Neutral Citation Number: [2017] EWHC 2889 (Ch)

Case No: HC-2016-002407

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2017

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

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Between:

KOZA LIMITED
HAMDI AKIN IPEK

Claimants

- and –

MUSTAFA AKÇIL
HAYRULLAH DAĠISTAN
MAHMUT HIKMET KELEŞ
HAMZA YANIK
ARIF YALÇIN
KOZA ALTIN IŞLETMELERI AS

Defendants

- -

Lord Falconer of Thoroton, Siward Atkins and Tom Hickman (instructed by Gibson Dunn & Crutcher LLP) for the Claimants
Jonathan Crow QC and David Caplan (instructed by Mishcon de Reya LLP) for the Defendants

Hearing dates: 22 September and 9 October 2017

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Introduction

1. This is an application by the first claimant ("Koza Limited"). It arises out of an Order made by Asplin J on 21 December 2016 ("the Order") and, in particular, an undertaking given by Koza Limited in the First Schedule to the Order that, until trial or further Order, Koza Limited "will not dispose of, deal with or diminish the value of any funds belonging to [it] or held to [its] order other than in the ordinary and proper course of business" ("the Undertaking"). The application is made pursuant to paragraph 2 of the Order, which provides that the parties shall have liberty to apply "including in relation to the undertakings set out in the Schedules hereto". The Order embodied the agreement of the parties to continue, with minor variations, a regime which had been put in place as a result of an application for various injunctions which had been made by Koza Limited to Snowden J without notice on 16 August 2016 and the continuation by consent on 25 August 2016 of the interim relief that had been granted by Snowden J.

2. The application seeks orders (a) declaring that four classes of expenditure are within the terms of the Undertaking, alternatively (b) that the Undertaking be varied "for good reason" to permit that expenditure. The application notice (dated 20 June 2017) states that the reasons for the application are (i) that the expenditure is in the commercial interests of Koza Limited and, if not allowed, is likely to impede its business activities; (ii) that the expenditure would not offend the purpose of the Undertaking, which is said to be "to ensure that orders of the court are not rendered ineffective by expenditure that is not for legitimate business expenses"; and (iii) that the expenditure is "necessitated by the extreme and unique circumstances facing the claimants". One of those classes of expenditure, relating to the release of funds to pursue applications before the European Court of Human Rights, was not pursued at the hearing before me, because on 4 May 2017 (but on Koza Limited's case unknown to it at the time when the application was issued) that Court had made a ruling the effect of which is that the applications are or will be inadmissible due to a failure to exhaust domestic remedies in Turkey. In the result, this judgment is only concerned with the remaining three classes of expenditure.

3. The application is resisted root and branch by the sixth defendant ("Koza Altin"), in essence on two grounds. First, the proposed expenditure does not fall within the terms of the Undertaking because it would not be made "in the ordinary and proper course of business" of Koza Limited. Second, the Order should not be varied so as to permit the expenditure, in particular because that would enable the assets of Koza Limited, which is a wholly-owned subsidiary of Koza Altin, to be used not for the benefit of Koza Limited, but instead for the benefit of the second claimant ("Mr Ipek") and his family.

4. Koza Altin made clear that, in resisting the application in this way, it did not intend to give up or prejudice a jurisdictional challenge to these proceedings which it had argued before, and which had been rejected by, Asplin J. Koza Altin's appeal against that decision of Asplin J was heard by the Court of Appeal on 13 and 14 September 2017,

and judgment was reserved. At the time of the hearing before me that judgment was still awaited, but it has since been handed down by the Court of Appeal: see *Koza Ltd & Anor v Akcil & Ors* [2017] EWCA Civ 1609. The appeal was dismissed for reasons given by Floyd LJ, with whom Flaux LJ agreed. The outcome of the appeal does not affect the matters that I have to decide, although I am fortunate in now being able to adopt the exposition of these proceedings that is contained in the judgment of Floyd LJ.

5. At one stage, issues were flagged up concerning the admissibility of materials that were served late. As the hearing progressed, however, both sides referred to these materials without objection, and this judgment proceeds on the basis that these points have gone.

6. Lord Falconer appeared for Koza Limited and Jonathan Crow QC for Koza Altin. I am grateful to them, and to their juniors and solicitors, for the high standard to which this case was prepared and presented, and in particular for their well-argued submissions.

The proceedings in outline

7. What follows is substantially in the words of the judgment of Floyd LJ.

8. The proceedings concern a dispute between rival parties over the management and control of Koza Limited. Mr Ipek is a director of Koza Limited and a member of the family which owns the corporate group to which Koza Limited belongs ("the Koza Group"). The Koza Group is a large Turkish-based mining and media conglomerate. Koza Altin is a member of the Koza Group and Koza Limited is its wholly-owned subsidiary.

9. Following a police raid of the Koza Group's headquarters in Ankara in September 2015, allegations were made by the Turkish authorities that the Koza Group was involved in the financing of terrorism. On 26 October 2015, an Ankara Criminal Peace Judge made an order under article 133(1) of the Turkish Criminal Procedure Code replacing the then existing boards of various companies within the Koza Group (including Koza Altin) with trustees who were required to manage those companies pending further investigations. An appeal from that decision was rejected on 12 November 2015 and a further appeal dated 18 November 2015 was lodged with the Constitutional Court but has not been dealt with. Pursuant to two further decisions of the Turkish Criminal Peace Court dated 13 January and 3 March 2016, the first to fifth defendants were appointed trustees of Koza Altin.

10. On 19 July 2016 a notice ("the section 303 notice") under section 303 of the Companies Act 2006 ("the 2006 Act") was purportedly served on behalf of Koza Altin requisitioning a general meeting of Koza Limited to pass resolutions replacing its directors (including Mr Ipek) with the first, second and third defendants. Koza Limited did not call such a meeting. Thus, following the statutory procedure, on 10 August 2016 a further notice under section 305 of the 2006 Act was purportedly served on behalf of

Koza Altin, calling for a general meeting of Koza Limited for the purpose of passing those resolutions ("the section 305 notice").

11. Article 26 of Koza Limited's articles of association provides:

> "26.1 Each shareholder shall exercise all voting rights and powers of control available to him in relation to the Company to procure that, save with A shareholder consent, the Company shall not effect any of the following matters:
> (a) Permit or cause to be proposed any amendment to the Articles;
> (b) Permit the appointment or removal of any person as a director of the Company; or
> (c) …
> 26.2 As a separate obligation, severable from the obligations in clause 26.1, the Company agrees that, save with A Shareholder Consent, the Company shall not affect any of the matters referred to in subparagraphs (a) to (c) of Article 26.1 above."

12. Article 2.1 defines "A Shareholder Consent" as meaning "the prior, signed written consent of each A Shareholder". The two A shareholders were Mr Ipek and his brother, each of whom held one A share. It is the claimants' case that at least Mr Ipek did not and would not consent to the resolutions.

13. On 16 August 2016 the claimants commenced these proceedings seeking (i) declarations that the section 303 and section 305 notices were ineffective, (ii) an injunction preventing the defendants or any of them from holding any meeting of Koza Limited pursuant to those notices, (iii) an injunction to restrain the first five defendants or any of them from holding themselves out as having the authority to act for or to bind Koza Altin as a shareholder of Koza Limited and from causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Limited. This relief was stated to be sought on two grounds. The first ground was that by article 26 of Koza Limited's articles of association, the resolutions to which the notices related could not be passed without the consent of Mr Ipek as an A shareholder and he did not consent. The second ground was that the court should not recognise any authority of the first five defendants to cause Koza Altin to serve the notices or any further notices or to take any other step as a shareholder of Koza Limited because such authority was granted (i) illegally under Turkish law, (ii) on an interim basis only, and (iii) in breach of natural justice and/or article 6 ECHR. Further, it would be contrary to public policy to recognise the grant of such authority. These two grounds for seeking the relief claimed have been referred to in these proceedings as "the English company law claim" and "the authority claim".

14. The basis of the authority claim, as it has been called, is expanded in the Particulars of Claim at paragraphs 5-30. Paragraph 5 of the pleading asserts that the English courts should not recognise any authority of the Trustees to cause Koza Altin to call any general meetings of the company or to do or permit the doing of anything else as a shareholder of the company. It is said by the claimants that the appointment of the Trustees was unlawful as a matter of Turkish law and that there is no way in practice of

redressing this through an appeal; that the judicial process by which the Trustees were appointed was contrary to natural justice and to article 6 ECHR; and that the purpose for which the Trustees were appointed was to assist the Turkish government to expropriate the assets of Mr Ipek, his family and businesses for unjustified political reasons. While it was not necessary for the purposes of the judgment of Floyd LJ to rehearse the detail of all the allegations which the claimants then make concerning events following the appointment of the Trustees, the breadth of those allegations was referred to in the arguments before me, and I therefore summarise them as follows:

(1) Paragraphs 17-30 of the Particulars of Claim are entitled "Attempts by the Trustees to misappropriate the funds representing [Koza Limited's] share capital". Those paragraphs detail events which start, in effect, on 10 November 2015 with the making of a freezing order that was made against bank accounts with Garanti Bank in Luxembourg into which Koza Limited had paid the £60m share capital that had been injected into it by Koza Altin, and which end on 19 July 2016 with the outcome of a summary proceeding in Luxembourg in which Koza Limited was successful in obtaining a judgment that Garanti Bank should make the monies standing to the credit of those accounts available to Koza Limited.

