IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

31 January 2024

CASE No: AIFC-C/CA/2023/0040

MICHAEL WILSON & PARTNERS LIMITED

Appellant

v

(1) CJSC KAZSUBTON
(2) KAZPHOSPHATE LLP
(3) KAZPHOSPHATE LIMITED

Respondents

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

Court

ORDER

The required extension of time is granted but the applications for permission to appeal and a stay pending appeal are refused.

JUDGMENT

1. By proceedings in Case No. AIFC-C/CFI/2023/0002 the present Appellant, Michael Wilson & Partners, Limited, sought orders from the AIFC Court recognising and enforcing judgments given by the English High Court against the First and Second Respondents and/or judgments given by a Netherlands Court recognising and granting permission to enforce those English judgments. For reasons given in a judgment dated 26 September 2023 the AIFC Court of First Instance ("the CFI") declared that the Court had no jurisdiction to entertain those proceedings and ordered that the Claim Form be set aside and the proceedings be dismissed as against all three Respondents. By a separate judgment, dated 31 October 2023, the CFI made a consequential order for costs in favour of the Second and Third Respondents. Both judgments were given by the then Chief Justice of the Court, The Rt Hon The Lord Mance, following an *inter partes* procedure.

2. By the present application the Appellant seeks permission to appeal against those decisions, together with ancillary relief. The appellant's notice was filed on 30 October 2023 and amended on 21 or 22 November 2023 to add a challenge to the costs decision of 31 October. Written submissions in opposition to the application have been received from the Second and Third Respondents.

3. The Appellant has requested an oral hearing but the Court is satisfied that the application can be fairly determined on the papers without an oral hearing (see Rules 29.16-29.17 of the AIFC Court Rules).

4. The application requires an extension of time. By Rule 29.10 the appellant's notice must be filed within 21 days after the date of the decision of the lower Court. As regards the decision on jurisdiction, time ran from 26 September 2023, the date when the judgment was circulated by email to the parties, and not from 10 October 2023, the date contended for by the Appellant, when the physical signed original of the judgment was provided to the Appellant; and on that basis the appellant's notice was some 2 weeks out of time. The emailed judgment contained the decision and the reasons for it. It gave the Appellant all that was needed in order to determine what, if any, grounds existed for seeking permission to appeal. On the other hand, the added challenge to the costs judgment of 31 October 2023 was either within time or only just out of time. Allowance must also be made for the fact that the Appellant had to spend time during the relevant period dealing with the costs issues. Moreover, the application under consideration in the judgment on jurisdiction is a novel one and there is some value in considering the substance of the challenge to that judgment rather than dismissing the challenge on grounds of delay alone. Taking everything into account, the Court is satisfied that the required extension of time should be granted.

5. Permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be

heard: see Rule 29.6. Success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court: see Rule 29.7.

6. It is not necessary to repeat or summarise the judgments under challenge. Reference can be made to their text for the full context of the points discussed below.

7. Dealing first with the judgment on jurisdiction, it provides on its face a detailed, clearly reasoned and cogent analysis of the issues and a compelling conclusion. None of the grounds of appeal advanced by the Appellant causes this Court to doubt the correctness of the decision.

8. The first ground is that the CFI adopted the wrong procedure. It is submitted that in the common law world, applications for recognition and enforcement of foreign judgments are typically dealt with on the papers by masters, registrars and the like, not by senior judges, and other parties are not involved until a later stage; and it is contended in effect that the Court erred in not adopting a similar procedure in this case. Such a contention, however, lacks any merit. The AIFC Court Rules contain no special procedure for applications of this kind – unsurprisingly, given the CFI's finding that there is no jurisdiction to entertain them. The question whether jurisdiction existed was rightly determined by a judge of the Court (and was appropriately determined by the Chief Justice himself) applying the normal procedural rules governing claims and applications.

