Abuse of process—arbitration funding and injunctions (Koza v Koza Altin Isletmeleri)

04/08/2020

Dispute Resolution analysis: Koza Ltd unsuccessfully sought to overturn an injunction, which had been granted to Koza Altin Isletmeleri, to restrain the use of Koza Ltd's assets in an International Centre for Settlement of Investment Disputes (ICSID) arbitration pursued by a related entity. Against a complex factual and procedural background, the appeal raised questions as to whether the injunction application amounted to an abuse of process, including whether it was contrary to the rule in Henderson v Henderson, and whether the court had the power pursuant to section 37(1) of the Senior Courts Act 1981 (SCA 1981) to grant the injunction in question. By majority, the Court of Appeal concluded that seeking the injunction was neither Henderson abuse nor an abusive collateral attack on a prior decision of the Court of Appeal, and that the jurisdictional basis for the grant of the injunction to restrain a breach of an undertaking provided earlier in the proceedings had existed. Koza Ltd's appeal was dismissed accordingly. Written by Andrew Stafford QC of Kobre & Kim LLP.

Koza Ltd v Koza Altin Isletmeleri AS [2020] EWCA Civ 1018

What are the practical implications of this case?

For the purposes of arbitration law, the decision reflects a willingness of the court to intervene in matters collateral to the arbitration itself (ie funding arrangements) by granting and, on appeal, upholding injunctive relief that could arguably have the effect of financially preventing an arbitration claimant from the pursuit of its arbitration claim.

More generally, the decision of the court is important because of its treatment of abuse of process, including of the rule in *Henderson v Henderson* [1843–60] All ER Rep 378. In order to resolve the issues, the court was required to address the extent to which it was possible for a party that had obtained some level of injunctive relief to return to court to 'upgrade' that relief. The majority concluded that the test of an abusive/preclusive upgrade application was not whether the applicant merely could have applied at an earlier stage for wider relief, but whether it should have done so.

The court further reinforced the existing view that there is jurisdictional power to grant relief ancillary to an original injunction order (which applies equally to undertakings) and, more broadly, emphasised the courts' flexibility to grant injunctions pursuant to SCA 1981, s 37(1) whenever it appears '…to be just and convenient to do so'.

What was the background?

Koza Ltd wished to use some of its assets to fund an investor-state arbitration that a related entity, Ipek Investments Ltd (IIL), was pursuing against the Republic of Turkey. Control of Koza Altin Isletmeleri AS (Koza Altin) was in the hands of trustees appointed in Turkey following proceedings brought by Turkey. Hence, even though Koza Ltd and Koza Altin were parts of the same corporate grouping, they were in highly adversarial relations with each other.

IIL was an English incorporated company. Its legitimacy as a holding company was controversial within the arbitration, it being alleged by Turkey that it had been created, aided by backdated documentation, to found locus standi under the relevant bilateral investment treaty that would not otherwise have been available to any of the relevant entities incorporated in Turkey.

There had been earlier prior proceedings in the UK by which Koza Ltd sought to prevent the convening of a shareholders' meeting to remove and replace existing directors. Part of the holding regime imposed by the court included an undertaking by Koza Ltd not to use its assets 'otherwise than in the ordinary and proper course of business'.

An application was thereafter made by which Koza Ltd sought declaratory relief that using its assets to fund IIL's arbitration claim would fall within the scope of ordinary course of business. On an appeal from this funding application, the Court of Appeal declined to grant either a positive or a negative declaration and commented that '…if Koza Ltd pursues the funding of the ICSID arbitration it will do so at their own risk that it may be shown to be in breach of its undertaking to the court' (*Koza Ltd and another v Akcil and others* [2019] EWCA Civ 891).

Thereafter, Koza Altin sought but failed to receive assurances from Koza Ltd that it would give advance notice of any intention to use its assets to fund the ICSID arbitration. This, then, prompted the application for an injunction to restrain Koza Ltd from using its assets in this way.

The prior undertaking as to the use of its assets, and the prior proceedings relating to declaratory relief on the use of the assets, prompted Koza Ltd to argue that Koza Altin had missed the boat—it could have applied for stronger relief when it had the chance and, having failed to do so, the current application was an abuse of process as an abrogation of the rule in *Henderson v Henderson* as well as a collateral attack on the decision of the Court of Appeal. The judge at first instance rejected Koza Ltd's arguments and granted the injunctive relief sought by Koza Altin.

What did the court decide?

The majority (Lord Justice Popplewell and Lord Justice Asplin) concluded that, while there was considerable factual overlap between the current proceedings and the prior Court of Appeal decision and that the injunction application could have been brought in the prior proceedings, nevertheless it was wrong to say that Koza Altin should have done so. Accordingly, it was not an abuse of process (including specifically it was neither a breach of the rule in *Henderson v Henderson* nor an abusive collateral attack on the previous decision of the Court of Appeal) for Koza Altin to apply for further relief in the current proceedings.

The majority concluded that the decisions in *Holyoake v Candy* [2016] EWHC 3065 (Ch) and *Orb v Ruhan* [2016] EWHC 850 (Comm), which hold that an upgrade cannot be granted to a party without a material change in circumstances, are not irreconcilable with the decision in *Woodhouse v Consignia* [2002] EWCA Civ 275. Rather, the decision in *Woodhouse* (including the dictum that *Henderson* applies less strictly to interlocutory proceedings) merely reflects the practical reality that interlocutory proceedings involve a lower risk of irreconcilable judgments, such that arguing that the raising of a point in a subsequent application is abusive will be less easy to prove.

Koza Ltd's assertion that the relief sought by Koza Altin was an illegitimate exercise in upgrading prior relief was also rejected, again having regard to the specific factual and procedural context. In rejecting Koza Ltd's argument, the majority commented that the starting point of any such discussion is that the original undertaking had been given to the court, and that the court is not required to revisit whether the undertaking should have been given or whether the court would have granted an order in equivalent terms.

In short, the court has an interest in the enforcement of orders and undertakings and a flexible jurisdiction to do 'what is necessary to "police the order"' (para [79]). The jurisdiction to make an ancillary order to enforce an injunction or undertaking clearly existed and applied on the facts (see

paras [64]–[81]). The Court of Appeal further concluded that an alternative, original freezing order, jurisdictional basis existed for the injunction granted by the lower court (see paras [82]–[96]).

On whichever basis the flexible jurisdiction under SCA 1981, s 37(1) was being exercised, the majority considered that it had been open to the lower court to apply the test in *American Cyanamid v Ethicon* [1975] 1 All ER 504 and the principles in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16, [2009] 1 WLR 1405, and to grant the injunction on the grounds that the judge had had a high degree of assurance that the funding would be a breach of the undertaking and the balance of least irremediable prejudice favoured doing so (see paras [98]–[105]).

Lord Justice Moylan had come to 'a different conclusion' (see paras [108]–[162] for his detailed, alternative analysis). However, for the reasons set out by Popplewell LJ and detailed above, Koza Ltd's appeal against the injunction was dismissed.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Moylan LJ, Asplin LJ, and Popplewell LJ
- Date of judgment: 31 July 2020

Andrew Stafford QC of Kobre & Kim LLP is a member of LexisPSL's Case Analysis Expert Panel. If you have any questions about membership of these panels, please contact caseanalysis@lexisnexis.co.uk.