(2) Paragraph 30 pleads that on 19 July 2016, the same day as the Luxembourg Court gave judgment in favour of Koza Limited, the Trustees sought to replace the board of Koza Limited with themselves, and that two days later on 21 July 2016 they purported to direct the board to freeze the monies in the above accounts with Garanti Bank pending their appointment as directors. Paragraph 30 then pleads:

> "It is therefore to be inferred that the Trustees are seeking to have themselves appointed as directors of [Koza Limited] in order to obtain direct control of its share capital. As the Trustees have shown no interest in [Koza Limited's] business, and are not capable of carrying it on anyway, it is to be inferred that their intention is to misappropriate [Koza Limited's] funds and put them under the control of the Turkish government as part of the government's larger plan to destroy the Koza Group, Mr Ipek and his family."

15. The pleading then turns to the section 303 and 305 notices and the claimants' case on why those notices were invalid. Paragraph 34 asserts:

> "The s 303 Notice was invalid because:
> (1) The Trustees have no authority in this jurisdiction to cause Koza Altin to do anything as a shareholder of the Company; and in any event
> (2) The s 303 Notice was invalid as a matter of English company law."

16. The pleading goes on to explain that the first of the grounds (the authority claim as it has been called) has already been explained, but that the second ground (the English company law claim) will be explained below. By section 303 of the 2006 Act, members

of a company can only require the directors to call a general meeting to consider resolutions which "may properly be moved". Section 303(5) provides that a resolution may be properly moved at a meeting unless it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise). The claimants contend that the proposed resolutions were not such as could properly be moved at a general meeting of the company because they would, if passed, be ineffective for the purposes of section 303(5)(a) of the 2006 Act as being contrary to the Company's constitution.

17. At paragraph 44, under the heading "Claimants' case on need for final relief", the pleading asserts that the defendants are likely unless restrained to purport to serve further notices under section 305 of the 2006 Act following the directors' refusal to call a meeting in response to the section 303 notice; and/or take further steps to try to change the constitution of the board of the company, misappropriate funds representing its share capital and/or its other assets, or otherwise harm the business of the company.

18. The relief claimed in paragraph 45 reflects, in somewhat expanded form, that sought in the claim form which is summarised above.

19. On the same day as the claim form was issued, the claimants sought an injunction, without notice to the defendants, to prevent any meeting of Koza Limited taking place for the purpose of passing the resolutions. Snowden J granted the injunction. He concluded, albeit in the absence of argument from the defendants, that there was jurisdiction over the defendants because both aspects of the claim fell within Article 24(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Recast Judgments Regulation").

20. On 14 September 2016 all the defendants filed an acknowledgement of service in which they stated that they intended to contest the jurisdiction of the English court. On 7 October 2016 they issued an application to that effect. On the same day, Koza Altin (but not the Trustees) served a defence and counterclaim. The defence contains an express reservation that it is served subject to a jurisdictional challenge on the part of Koza Altin as to the authority claim (at that stage called the Trustee issue) and by the first five defendants as to both the authority and the English company law claims. The defence does not plead to any aspect of the Particulars of Claim which alleges want of authority on the part of the Trustees. In paragraph 9(3) of the defence Koza Altin pleads that the purported introduction of article 26 into the company's articles of association was invalid and ineffective, having been carried out otherwise than in good faith for the benefit of the company as a whole; that the purported issue and allotment of the A ordinary shares was invalid and ineffective, again having been carried out otherwise than in good faith for the benefit of the company as a whole and/or for an improper purpose; and that article 26 is unenforceable, being an unlawful fetter on powers

conferred upon the company by statute, including the power under section 168(1) of the 2006 Act to remove a director by ordinary resolution.

21. The counterclaim incorporates by reference the relevant contents of the defence and adds no further factual allegation. It also expressly states that the counterclaim is not intended to waive the jurisdictional challenges that the defendants have made. The relief claimed in the counterclaim is purely declaratory. It claims declarations that (1) the changes introducing article 26 purportedly effected to the company's articles of association in September 2015 were invalid and ineffective and/or that article 26 is unenforceable or otherwise ineffective, and (2) the resolution purportedly passed by the directors at the board meeting on 11 September 2015 and/or the purported issue and allotment of A ordinary shares to Mr Ipek and his brother were invalid and ineffective.

22. In September 2016, the Turkish Savings Deposit Insurance Fund ("SDIF") was appointed as "trustee" in place of the first five defendants, and then purported to use its power as such to appoint a new board of directors of Koza Altin. For that reason the first five defendants are sometimes referred to as the former trustees.

23. There have been further procedural developments since Koza Altin served its defence and counterclaim. On 3 November 2016 the claimants issued an application to strike out "the Acknowledgement of Service, Defence and Counterclaim and other documents filed by Mishcon de Reya [the defendants' solicitors] on behalf of" Koza Altin, with an associated application for directions for a trial of that application. These applications can be referred to as "the strike out application" and "the directions application". The strike out application appears to have been brought (a) because of the procedural requirement to raise objections to authority at an early opportunity rather than rely on them as a defence at trial, see e.g. *Russian Commercial and Industrial Bank v Comptoir D'Escompte de Mulhouse and others* [1925] AC 112 at 130; and (b) to guard against the possibility that the authority claim was held to be outside the jurisdiction of the court. In those circumstances, the claimants wished to preserve the ability to argue that the defendants' solicitors had no authority to act in the context of the English company law claim.

24. Koza Altin took the view that the strike out application was misconceived. On the second day of the hearing before Asplin J it put forward a draft application notice setting out the reasons why it considered that the strike out application should be summarily dismissed in the exercise of the court's case management powers.

25. Asplin J held that the court had jurisdiction in respect of all the issues raised in the action. If she was wrong about that, she held that by counterclaiming in the action Koza Altin had submitted to the jurisdiction. She expressed puzzlement about the strike out application. In her judgment she pointed out that, unlike in cases where a defendant wishes to take a point on the authority of those purporting to act for the claimant, the claimants had brought Koza Altin before the court as a defendant. She continued:

> "It seems to me that it would be a nonsense if, having done so, the Claimant could contend that the Acknowledgment of Service and Defence could be struck out as an abuse of process arising from the very lack of authority which is relied upon in the claim itself."

26. Asplin J then went on to consider whether the position was different in relation to the counterclaim and concluded that it was not. She also held that:

> "…it would also make a nonsense of the Jurisdiction Application if it were possible, having lost that application in relation to the Authority Claim, to seek to resurrect it outside the ambit of Article 24(2)…"

27. In the result, however, Asplin J adjourned the strike out application to be dealt with at the trial of the "Authority Issue". By that stage undertakings had been given by the defendants not to assert that the strike out could not be dealt with at trial, thus waiving any point based on the principle in *Russian Commercial and Industrial Bank* (*supra*), and the claimants had waived any potential case of breach of warranty of authority against Mishcon de Reya. Asplin J ordered that the costs of the strike out application should be costs in the Authority Issue. She ordered that the claimants should pay the defendants' costs (if any) of the associated directions application.

28. The issues before the Court of Appeal were, accordingly, as follows: (1) whether Asplin J was correct to hold that the proceedings were within Article 24(2) of the Recast Judgments Regulation ("the jurisdiction issue"); (2) whether Koza Altin had in any event submitted to the jurisdiction of the English court in relation to the authority claim ("the submission issue"); and (3) whether Asplin J's refusal to dismiss the strike out application was wrong ("the strike out issue").

29. The Court of Appeal ruled in favour of Koza Limited on the jurisdiction issue. In those circumstances, the submission issue did not strictly arise. However, the Court of Appeal stated that, if the issue had arisen, it would not have reached the same conclusion as Asplin J in relation that issue. The Court of Appeal declined to interfere with the decision of Asplin J to stand the strike out application over to the trial of the claim.

Ordinary and proper course of business

30. The parties did not agree as to the correct approach to the interpretation of the expression "in the ordinary and proper course of business" in the Undertaking.

31. It seems clear that the inspiration for these words came from the standard form freezing injunction. This fits in with the context in which the Undertaking was given by Koza Limited. In correspondence in July 2016 Koza Altin expressed concern that Koza Limited, acting in particular through the medium of Mr Ipek, would dissipate its assets or utilise them on expenditure which was not for the benefit of Koza Limited. While it did not accept that Koza Altin would have any basis for seeking let alone obtaining a

freezing injunction against it, Koza Limited stated in correspondence that it would only make payments "bona fide in the ordinary and proper course of its business (whether that be existing or new projects)" (see letter dated 2 August 2016). It seems that Koza Limited was willing for this stance to be reflected in the Undertaking, as something it was prepared to concede when reaching agreement about whether and in what form interim relief should be continued by consent on 21 December 2016; Asplin J was not required to make any ruling on this.

