-application in the proceedings dealing with the Funding Application and, given the "*substantial overlap in the evidence and issues*",[11] significant time and expense would have been saved had it done so. However, this alone did not make the Injunction Application abusive.

The Court of Appeal agreed with the High Court that, based on an objective assessment of what was apparent to KA at the time of the Funding Application, it was reasonable for KA to assume that KL would not fund the ICSID arbitration without a positive declaration or a variation of the undertaking. It would therefore be wrong to say that KA should have brought the Injunction Application earlier.[12]

The Court of Appeal also found that the Injunction Application was not a collateral attack on its judgment in the Funding Application, on the basis that the Court was asked to consider different questions in each of the applications. In the Funding Application, the Court was only asked to declare whether or not the funding would be a breach of the undertaking; it had not been asked to go on and determine whether that funding should be prevented by issuing an injunction (as it was asked to do in the Injunction Application). The Court of Appeal thus held that the grounds on which the Injunction Application was based were consistent with, and sought to build upon, its conclusions in the Funding Application: the Injunction Application took as its starting point that it could not definitively be said whether the funding would, or would not, be a breach of the undertaking (i.e. the question in the Funding Application), and asked the Court to grant an injunction in those circumstances.

Jurisdiction to grant an injunction

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[8] An injunction is usually granted on the basis that there will later be a hearing or trial to determine the underlying issue. Here there was no forum where the issue of whether the threatened conduct was a breach of the undertaking was going to be tried by the parties and the Court of Appeal held that it would not be a sensible use of assets to order that the issue be tried between the parties, "*even if it had been practical to give directions to enable such hearing to take place in advance of the jurisdiction hearing in the Arbitration.*" Koza Ltd and Anor v Koza Altin Isletmeleri AS [2020] EWCA Civ 1018 ("Koza") at [76].

[9] Through the majority judgment given by Popplewell LJ.

[10] Koza at [42].

[11] Ibid at [43].

[12] Moylan LJ disagreed. He considered that KA could and should have made their Injunction Application at the same time as the Funding Application. He stated that the issue before the Court in the Funding Application was whether KL should or should not be permitted to fund the arbitration, and if KA had wanted to argue that KL should be injuncted from funding the arbitration "*then it was incumbent on them to make that application at the same time as* [KL's] *application for a declaration and a variation.*" Ibid at [156].

The Court of Appeal identified two distinct bases for its jurisdiction to grant an injunction in this case:

1. An ancillary jurisdiction to grant injunctions in order to enforce orders of the Court and undertakings. The Court of Appeal held that such jurisdiction could be invoked even where it would never be definitively established that the threatened conduct would breach the undertaking. However, a "*heightened emphasis on the merits*" would apply in such cases and the Court may need a "*high degree of assurance*" that the threatened conduct will be a breach of the undertaking before granting an injunction.[13]

2. An original jurisdiction to grant an interim injunction in support of the relief claimed in the action. The Court of Appeal alternatively held that, "[w]*here there is a dispute over control of a company the court may make interim orders…whose purpose is to preserve the value of the company in favour of a party who has a legitimate interest in preserving its value.*"[14] It found that KA, as KL's parent company, did have such an interest and that it was no bar that KA only sought declaratory remedies in its counterclaim in the underlying English Proceedings. The Court of Appeal found that the same heightened emphasis on the merits as under the ancillary jurisdiction, would apply when considering whether to exercise the Court's discretion to grant the relief, given that there would be no final determination of whether the threatened conduct would breach the undertaking.

No underlying claim

The Court of Appeal rejected KL's arguments on this ground of appeal. It held that for the Court to grant an injunction pursuant to its ancillary jurisdiction to make the undertaking effective, there was no need for an underlying claim. Under the Court's original jurisdiction, KA's counterclaim in the English Proceedings was sufficient for an injunction for the purposes of preserving its subsidiary's assets.

Exercise of discretion

The appellants had argued that the High Court was not entitled to find that it had a "*high degree of assurance*" that funding the arbitration would breach the undertaking, because this went further than the finding by the Court of Appeal in the Funding Application that there was "*very serious doubt*" concerning the authenticity of the SPA.[15] This was rejected by the Court of Appeal in the Injunction Application. It held that nothing the Court of Appeal had said in the Funding Application was "*inconsistent with their taking the view that they had a high degree of assurance that it was inauthentic if that had been something which they had had to address. They simply did not have to address it and did not do so.*"[16] There was therefore no basis for the Court of Appeal in the Injunction Application to interfere with the High Court's exercise of its discretion.

Accordingly, the Court of Appeal dismissed the appeal and upheld the granting of the injunction preventing KL from funding the ICSID arbitration.

The overriding objective

In his dissenting judgment, Moylan LJ (who would have allowed the appeal) found that (i) granting the injunction would not be consistent with the overriding objective; (ii) there was no proper basis for the injunction; and (iii) KA could and should have made their Injunction Application at the same time as the

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[13] Ibid at [77]. Moylan LJ disagreed with the majority judgment. He stated that to "*permit an application for an injunction to be made, on the basis that the proposed expenditure is allegedly in breach of an undertaking, because it is allegedly not expenditure permitted by the business exception turns the exception on its head… This converts the exception into the justification for a further injunction, and uses it, as the basis for the lower threshold of an arguable breach*." Ibid at [144].

[14] Ibid at [82].

[15] Ibid at [99].

[16] Ibid at [100].

Funding Application. On the first of these points, he stated that, while the applications differed in form, the substantive issues considered in both the Funding Application and the Injunction Application were the same.[17] In those circumstances, he considered that the Injunction Application was not consistent with the overriding objective of the Civil Procedure Rules, that "*cases should be dealt with proportionately, including by saving expense and allotting to a case an appropriate share of the court's resources.*"[18] Whilst, on the facts, the majority disagreed with Moylan LJ's conclusion, his comments are nevertheless an important reminder that the Court requires parties to prioritise efficiency in the resolution of any dispute, and a failure by a party to do so might result in the Court refusing to exercise its discretion in that party's favour.

[17] Ibid at [114] and [115].
[18] Ibid at [114].

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