9. The second ground is based on a submission that as a matter of Kazakh law and practice, foreign judgments and orders are generally capable of being reciprocally recognised and enforced in the national courts of Kazakhstan, and that the CFI was in error in asserting the contrary at paragraph 52 of its judgment. Paragraph 52, however, makes the more nuanced point that the Appellant's case as to recognition and enforcement of foreign judgments by the AIFC Court, rendering such judgments enforceable not only within the AIFC but also throughout the Republic of Kazakhstan, "would have the direct effect of side-stepping any provisions of ordinary Kazakh law regarding recognition and enforcement of foreign judgments". Reference is made to an unsuccessful attempt by the Appellant to enforce the relevant judgments in the ordinary courts of Kazakhstan in 2006, and to Article 501 of the Civil Procedure Code of Kazakhstan "which provides for recognition and enforcement of foreign judgments by the ordinary Courts, but only under conditions and procedures determined by law or by international treaty ratified by the Republic". The point is made by the Appellant that the 2006 proceedings did not relate to or include the later English and Dutch judgments in issue and, more importantly, that foreign judgments and orders can be recognised and enforced in the ordinary courts of Kazakhstan on the basis of reciprocity, to which Article 501 of the Civil Procedure Code also refers. Those points serve to qualify, but do not undermine, the reasoning in paragraph 52 of the CFI's judgment. In any event, paragraph 52 provides only an additional and subsidiary reason for the CFI's conclusion as to the AIFC Court's lack of jurisdiction; and even if the paragraph were in error it would not affect the primary reasoning in support of that conclusion.

10. The third ground is an argument that the AIFC Court has jurisdiction because, on the *Respondents'* case, a company called KazChemicals LLP is now the sole participant in, and an integral part of, the Second Respondent and is itself an AIFC Participant, and the Court has jurisdiction over AIFC Participants. Such an argument is wholly unconvincing and fails to address, let alone to undermine, the reasoning of the CFI that the Court has a specifically delimited jurisdiction and that the present

proceedings do not fall within any of the heads of jurisdiction contained in particular in Article 13 of the Constitutional Statute and Regulation 26 of the AIFC Court Regulations. A generalised contention that the Court has jurisdiction over AIFC Participants takes the Appellant nowhere. It should also be noted that on the *Appellant's* case the Third Respondent, not KazChemicals LLP, is the sole participant in the Second Respondent and is subject to the jurisdiction by that route: that is a matter considered below in the context of the sixth ground of appeal.

11. The fourth ground is that Regulation 40 of the AIFC Court Regulations, in particular Regulation 40(3), envisages and allows the recognition of, and the grant of permission to enforce, English and Dutch judgments and not merely AIFC Court judgments and arbitral awards. Regulation 40 is, however, examined in detail at paragraphs 38 to 47 of the CFI's judgment, where the Appellant's arguments are considered and rejected. The submissions now advanced by the Appellant do not disclose any flaw in the Court's reasoning.

12. The fifth ground is that there is and was no need for the Appellant to file and serve a "claim", through the issue of a Claim Form, since reciprocal recognition and the grant of permission to enforce is always sought in court systems by means of an "application" and not by a "claim"; so that there was never any need for the Appellant to do anything other than file an "application", as it did. It is submitted that the Appellant should not be prejudiced by the AIFC Court's use of a standard form applicable both to claims and to applications; that in seeking reciprocal recognition and permission to enforce one does not have to prove jurisdiction; that it was wrong to involve the Respondents; and in summary that the CFI adopted the wrong procedure. Those points overlap with the substance of the first ground of appeal, dismissed above, and in any event they take the Appellant no further. They reflect the Appellant's argument summarised at paragraph 29 of the CFI's judgment, in particular that there is "no need to look within the Constitutional Statute or Court Regulations for a jurisdictional basis for a simple application of this sort". The CFI's judgment, however, rejects that argument on solid grounds. It establishes a clear requirement to find a jurisdictional basis within the Constitutional Statute and Court Regulations and (as set out at paragraph 53 of the judgment) for proceedings to be begun by completing a claim/application form identifying the head of jurisdiction relied on.