32. Against this background, Lord Falconer submitted that the objective of the Undertaking was the same as that of a freezing injunction, namely to prevent dissipation of the assets of Koza Limited. Accordingly, he submitted, what matters is not whether the expenditure is "routine, novel or extraordinary" but, rather, the purpose of any proposed expenditure, and, in particular, whether or not it is such as would "further the ordinary operational activities of the company as a going concern".

33. Lord Falconer also submitted that the Undertaking should be interpreted narrowly and in favour of Koza Limited, by analogy with the "strict construction principle" that, because the consequences of breach are serious, injunctions must be "clear and unequivocal" and "strictly construed" in favour of the addressee. This principle was referred to by Lord Clarke JSC, with whom the other members of the Supreme Court agreed, in *JSC BTA Bank v Ablyazov* [2015] 1 WLR 4754 at [13] in the context of discussing the judgment of Beatson LJ in the Court of Appeal in that case. However, it does not seem to have played any part in the subsequent reasoning of Lord Clarke, which included that the proceeds of certain loan agreements were "assets" within the meaning of the extended definition in paragraph 5 of the freezing order in that case on the basis that Mr Ablyazov had power "directly or indirectly to dispose of, or deal with [the proceeds] as if they were his own".

34. Mr Crow did not in terms accept any of these propositions. Nor did he put forward any specific formulation of his own as to the precise meaning to be attributed to the words "in the ordinary and proper course of business" in the present context. On one view, however, his references to the correspondence which preceded the agreement of the Undertaking suggest a recognition that the appropriate analogy in the present case is with a freezing injunction. The thrust of his argument was that, whatever approach to interpretation is correct, none of the expenditure now proposed by Koza Limited would be "in the ordinary and proper course of business" for the purposes of the Undertaking.

35. In support of that argument, Mr Crow made some general observations. These included that Koza Limited is a mining company and not a litigation funder; that, although Mr Ipek is presently able to exercise sole control over the company, his interests and the interests of the company are not necessarily the same; and that due to Mr Ipek's position of sole control it is necessary to take particular care to distinguish between Mr Ipek's interests on the one hand and the interests of the company on the other, and in determining whose interests would truly be served by the proposed expenditure.

36. Lord Falconer referred me to *Countrywide Banking Corporation Ltd v Dean* [1998] AC 338. That was a decision of the Privy Council in which the judgment was given by Gault J. The issue in that case was whether a transaction by a company should be set aside, following its liquidation, on the basis that it was a preference within the New Zealand Companies Act 1955. The applicant applied to the High Court of New Zealand for an order that the transaction should not be set aside on the ground that it had taken place in the ordinary course of business. Gault J referred to the diversity of contexts in which the courts had given consideration to the expression "the ordinary course of business". Having reviewed a number of authorities, Gault J said at p349 that there were difficulties in drawing upon formulations derived from different legal and factual contexts and treating them as applicable in all circumstances, that "[t]his is particularly so where the test is essentially one of fact in any event", and that for these reasons "their Lordships do not adopt any particular formulation".

37. Nevertheless, Lord Falconer submitted that some general observations of the Privy Council should properly be viewed as being of application in the context of the Undertaking. In particular, Gault J stated that:

    (1) "the transaction must be examined in the actual setting in which it took place";

    (2) this "defines the circumstances in which it is to be determined whether it was in the ordinary course of business";

    (3) this determination then "is to be made objectively by reference to the standard of what amounts to the ordinary course of business";

    (4) "the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business";

    (5) "[b]ecause the transaction is undertaken objectively by reference to the ordinary course of business, there may be circumstances where a transaction, exceptional to a particular trader, will nonetheless be in the ordinary course of business as for example its first transaction of a particular type" and (conversely) "[i]t may be that transactions undertaken in the past will, because of changed circumstances, no longer be considered as in the ordinary course of business"; and

    (6) "[t]he particular circumstances will require assessment in each case".

38. Lord Falconer also relied on *Reynolds Bros (Motors) Pty Ltd v Esanda Ltd* (1983) 8 ACLR 422, in which the Court of Appeal of New South Wales was required to consider whether an unusual trading transaction by a company was contrary to an equitable mortgage and floating charge which it had given to a bank. Mahoney JA said at p428 (omitting citation):

> "The principle by reference to which it is to be determined whether a subsequently created interest is held free of a floating charge is clear … where it is provided that the charge is a floating charge, or where the intention that it be such appears from the terms of the charge … or where it is the intention of the parties that the company continue to deal with the charged asset as part of a continuing business … the company will be entitled, while the charge continues to float, to deal with such assets free of it. The test conventionally adopted for determining whether what the company has done is within this principle is: was it done by the company in the ordinary course of business? … within this principle, 'ordinary' is not to be confined to what is in fact ordinarily done in the course of the particular business of the company. Transactions will be within this principle, even though they be, in relation to the company, exceptional or unprecedented."

39. In *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch), [2005] BCC 634, a case that was not cited to me, Etherton J carried out an extensive review of "numerous English, Australian and New Zealand authorities". That was done in the context of considering whether a transaction fell within the ordinary course of business of a company for the purpose of a floating charge. In that case, one party submitted that a transaction of one of the companies in the material group was only in the ordinary course of its business if it was "part of the common flow of business done by the company, forming part of the ordinary course of business which it carried on, calling for no remark and arising out of no special or particular situation", whereas the other party submitted that it would be in the ordinary course of the business of one of the group companies if it "was not fraudulent, was within the ambit of the memorandum of association of the company, and was not calculated to bring the business of the company to an end". These formulations were derived from judgments in different cases. Etherton J decided that neither of these extreme positions was correct.

40. Etherton J considered not only the authorities relied upon by Lord Falconer in the present case but also *Re Florence Land and Public Works Co* (1878) LR 10 Ch D 530, p541 (Jessel MR); *Re Hamilton's Windsor Ironworks* (1879) LR 12 Ch D 707, p712 (Malins V-C); *Willmott v London Celluloid Co* (1887) LR 34 Ch D 147*; Driver v Broad* [1893] 1 QB 744 (Court of Appeal); *Re Borax Co* [1901] 1 Ch 326 (Court of Appeal); *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd* (1948) 76 CLR 463 (Rich J); *Torzillu Pty Ltd v Brynac Pty Ltd* (1983) 8 ACLR 52 (Helsham CJ, sitting in the Equity Division of the Supreme Court of New South Wales); *Liquidator of West Mercia Safetyware Ltd v Dodd* (1988) 4 BCC 30 (Court of Appeal)*; Re MC Bacon Ltd (No 2)* [1991] Ch 127 (Millett J)*; Julius Harper Ltd v F W Hagedorn & Sons Ltd* [1991] 1 NZLR 530 (New Zealand Court of Appeal); and *Fire Nymph Products Ltd v The Heating Centre Pty Ltd* (1992) 7 ACSR 365. Having done so, he concluded at [227] that it would not be appropriate to attempt to set out any particular formulation of the test for determining whether a transaction falls within the ordinary course of a company's business for the purpose of a floating charge, or to make any

comprehensive statement of the criteria for determining when a transaction is to be held to have taken place in the ordinary course of business for that purpose. He continued:

> "On the other hand, it may be helpful to summarise briefly the following conclusions that I have reached from the decided cases that I have reviewed: (1) The question whether a particular transaction is within the ordinary course of a company's business in the context of a floating charge is a mixed question of fact and law; (2) it is convenient to approach the matter in a two-stage process; (3) first, to ascertain, as a matter of fact, whether an objective observer, with knowledge of the company, its memorandum of association and its business, would view the transaction as having taken place in the ordinary course of its business; and, if so (4) secondly, to consider whether, on the proper interpretation of the document creating the floating charge, applying standard techniques of interpretation, the parties nonetheless did not intend that the transaction should be regarded as being in the ordinary course of the company's business for the purpose of the charge; (5) subject to any such special considerations resulting from the proper interpretation of the charge document, there is no reason why an unprecedented or exceptional transaction cannot, in appropriate circumstances, be regarded as in the ordinary course of the company's business; (6) subject to any such special considerations, the mere fact that a transaction would, in a liquidation, be liable to be avoided as a fraudulent or otherwise wrongful preference of one creditor over others, does not, of itself, necessarily preclude the transaction from being in the ordinary course of the company's business; (7) nor does the mere fact that a transaction was made in breach of fiduciary duty by one or more directors of the company; (8) such matters in (6) and (7) may, however, where appropriate and in all the circumstances, be among the factors leading to the conclusion that the transaction was not in the ordinary course of the company's business;(9) transactions which are intended to bring to an end, or have the effect of bringing to an end, the company's business are not transactions in the ordinary course of its business."

41. The question in the present case is not whether each of the proposed classes of expenditure falls within the ordinary course of the business of Koza Limited for the purposes of a floating charge, but whether it does so for the purposes of the Undertaking. It is necessary to bear that in mind before applying these authorities to the facts of the present case. It seems to me, however, that they suggest that it would not be inappropriate to have regard to the following considerations in the present case:

    (1) First, to ask whether an objective observer, with knowledge of Koza Limited, its memorandum of association and its business, would view the proposed expenditure as being made in the ordinary and proper course of its business.

    (2) Second, to ask whether, on the proper interpretation of the Undertaking, the parties nonetheless did not intend that the proposed expenditure should be

regarded as being in the ordinary and proper course of the business of Koza Limited for the purpose of the Undertaking.

(3) Third, and subject always to the foregoing, to recognise that the fact that the proposed expenditure is unprecedented or exceptional does not of itself preclude it from being regarded as one that would be made in the ordinary and proper course of the business of Koza Limited.

(4) Fourth, to recognise that if the proposed expenditure would give rise to a breach of fiduciary duty by Mr Ipek (or any other director of Koza Limited), that may properly lend support to the conclusion that the expenditure would not be in the ordinary and proper course of the business of Koza Limited.

42. Because the standard form of freezing injunction uses the same words as the Undertaking, and there are many cases concerning the ambit and terms of freezing injunctions, I asked whether there were cases in which the meaning of the expression "in the ordinary and proper course of business" had been considered in that context. In response to these observations, Lord Falconer referred to a number of additional cases.

43. In *Major General Campbell Mussells (And Others) v Okerentugba Gbataminigin Thompson The Ogt Group of Companies Limited* [1984] WL 282938, the Court of Appeal dismissed an appeal against a decision of Bingham J whereby he had varied a freezing injunction to permit expenditure on legal expenses. The background to that application was described by Sir John Donaldson MR as follows: "There has been a long history of Mareva injunctions, changes in Mareva injunctions and so on, in this action and associated actions. The first defendant has been an arms dealer. He comes from Nigeria. He is on any view an entrepreneur. He has made inadequate disclosure of what his assets are outside the jurisdiction. That has been found by at least two of the Commercial Court judges. But the situation which was reached in front of Bingham J was that it was said that there was a desperate need for funds to enable legal representation to continue. There was affidavit evidence that the two Mrs. Thompsons and their 19 children were in dire straits in London because all the funds available to them were drying up." The Court of Appeal rejected the notion that the discretion of judges administering freezing injunctions is limited by a principle of universal application that in the absence of evidence that a defendant did not have other assets out of which payment could be made, the Court would not permit the defendant to pay out of the assets subject to the injunction the legal costs likely to be incurred by him in the proceedings. Sir John Donaldson MR said that "Every case has to be dealt with on its own merits" and that "All that *A v C* (No 2) [1981] QB 961 illustrates is that judges should have a very healthy scepticism when they are dealing with parties to whom Mareva injunctions apply – and they do."

44. In *Halifax Plc v Chandler* [2001] EWCA Civ 1750, [2001] NPC 189, [2002] CPLR 41, the Court of Appeal allowed an appeal by the defendant against the refusal of Mitting J to vary a freezing injunction to permit the defendant to spend money on an action (referred to as "the Brown action") in which he was claiming the transfer of shares which were said to be worth £2m. In fact, the freezing injunction in that case did not contain an exception in relation to business expenses. However, the argument on behalf of the defendant before the Court of Appeal proceeded on the basis that there was no distinction in principle between ordinary business expenses and the defendant's expenditure in connection with his claim in the Brown action. In the course of considering the issues raised by that argument, Clarke LJ stated at [18]-[23] as follows:

> "18. In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment. As I see it, that is because the purpose of a freezing injunction is not to interfere with the defendant's ordinary business or his ordinary way of life.
>
> 19. In the fourth edition of Mareva Injunctions and Anton Pillar Relief, Gee says at page 318:
>
> > "The court will always be concerned to ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the plaintiff from the risk of improper dissipation of assets. Since the plaintiff is not in the position of a secured creditor, and has no proprietary claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value."
>
> 20. In my judgment, the relevant principles are correctly stated in that passage …
>
> 23. … In my opinion, the correct approach would have been to hold that the appellant was in principle entitled to incur reasonable expenses in connection with the Brown action and that the freezing injunction should be varied accordingly. A freezing injunction should not in principle prevent such expenditure, given that it was bona fide legal expenditure in connection with an action which had a reasonable prospect of success and which was on foot when the injunction was granted."

45. Mr Crow cited *Compagnie Noga D'Importation et D'exportation SA, Nessim D Gaon v Australian and New Zealand Banking Group and Ors* [2006] EWHC 602 (Comm). In that case, the claim was based on an alleged fraud in respect of the proceeds of certain bills of exchange involving, among others, a company that was beneficially owned by

two defendants, Mr Bagudu and Mr Mohammed Sani Abacha ("Mohammed"). A worldwide freezing injunction was granted against, amongst others, Mr Bagudu and Mohammed. Mr Bagudu applied to vary that freezing injunction so as to enable him to put up a bail bond (in the sum of CHF 5 million, equivalent to about US $ 3.8 million) for Mohammed's brother, Mr Abba Abacha ("Abba"), who had been charged with money laundering in Switzerland.

46. Christopher Clarke J concluded that it was not appropriate to make the variation sought because the interests of justice did not require it, essentially for two reasons. First, because the payment that Mr Bagudu was seeking to make was "not a payment in the ordinary, normal or usual course of business or living" as Mr Bagudu had no cultural or social obligation to raise bail for Abba, who was not his relative but the brother of his business partner. Second, because it was inappropriate to allow payment of the sum needed for bail in the absence of "full and direct information" as to whether Abba, his wife, and Mohammed were able to secure Abba's release, because "it is Abba and his family who should be securing, if they can, Abba's release".

47. In reaching those conclusions, Christopher Clarke J applied the following principles that he summarised at [9]:

> "(i) The essential test is whether it is in the interests of justice to make the variation sought;
>
> (ii) Since the court has already determined that, in the absence of a freezing order, there is a real risk of dissipation sufficient to justify the making of an order it is for the applicant to satisfy the court that it is appropriate to make the variation sought and to adduce any evidence that is necessary to persuade the court that that is so;
>
> (iii) In determining whether or not to allow the variation proposed the Court is concerned to examine whether to do so would be consistent with the policy that underpins the jurisdiction, namely that a defendant should be restrained from evading justice by disposing of assets otherwise than in the ordinary course of business with the result that any judgment goes unsatisfied; *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* [2001] 2 Lloyd's Rep 715; *TTMI Ltd of England v ASM Shipping Ltd of India* [2005] EWHC 2666 (Comm).
>
> (iv) The correct test is "to consider objectively the overall justice of allowing the payment to be made including the likely consequence of permitting it on the prospects of a future judgment being left unsatisfied, and bearing in mind that the assets belong to the defendant and that the injunction is not intended to provide the claimant with security for his claim or to create an untouchable pot which will be available to satisfy an eventual judgement": Gee, para 20.054;
>
> (v) If the question is whether or not the Mareva should be varied so as to allow frozen monies to be used to fund a defence it may be necessary to show that there are no other funds or sources of payment which should as a matter of

objective fairness be used for that purpose in preference to the frozen funds. The same principle must apply if what is sought is to fund the giving of a recognizance in favour of another.

(vi) Because the court has already been satisfied of a risk of dissipation judges are entitled, on an application to vary, to have a healthy scepticism about assertions made by the applicant particularly where the applicant, or those to whom his evidence or contentions relate, have been less than frank in dealing with the court or the claimant."

48. The judgment of Males J in *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd & Ors* [2015] EWHC 2748 (Comm) is to the like effect. In that case, the funds in two Swiss bank accounts were frozen by a freezing order. The funds in the account in the name of one defendant had been exhausted, and the defendants sought an order permitting the funds in the second account, which was in the name of another defendant, to be used to pay legal expenses. The application was refused, in essence for two reasons. First, because the defendants had failed to show that they had no other funds available to them. Second, because their conduct had been such that a refusal of the application would accord with the overall interests of justice even if they had been able to show that the frozen funds were the only funds available to them. Males J held at [34] that a defendant has no absolute right to use frozen funds to defend itself even where it has no other available assets, and that when deciding whether or not such use should be permitted "[u]ltimately it is the interests of justice which must be decisive".

49. Among other things, Males J stated the following:

(1) "While the disposal of assets outside of the ordinary course of business is prohibited as being contrary to the interests of justice, payments in the ordinary course of business are permitted even if the consequence will be that the defendant's assets are completely depleted before the claimant is able to obtain its judgment … Moreover, so long as the payment is made in good faith, the court does not enquire as to whether it is made in order to discharge a legal obligation or whether it represents good or bad business on the defendant's part." [35]

(2) At [45]-[46], that the following summary contained in the 5th Edition (2004) of *Gee on Commercial Injunctions* at paragraph 20.054 is an accurate statement of the principles applicable in cases that involve freezing injunctions:

"In exercising the discretion whether or not to grant an application to vary an injunction the court acts in accordance with what is 'just and convenient'. This is the test laid down in s.37(1) of the Supreme Court Act 1981. On an application for a variation, the claimant has already established a real risk of dissipation and a good arguable case. The principles which apply in considering whether to grant a variation are the same as those which apply when considering whether or not to grant *Mareva* relief. …
The correct test is to consider objectively the overall justice of allowing the payment to be made including the likely consequences of permitting it on the

> prospects of a future judgment being left unsatisfied, and bearing in mind that the assets belong to the defendant and that the injunction is not intended to provide the claimant with security for his claim or to create an untouchable pot which will be available to satisfy an eventual judgment."