13. The sixth ground relates to paragraph 27 of the CFI's judgment, where the Court gives reasons why, even leaving aside the core jurisdictional issue, the Appellant had not made good any basis for seeking to join the Third Respondent in the claim. The submissions overlap with the third ground, considered above. It is contended that on the Appellant's case the Third Respondent was and is the sole participant in the Second Respondent, a limited liability partnership, and as such exercises management and control of the Second Respondent; the Third Respondent has assets in the jurisdiction, and the Appellant quite properly applied for permission to reciprocally recognise and enforce against it through the AIFC Court. As to the Respondents' case that KazChemicals LLP, not the Third Respondent, is now the sole participant in the Second Respondent, the validity of the alleged transfer of the participatory interests from the Third Respondent to KazChemicals LLP is denied, but it is contended that the exercise by KazChemicals LLP of its rights as sole participant in the Second Respondent would fall within Article 13.4(2) of the Constitutional Statute as "activities conducted in the AIFC" and within Regulation 26(1)(b) of the Court Regulations as "operations carried out in the AIFC". It is submitted that the CFI's judgment is in error in failing to address these various

matters. Such an argument is again wholly unconvincing. It does not undermine the reasons given in paragraph 27 of the judgment for holding that the proceedings against the Third Respondent were irregular and inadmissible, whatever the merits of the core jurisdictional issue. Nor does it provide any sensibly arguable basis for bringing the proceedings within the heads of jurisdiction in Article 13 of the Constitutional Statute or Regulation 26 of the Court Regulations or for otherwise doubting the correctness of the CFI's conclusion that there was no jurisdictional basis for the present proceedings in the Constitutional Statute or the Court Regulations.

14. The seventh and final ground relates to the costs judgment. It is submitted in summary that the CFI erred by not granting the Appellant an oral hearing to which it was entitled in relation to costs; by refusing to proceed by way of detailed assessment (the Chief Justice not being equipped to conduct the assessment exercise himself); by ignoring submissions of the Appellant which included evidence that the Third Respondent's legal representatives were paid by a bank and not by any of the Respondents, and submissions as to the excessive nature of the purported costs; and by not allowing a set-off of the judgment debts owed by the Respondents to the Appellant. None of those submissions is sustainable. The Court Rules confer no automatic right to an oral hearing in relation to costs. It lies within the discretion of the Court whether to deal with the matter on the papers or to direct a hearing. It cannot be said that the decision of the CFI to proceed in this case on the papers was an erroneous exercise of discretion. Further, all parties were given a fair opportunity to make submissions, and those submissions were plainly taken into account by the Court in reaching its decision on costs. The decision to order the Appellant to pay the Second and Third Respondents' costs was taken on a principled basis in accordance with the Rules; as was the decision, in the exercise of the discretion under Rule 26.13, to make an immediate assessment of the costs rather than to order a detailed assessment. The Court was reasonably entitled to accept the Respondents' documentation in support of their costs claims, and to reject the Appellant's objections. It was well within the discretion of the Court to make an immediate assessment in the full amounts claimed.

15. In conclusion, neither as regards the judgment on jurisdiction nor as regards the costs judgment would an appeal have a real prospect of success. Nor is there any other compelling reason why an appeal should be heard, given the clear-cut nature of the decision reached by the then Chief Justice of the Court and notwithstanding the potential significance of the jurisdiction issue.

16. Accordingly, the conditions for the grant of permission to appeal are not met and the application for permission must be refused.

17. As to ancillary relief, this Court has previously made an order refusing the Appellant's application for a stay pending determination of the application for permission to appeal. In the light of the refusal of permission to appeal, the Appellant's further application for a stay pending an appeal must also be refused.

By the Court,

Sir Stephen Richards

Justice, AIFC Court

Representation:

The Appellant was represented by Mr Michael Wilson, Partner, Michael Wilson & Partners, Limited, Almaty, Kazakhstan.

The First Respondent was not represented.

The Second Respondent was represented by Mr Bakhyt Tukulov, Partner, Tukulov & Kassilgov Litigation LLP, Almaty, Kazakhstan.

The Third Respondent was represented by Ms Dinara Nurgazy, Associate, Kinstellar LLP, Almaty, Kazakhstan.