50. These cases provide guidance not only with regard to the question of whether, in the context of freezing injunctions, particular types of payment are in the ordinary course of business but also as to the correct approach, in that context, towards an application to vary the order to allow the expenditure of sums which would otherwise be caught by it.

The variation of undertakings

51. If, contrary to Koza Limited's primary case, the proposed expenditure does not fall within the ambit of the Undertaking, it was common ground that Koza Limited is nevertheless entitled to apply to the court to have the Undertaking varied (or discharged) "if good grounds for doing so are shown" (*Chanel Ltd v Woolworth & Co Ltd* [1981] 1 WLR 485, Buckley LJ at 492). Further, it was common ground that "good grounds" typically requires a material change of circumstances, having regard to the proposition that "[e]ven in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter" (*ibid*, Buckley LJ at 493).

52. In my opinion, this proposition engages policy considerations concerning the desirability of finality in litigation. However, I do not consider that this means that it has to be applied rigidly and without regard to the circumstances of each particular case. That would seem contrary to the statements of Sir John Donaldson MR that every case has to be dealt with on its own merits and of Christopher Clarke J that the essential test is what is in the interests of justice. I consider that support for this view can be found, for example, in *Candy, Candy and CPC Group Ltd v Holyoake and Hotblack Holdings Ltd* [2017] EWCA Civ 92. In that case Gloster LJ said at [68] with regard the decision of the judge at first instance not to allow further evidence to be adduced in what was "a fast moving interlocutory context" that although an application of conventional principles stated in cases such as *Chanel Ltd v Woolworth & Co Ltd* [1981] 1 WLR 485 suggested that the evidence should not have been admitted unless the appellants could have shown, for example, a material change of circumstances, nevertheless "in the specific and unusual circumstances of the case" the further evidence should have been admitted "as it would have been unjust not to do so".

53. I consider that this also accords with the analysis of Teare J in *Emailgen Systems Corp v Exclaimer Ltd & Anor* [2013] 1 WLR 2132. In that case, Teare J considered not only the *Chanel* case but also (among other cases) *Pet Plan Limited v Protect-a-Pet Limited* 1988 FSR 34 and *Esal (Commodities) v Mahendra Pujara* [1989] 2 Lloyd's Law Reports 479. He concluded at [32]:

"The phrase "good cause" was used in *Pet Plan Limited* by Nicholls LJ at p.41. Nicholls LJ said that what are "good grounds" will depend upon all the circumstances of the case; see p.40. Although Buckley LJ in *Chanel v Woolworth* had not put the matter as broadly as this, instead saying (at p.492-3) that there had to be a significant change of circumstances or the discovery of some new facts which could not reasonably have been known about when the undertaking was given, I accept, following *Pet Plan Limited*, that what is "good cause" will depend upon all the circumstances of the case, though typically a change of circumstances or the discovery of some new fact will be required. In *Secretary of State for Trade and Industry v Bell Davies Trading* [2005] 1 AER 324 at paragraph 104 the Court of Appeal put the matter this way:

> "The normal procedure would be for the party, who had given the undertaking, to apply to the court, to which he had given the undertaking, on a specific ground, usually changed circumstances making the continuation of the undertaking unnecessary, oppressive or unjust.""

54. In *Di Placito v Slater* [2004] 1 WLR 1605, distribution proceedings were compromised by consent on terms which included a voluntary undertaking by the claimant not to commence proceedings for the revocation of probate after a specified date. The claimant did not comply with that time limit, and he applied for an extension of time. The master refused that extension and the judge struck out the proposed proceedings, and that decision was upheld by the Court of Appeal. Although the discussion therefore arose in a quite a different context from the present case, Lord Falconer relied on a number of the observations made by Potter LJ as being of more general application.

55. At [31] Potter LJ referred to "the onus which rests upon the applicant who seeks release from an undertaking voluntarily given in the course of litigation" and expressed the view that this onus is best reflected in the expression "special circumstances" because "it is more apt to emphasise that the discretion is not simply a discretion at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given". However, Lord Falconer's reliance focussed on what Potter LJ said at [32]-[33] to the effect that when deciding whether release from an undertaking is in the public interest and/or just as between the parties, the following matters are of particular importance:

(1) "First, the context, including of course the nature of the proceedings in which the undertaking was given."

(2) "Second, the question whether the undertaking was (a) given to the court as an undertaking required by, or offered to, the court independently of the agreement of the other party (as in the case of undertakings required by, or offered to, the court as the price of obtaining a particular form of relief), or (b) as part of a collateral bargain between the parties (as for example as part of, or pursuant to, the freely agreed compromise of an action). In the former case, the court is

concerned primarily with questions of judicial policy and the importance of ensuring that an undertaking solemnly given to the court is observed unless and until the court sees fit to discharge or release such undertaking. In the course of doing so, the court incidentally takes account of the interests and reasonable expectations of any party for whose benefit or protection the undertaking has been given. In the latter case, the court will be primarily concerned with the issue of justice as between the parties and the fact that, by granting release from or modifying the injunction, the court will deprive the beneficiary of the undertaking of the benefit of a bargain voluntarily made."

(3) "Third, the court will be concerned with the circumstances in which the application is made. In relation to both categories of undertaking, the question is whether there are "special circumstances" in the sense of circumstances so different from those which may properly be regarded as contemplated or intended to be governed by the undertaking at the time that it was given, that it is appropriate to release the undertaker from the burden of his undertaking."

First item of expenditure - financing an ICSID arbitration

56. The largest item of proposed expenditure is the payment of up to £1.5m for fees and disbursements in a proposed arbitration before the International Centre for Settlement of Investment Disputes ("ICSID") over an initial 18 month period, during which it is envisaged that issues relating to jurisdiction and interim relief would be addressed, and up to a further £1.5m by way of provision against possible adverse costs orders.

57. The proposed arbitration would not be brought by Koza Limited, but would instead be brought by Ipek Investment Limited ("IIL"), a company incorporated in England and Wales. IIL is said by Koza Limited to have become the ultimate parent company of Koza Limited pursuant to a Share Purchase Agreement dated 7 June 2015 ("the SPA").

58. The SPA is expressed to be made between (1) various members of Mr Ipek's family as "Sellers" of the shareholdings in their names in Koza-Ipek Holding A.S. ("Koza Holding") detailed in Schedule 1 to the SPA, (2) IIL as "Purchaser" of those shares in consideration for issuing the Sellers like shareholdings in IIL, and (3) Koza Holding, a company incorporated in Turkey which was the ultimate holding company of the Koza Group as at 7 June 2015. The SPA recites (among other things) that "The Sellers have decided to continue their business activities in England and have established the Purchaser to carry [on] their business activities", that the Sellers have agreed to sell their shares in consideration for shares in IIL, and that Koza Holding has agreed to obtain a Board resolution to register IIL as the new owner of shares in Koza Holding.

59. Lord Falconer put this aspect of the application on two grounds: first, the proposed expenditure is in the ordinary and proper course of business of Koza Limited; second, it is in any event expenditure which it is legitimate and appropriate for Koza Limited to incur, and so if necessary the Undertaking should be varied to permit it to be incurred.

60. The argument on behalf of Koza Limited proceeded along the following lines.

61. On 6 March 2017, IIL and Koza Limited issued a notice to the Government of Turkey under the terms of the relevant Bilateral Investment Treaty ("BIT"), which is the necessary first step to ICSID arbitration. However, for purposes of the present application, it is accepted that IIL would be the sole claimant in the arbitration.

62. On 5 April 2017, IIL made a formal request to Koza Limited to assist IIL with funding the arbitration (to the extent outlined above) on the basis that IIL has no monies to do this itself. On the same day, the Board of Koza Limited approved this expenditure, for the following sound and sensible reasons which are reflected in the material Board Minutes and which are supported by the evidence of Koza Limited on this application.

63. The ICSID proceedings represent a direct challenge to the government of Turkey and an assertion that its actions in respect of the Koza Group have been improperly motivated and are unlawful, which will be conducted in public and to which that government will be obliged to respond. Accordingly, the proceedings will be of great importance to supporting, and ultimately establishing, Koza Limited's case that (a) Koza Limited and the wider Koza Group, have been the subject of a politically-motivated takeover, and (b) the allegations of serious criminality and terrorism made against the Koza Group are baseless and politically motivated. On the evidence before the court, the arbitration proceedings would add materially and significantly to the ability of Koza Limited to engage constructively with current and potential investors.

64. Further, as Mr Evran explains in his evidence, the takeover of Koza Altin and the other companies in the Koza Group has cut off the source of funding for larger scale mining projects, such that Koza Limited has been confined to "early stage" exploration projects. If the Government of Turkey were required to desist from its unlawful actions against the Koza Group, that would benefit Koza Limited by enabling it to obtain funds from companies in the Koza Group for larger-scale projects. It would also benefit Koza Limited by freeing it from the threat and stigma of control by that Government.

65. These considerations are reflected in the Board Minutes, which state:

> "The chairman noted that the Arbitration is extremely important to the Company because in order to continue and to progress its mining business the Company has to explain to its current and potential partners the true nature of the events that have taken place, and that those events represent an unlawful politically-motivated expropriation of assets. The chairman further noted that the Arbitration will demonstrate the credibility and substance of the Company's position, a position that would be vindicated were the Arbitration to succeed."

> "The chairman further noted that Company will also be able to point to the Arbitration as providing an assurance that steps are being taken to ensure that it continues to operate as an effective mining business, free from the interference and control of the Turkish state."

66. In particular, Koza Limited contends that one important benefit which it would gain from the arbitration relates to an order made by a Peace Criminal Judge on 24 November 2016 for seizure of all of the funds belonging to Koza Limited in the client account of its then solicitors, Morgan Lewis ("the Seizure Order") and the attempts that Koza Limited contends to have been made to enforce the Seizure Order through the involvement of the UK authorities on 29 November 2016, 27 February 2017, 28 April 2017 and 28 June 2017. Koza Limited contends that the essential premise of the Seizure Order is that the capitalisation of Koza Limited for the purpose of conducting gold mining operations is a sham, and that this assertion is without foundation and is part of a pattern of making absurd allegations to justify the destruction of a legitimate business for purely political purposes. Koza Limited also contends that the Turkish judge was provided with information from these and related proceedings, including details of the transfer of funds from Garanti Bank in Luxembourg to the client accounts of Morgan Lewis, the bank account details of which are specified in the Seizure Order; that Koza Altin's denials that it was the source of such information are not credible; and that Koza Altin failed to inform the Turkish Court of aspects of the present proceedings which were material to that Court's exercise of its powers, and failed to inform the English Court about material events in Turkey. It is argued that success in the proposed arbitration would demonstrate that the Seizure Order is without foundation, such that there would be no question of it being enforced against Koza Limited, and that once Koza Altin and other group companies are freed from the influence of the government of Turkey they will be able to defend the position of Koza Limited and correct the spurious allegations on which the Seizure Order is based.

67. Although Koza Limited accepts that final relief might not be determined for several years, it nevertheless contends that the ICSID tribunal will have jurisdiction to grant interim relief in the form of a "non-aggravation order" against the government of Turkey, which will be of benefit to Koza Limited.

68. Further, the funding would be subject to a commercial rate of return, which is a material feature of the arrangement, and a potential benefit to Koza Limited.

69. For all these reasons, the expenditure proposed is in the ordinary course of business. In particular, this is so in light of (a) the very serious, real day-to-day obstacles experienced by Koza Limited in pursuing its mining business because of the past actions and on-going media campaign orchestrated by the Government of Turkey, which have led to extensive reputational harm, the severing of its source of funding and attempts to seize its assets, and (b) the fact that the expenditure proposed is necessary to assist Koza Limited to establish and maintain partnerships in the

mining sector, and it does not involve it in seeking to invest in new business activities or engaging in some other action which is not directed at its mining activities. The same points support the alternative argument that, even if this expenditure is not in the ordinary and proper course of business, the Undertaking should be varied to permit it.

70. Finally, the issue has not been raised before in these proceedings, and could not have been raised before, because it was not previously in contemplation by Mr Ipek. In fact, the ICSID claim was sent promptly, in March 2017, after advice had been taken which enabled it to be formulated. It was only in April 2017 that Koza Limited was asked to support the action through funding, and it would have been premature for Koza Limited to have sought a variation to the Undertaking at any earlier point.

71. In paragraphs 7 and 8 of his fourth witness statement, dated 4 September 2017 ("Ipek 4"), Mr Ipek answers the contention that he would have known about the circumstances which are now said to warrant the ICSID arbitration by stating that (a) before and at the time that the Order was made he did not foresee that the government of Turkey would intensify its campaign against him and the Koza Group, and did not understand the impact that the campaign would have on the Koza Group, (b) a number of significant events which form the basis of the proposed ICSID arbitration had not occurred, notably the seizure of his personal assets and those of his brother, mother and sister by order of the Ankara 6th Criminal Judge of Peace dated 19 January 2017, and (c) "Speaking from IIL's perspective, I can say that it was not in a position to articulate the ICSID claim that it now has, far less to seek funding for that claim from Koza Limited, until 2017".

72. The main grounds on which this aspect of the application is resisted by Koza Altin were foreshadowed in the fifth witness statement of Mr Plowman, a partner in Koza Altin's solicitors, Mishcon de Reya, dated 11 August 2017 ("Plowman 5") and a letter with enclosures from Mishcon de Reya dated 11 September 2017. They are, in summary, as follows: (1) there are serious doubts about the authenticity of the SPA (in this regard, the letter pulls no punches in asserting that the SPA "is a sham and backdated, created in order to engineer a position in which IIL can attempt to bring an ICSID arbitration. We maintain that providing funding for such an arbitration, the foundation of which would in the circumstances be fraudulent, cannot be a proper use of corporate funds"), (2) the proposed ICSID arbitration is wholly or substantially concerned with furthering the interests of IIL and members of Mr Ipek's family, and would not be of commercial benefit to Koza Limited, (3) there are in any event serious issues as to whether the ICSID tribunal would have jurisdiction to determine the proceedings, and (4) the evidence does not establish that the assets of Koza Limited are the only source of funds available to finance the proposed ICSID arbitration.

73. Mr Crow added further grounds in the course of his submissions, principally as follows: (5) the present proceedings concern the question of control over Koza Limited, and it is not appropriate for the assets of the company to be expended on

furthering the interests of either side in a dispute between rival parties over the management and control of the company; and (6) (assuming that the proposed expenditure is not within the ambit of the Undertaking) Koza Limited has not shown "good grounds" for varying the Undertaking to allow the expenditure to be made.

74. In support of the first of those additional grounds, Mr Crow relied on *Ross River Limited v Waveley Commercial Limited* [2014] 1 BCLC 545. Mr Crow submitted that Lloyd LJ had made clear in that case, at [110], that it would be a breach of fiduciary duty for a director to cause a joint venture company to incur liability for legal fees in respect of a dispute where the "real contest" was between the joint venture partners, and although the company was a necessary party it was not one "which had any separate interest of its own in resisting the claims". On the facts of that case, if the director wanted to defend the proceedings, he should have spent his own money on doing so. Mr Crow further relied on *Re Crossmore Electrical and Civil Engineering Ltd* [1989] 5 BCC 37, per Hoffmann J at 38G-H: "It is a general principle of company law that the company's money should not be expended on disputes between the shareholders … Consequently … expenditure on defending [a petition under s459 of the Companies Act 1985] would not be in the ordinary course of business …", and on the citation with approval of that decision and the decision in *Re A & B C Chewing Gum Ltd* [1975] 1 WLR 579 by Harman J in *Re Hydrosan Ltd* [1991] BCC 19.

75. With regard to the authenticity issue, one of the points made by Mr Plowman is that in Mr Ipek's witness statement in these proceedings dated 16 August 2016 ("Ipek 1") Mr Ipek stated that Koza Holding was 100% owned by him and members of his family. Indeed, Mr Ipek made no mention of IIL at all either in the body of the witness statement or in a shareholding status chart that he exhibited to it. Further, although Mr Ipek made Ipek 4 in order (among other things) to "respond to certain factual matters" raised by Plowman 5, Mr Ipek states nothing in answer to this particular point.

76. In response to that argument, Lord Falconer submitted, first, that the point is addressed in a first witness statement of Mr Selman Turk dated 14 September 2017. This states that (a) in early June 2015 Mr Turk assisted Mr Ipek with the preparation of the final version of the SPA (i.e. the version which provided for a 100% sale and purchase of the shares in Koza Holding), (b) Mr Ipek asked him to keep the revisions to, and the execution of, the SPA confidential because at that time Mr Ipek was very concerned about rumours in Turkey that he was fleeing the country, and (c) Mr Turk witnessed the execution of the SPA by Mr Ipek on 7 June 2015. Second, Lord Falconer submitted that, at the time when Ipek 1 was made, Mr Ipek had many other pressing matters on his mind, and that it was therefore understandable that he may not have had the existence and effect of the SPA at the forefront of his mind at that time.

77. Mr Crow answered these submissions by making two main points: first, such arguments are no substitute for evidence from Mr Ipek, which is conspicuous by its absence; second, the suggested explanation is implausible, because the transfer of all

the shares in Koza Holding to IIL would have been on any view a major transaction, and accordingly it is not something that Mr Ipek would have been likely to forget.

78. Mr Plowman in Plowman 5 and Mr Crow in his submissions made a large number of other points in support of Koza Altin's case that the authenticity of the SPA is suspect.

79. It seems clear from the fact that the SPA bears the same electronic document identification code as an earlier draft that was produced by Morgan Lewis that it was created by amending that earlier draft. The amendments were substantial, not least because the earlier draft had only two parties, namely Mr Ipek and members of his family as "Sellers" and IIL as "Purchaser", but even more significantly because it provided for the transfer of only 10% of the shares in Koza Holding in consideration for the issue of shares in IIL. In light of the fact that the electronic identification code remained unaltered, a number of grammatical idiosyncrasies and glitches in the SPA, and the absence of any evidence from Morgan Lewis, it is logical to infer that the SPA was produced without input from Morgan Lewis. On that basis, it might be considered misleading to have retained the name and details of Morgan Lewis on the front sheet of the SPA. In my view, however, while these matters are consistent with the SPA being a backdated sham, they do not necessarily have sinister connotations. It is not impossible that, having obtained Morgan Lewis's help with a draft, the parties decided to finalise the terms of the SPA without further input from Morgan Lewis, and these matters tell one nothing about the crucial question of when the SPA was created.

80. However, it is Koza Altin's case that other documents provide strong support for its case that the SPA is both a sham and backdated. At least some of these documents were written in Turkish, but English translations are included in the papers.

81. First, there are emails dated 8 June 2015 relating to the 10% shareholding transaction which formed the subject of the draft produced by Morgan Lewis ("the Proposed Transaction"). One is from Ismail Bicer of Baycan Law Firm in Istanbul and contains advice about the Proposed Transaction, including that "Public disclosure and notification requirements shall arise". Another is from Ismail Kokbulut, described as "Partner/Tax" in BDO IK in Ankara, which states (among other things) that "There needs to be agreement regarding the value of the 10% shares of Holding before the transfer". There is also an email from Okan Bayrak to Ismail Bicer dated 9 June 2015. This opines that if IIL is going to own 10% of Koza Holding, which itself owns 62% of another company called Ipek Enerji which is a publicly listed company, in the result IIL will own 6.2% of a publicly listed company and "Disclosure requirement shall arise". There are extensive documents relating to the Proposed Transaction, including a Memorandum dated 5 June 2015 prepared by Baycan Law Firm "Regarding the steps required to be taken under the Capital Market law, Competition Law, Turkish Commercial Code and Direct Foreign Investments Law in the event that [IIL] acquires 10% privileged shares of [Koza Holding]". Koza Altin argues that if the SPA was genuine, these advisers would have been informed about it, and their advice would

have been sought with regard to the SPA and the 100% shareholding transaction that, on Koza Limited's case, was in fact proposed and taking place and not with regard to the Proposed Transaction which, on that case, was no longer proposed or taking place.

82. Second, there appears to be no mention of the SPA in any contemporary documents, nor any independent documentary support for its existence. The SPA appears to have been first mentioned in writing in a letter from IIL to Koza Holding dated 23 December 2016, approximately 18 months after it is alleged to have been made. The letter was signed by Mr Ipek on behalf of IIL. Koza Altin contends that it has a number of curious features. First, having made reference to the SPA, the letter then states that: "A copy of the SPA is attached to this letter". This suggests that IIL believed that Koza Holding did not already have a copy of the SPA, which is surprising if the SPA was genuine and had been agreed by Koza Holding on 7 June 2015. Second, the letter states that "since 31st August 2015 [IIL] has been the owner of all the Shares in your Company, previously owned by the Sellers, and accordingly your Company is a wholly owned subsidiary of [IIL]". The reference to 31 August 2015 is to the "Closing Date" in the SPA on which the completion of the sale and purchase of shares was to take place in accordance with the terms of the SPA. Koza Altin contends, however, that the suggestion that any such completion took place on 31 August 2015 is contradicted by the documents. In particular, Article 6 of the Articles of Association of Koza Holding requires that "Written prior approval of the Board of Directors shall be required [for the] transfer, pledge or implementation of any encumbrance on the share certificates" of that company, and Koza Altin contends that the Board resolution ledgers of Koza Holding do not evidence any such approval. Further, the balance sheet of IIL as at 31 December 2015, signed on behalf of the Board of IIL by Mr Ipek, states that the assets of IIL comprise 100 Ordinary shares of £1 each, whereas that would not be correct if the SPA had been made and completed.

83. The letter from Mishcon de Reya dated 11 September 2017 was answered by Gibson Dunn & Crutcher LLP ("Gibson Dunn") by letter dated 14 September 2017. Gibson Dunn disputed the significance of the documents relied on by Mischon de Reya, contending that the contemporary emails "were sent to persons who were not working closely with our client and who did not know of the signing of the 100% SPA" and pointing out that "you have not provided any documentary evidence of responses to those communications or that they were actioned by our client". The letter stated that the allegations are irrelevant to the current application and not properly matters for this court, but nevertheless the witness statement of Mr Turk had been obtained in answer to them. It further stated that the appropriate place to determine these matters was not in the present proceedings but before the ICSID tribunal, when constituted.

84. Lord Falconer's main argument in response was that Mr Ipek had set out his account concerning the SPA in proceedings before the Ankara Commercial Court of First Instance in Turkey. Those are proceedings in which Koza Holding is seeking a declaration that the SPA is null and void, on the grounds (among others) that the SPA

is a fake and was signed retrospectively. Those proceedings rely on a number of points concerning documents which are similar to those made by Mr Crow. These include that the registered address of Koza Holding given in the SPA was not the registered address of that company as at 7 June 2015 and did not become such until 26 July 2016, which is said to reflect the true position that the SPA was made after July 2016.

85. In the objection to those proceedings and the replies to that case of Mr Ipek and others, it is stated that Ipek 1 is essentially true because at the date when Ipek 1 was made the consideration shares in IIL had not been issued to the Sellers, and this did not take place until 17 October 2016. Accordingly, it is stated that the defendants to the claim in Turkey were "still legally the right owners in relation to [Koza Holding] and in the use of shares [of Koza Holding]". Elsewhere in those replies it is stated that, although 100% of the shares in Koza Holding was transferred to IIL pursuant to the SPA, because this transfer of shares has not been recorded in the share ledger of Koza Holding the defendants to the claim in Turkey may still use their rights as shareholders in relation to Koza Holding. Further and in any event it is stated that either directly on that basis or indirectly on the basis that 100% of Koza Holding belongs to IIL (and having regard to the fact that IIL is 100% owned by the defendants to the claim in Turkey) there is no basis on which Koza Holding can properly bring that claim. It is also stated, in short: that there are documents which support the authenticity of the SPA, but these are being withheld by those in control of Koza Holding's records; that statements in various company documents that Koza Holding alleges to be false are either true or have not been brought up to date because that has not been possible for various reasons; and that the address given in the SPA as the registered office of the Koza Holding was correctly given as that was an address widely used by that company.

86. The explanation given in those replies for the creation of the SPA is that following the establishment of Koza Limited on 24 March 2014, all the shareholders in Koza Holding "took the decision to move the Group headquarters to England in the second half of 2014 or start of 2015", and they therefore authorised Mr Ipek to move the headquarters of the Group to England. Accordingly, from the start of 2015 Mr Ipek and others began contacting banks and law firms in England and making business trips to England and conducting many meetings on this subject in England. Further:

> "In order to move the headquarters of the group to England and to establish a parent company for this purpose over [Koza Holding], it was decided to establish a company in England and to transfer the shares of the shareholder family members in [Koza Holding] to this company to be established in England.
>
> Finally, it was decided to establish [IIL] with the same partnership structure and the same partnership share rates of [Koza Holding] in order to move the headquarters of the group to England and to conduct the business activities of the group from England, and for this purpose the law firm was authorised by

> all family members for establishing the company and … articles of association of the company was signed by all family members one by one."

87. My conclusions with regard to the authenticity issue are as follows.

88. If the SPA was made on 7 June 2015, it is unsatisfactory that Ipek 1 was made in the terms that it was, and even more unsatisfactory that once the point about Ipek 1 was taken in Plowman 5 and in correspondence that Mr Ipek did not deal with it in a witness statement in response. That suggests two possibilities. First, that IIL and the SPA were not mentioned by Mr Ipek in August 2016 because the SPA had not been created then. On the one hand, that is supported by a number of points that are available to be made on the documents, including the form and contents of the letter dated 23 December 2016. On the other hand, the allegation of deliberate backdating and running a false case based on the SPA is very serious, and answers have been put forward to those points which cannot be shown to lack any substance on the materials available on the present application. Second, that there is an innocent explanation as to why the SPA and IIL were not mentioned by Mr Ipek in August 2016. The innocent explanation suggested by Lord Falconer was, in summary, oversight, and the innocent explanation suggested in the reply in the Commercial Court proceedings in Turkey is to the effect that what Mr Ipek stated was essentially correct because the shares in IIL were not issued to the Sellers until October 2016. These explanations are unsatisfactory: they do not sit entirely easily together; they are not set out in a witness statement of Mr Ipek in these proceedings; and the second explanation does not truly explain a failure to mention IIL and the SPA at all, which is why I suspect Lord Falconer ventured to suggest the first explanation. As against all of that, however, this application is not the occasion to try those issues.

89. The explanation for the creation of the SPA that is given in the proceedings in the Commercial Court in Turkey is difficult to reconcile with the creation of a version of the SPA, seemingly drafted by Morgan Lewis, which provided for the transfer of only 10% of the relevant shares. There is no explanation in the papers before me as to why a 10% transaction should have been in contemplation at all, let alone why it should have been put in hand up to the point of creation of a draft SPA by professional legal advisers, if a decision had truly been taken to "establish [IIL] with the same partnership structure and the same partnership share rates of [Koza Holding]". This casts doubt on the reliability of the account that is given in those proceedings. That, in turn, casts doubt on the authenticity of the SPA (which that account seeks to explain).

90. In these circumstances, I consider that, on the materials at present available to the court, the authenticity of the SPA is open to very serious doubt. If Koza Limited was a freezing injunction defendant, the healthy scepticism which is typically justified with regard to assertions made by such a defendant that are not firmly supported by seemingly reliable evidence might present a fatal obstacle to an application to use frozen funds for a purpose which depends on the authenticity of the SPA. However,

Koza Limited is not a freezing injunction defendant, and I therefore consider that it would not be appropriate to follow this precise approach in the present case. At the same time, it would be wrong to ignore the doubts that exist concerning the SPA.

91. In my opinion, the correct approach is to take those doubts into account when deciding whether the first class of expenditure should be allowed. If that class of expenditure appears, objectively, to be within the ambit of the Undertaking, those doubts are nevertheless relevant to whether the proposed expenditure would be made in good faith and consonant with Mr Ipek's fiduciary duty to Koza Limited, and more generally to the overall justice of allowing the first class of expenditure to be made. If that class of expenditure is outside the Undertaking, those doubts are relevant to deciding whether Koza Limited has discharged the onus which rests upon it to show that current circumstances are such that the balance of justice between the parties makes it appropriate to release it from the Undertaking that it voluntarily agreed – and the greater the doubts the more likely it is that this balance will come down against it. I have derived those formulations from my analysis of the authorities discussed above.

92. With regard to the "no benefit to Koza Limited" issue, Mr Crow's argument that the rights and interests at stake in the proposed ICSID arbitration concern IIL and the members of Mr Ipek's family, not Koza Limited, proceeded as follows.

93. First, because Koza Limited is at the bottom of the relevant corporate chain, as a matter of principle it should not be taking any position, or expending any funds, in relation to disputes about control that are taking place higher up the corporate chain.

94. Second, funding the arbitration would not be of benefit to Koza Limited in any of the ways that have been suggested on behalf of Koza Limited on this application:

    (1) Informing third parties of the existence of the arbitration will not have a positive impact on Koza Limited's reputation and the willingness of others to deal with it for a number of reasons. There is at least a serious risk that the arbitration will fail for lack of jurisdiction, or because of a finding that the SPA is either invalid or ineffective, and telling third parties this will have no positive reputational impact. The arbitration is not needed to give publicity to Mr Ipek's battles with, and criticisms of, the Turkish state, because they have been, and continue to be, widely publicised both in the media (including Bloomberg, Reuters and New York Times articles) and through the medium of public proceedings, including the present claim. Further, in contrast to those public proceedings, ICSID hearings and awards are confidential and the details of the same cannot be made public without the consent of the parties or an order of the tribunal.

    (2) Second, the suggestion that Koza Limited will get a commercial rate of return on the funding does not stand up to scrutiny. On the claimants' own case, IIL does not have any funds. Accordingly, this supposed benefit is entirely contingent on

a successful outcome in, and a concrete return from, the proposed arbitration. However, in all the circumstances this is extremely doubtful.

(3) Third, the suggestion that an ICSID tribunal may be able to prevent the expropriation of Koza Limited or its assets by the Turkish state is misguided and without foundation. This betrays confusion between the corporate interests of Koza Limited and the personal interests of Mr Ipek. Further, and more fundamentally, there is no prospect whatsoever of Koza Limited being expropriated. Koza Limited is an English company which is subject to English law and the jurisdiction of this court, and: "It cannot possibly be expropriated by any foreign government. Nor does it have any assets or operations in Turkey. Indeed, it was set up specifically to operate outside of Turkey."

95. In any event, as a request is being made for Koza Limited to use monies which are subject to the regime contained in the Order to fund an arbitration the principal (if not the sole) beneficiaries of which would be IIL and Mr Ipek and his family, it is incumbent on the latter to provide full and frank disclosure to show that they cannot fund the proposed arbitration themselves or obtain litigation funding before there can be any question of Koza Limited funding the arbitration: see *Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd* [2015] EWHC 2748 per Males J at [37]-[40]. As they have failed to do this, monies should not be released for that purpose.

96. Much of Lord Falconer's answer to these submissions was covered by his original argument. The following points were added or repeated. As the foundation for the proposed ICSID arbitration is genuine and not fraudulent, there is nothing in the suggestion that the arbitration would result in reputational harm or in the suggestion that it rests on a tenuous jurisdictional basis. As to the gains from publicity, although "Article 4 of the Convention allows ICSID to publish awards itself only when both parties consent" nevertheless "parties also frequently publish unilaterally. In practice, almost of all ICSID awards are published and readily available" (see Guide to ICSID Arbitration, by Lucy Reed, Ian Paulsson and Nigel Blackaby, 2nd Ed, 2011, p9) – so IIL would be able to publish unilaterally. Lord Falconer submitted that similar considerations would apply to interim measures in the proposed arbitration: for example, IIL would be able to publish unilaterally the substance of any interim determination that the Turkish state should cease or modify the actions complained of in the arbitration. Proceedings such as the present proceedings offer no substitute for an ICSID arbitration, for two main reasons. First, they "are not brought against the Government of Turkey directly challenging its politically motivated actions, and as a consequence the Government of Turkey is not bound to respond". Second, "in any event, these proceedings will not necessarily determine that question". In contrast: "The ICSID arbitration will subject the egregious conduct of the Erdoğan regime to the scrutiny of customary principles of public international law".

97. In my judgment, it is at lowest seriously arguable that a successful outcome for IIL in the proposed ICSID arbitration would be of substantial commercial benefit to Koza Limited, not least by enabling Koza Limited to obtain further funding from other companies in the Koza Group. It seems to me that this would be a genuine benefit for Koza Limited, which is separate and distinct from any benefit which Mr Ipek or his family (or for that matter other companies in the Koza Group) may gain from such an outcome. I also consider that the release of funds for such a purpose is not contrary to, or tainted by, the principle that the assets of Koza Limited should not be expended on disputes between shareholders. In the circumstances of this particular case, Koza Limited does have a separate interest of its own in furthering a claim (by IIL) against a shareholder (Koza Holding), although the furtherance of that claim may also benefit the individuals who, on the claimants' case, are the true ultimate beneficial owners of all the companies in the corporate hierarchy, including Koza Limited at the bottom.

98. I am less persuaded about the claimed reputational and "exposure of political oppression" benefits. It seems to me that it is more likely than not that those who have dealings with Koza Limited will make their own assessment concerning the charges and activities which have arisen in Turkey, and are unlikely to be significantly influenced by the existence of an ICSID arbitration or even by rulings in that arbitration, at least until those rulings become final and public. In short, Koza Limited does not need IIL to start an arbitration to assert both publicly and in commercial dealings that Koza Limited and its immediate prime mover Mr Ipek are innocent victims of political oppression and expropriation of assets, especially as such claims are already been made in ongoing proceedings in both Turkey and this jurisdiction. Nor would the existence of an ICSID arbitration (or even at least interim rulings in it) prevent allegations being put about by their adversaries that they are not innocent victims. Nevertheless, it is impossible to say that these claimed benefits are simply incredible.

99. Accordingly, I conclude that Koza Limited has established that as a starting point the expenditure of funds on the proposed arbitration would be of benefit to it. However, this is only a starting point, because doubts concerning the validity of the SPA and the issue about the jurisdiction of the ICSID tribunal may point to a different conclusion.

100. The like points apply to the contention that the prospect of a commercial rate of return is a benefit for Koza Limited which should be taken into account in this context. On Koza Limited's own case, IIL's prospects of making repayment would depend on a successful outcome in the proposed ICSID arbitration. Of itself, that would not prevent the investment with IIL as being treated for present purposes as a benefit to Koza Limited, if the correct approach for the court is to say that provided it is made in good faith the court will not enquire into whether it is good or bad business for Koza Limited. However, good faith is in issue in light of the doubts concerning the SPA, and if the ICSID tribunal lacks jurisdiction the investment would produce no benefit.

101. Further, although (because this is not a freezing injunction case) I would not take this view if the expenditure on the proposed ICSID arbitration fell within the ambit of the Undertaking, in the event that it falls outside that ambit (as I consider that it does in light of my findings on jurisdiction below), I am of the opinion that it is relevant to consider whether that arbitration could be funded from sources other than Koza Limited. In this regard, I am prepared to accept that IIL has no funds. However, Mr Ipek's evidence on this subject is exiguous: "The vast majority of my assets are in Turkey and out of my reach; indeed they have been seized by the Erdoğan Regime … My available assets are very substantially less than $10 million, and certainly insufficient to finance the ICSID arbitration". It may be understandable that, as submitted by Lord Falconer, Mr Ipek is reluctant to reveal details about his available assets for fear that they are made the subject of attempts at seizure. However, that does not prevent him from stating what value they have with greater specificity than he has done. Moreover, Koza Limited's evidence says nothing about the availability of litigation funding. As the proposed ICSID arbitration would potentially yield vast financial benefits, the prospect of obtaining such funding cannot be said to be unreal. In my view, these considerations play a part in assessing the overall justice of the case, and militate against a release of the Undertaking to permit this class of expenditure.

102. Turning to Koza Altin's third main ground of resistance, I received detailed argument about the jurisdiction of the ICSID tribunal. I was provided with 3 full lever arch files of ICSID materials in advance of the hearing. Further materials were added by both sides as the hearing progressed. I was referred to many of these materials.

103. Mr Crow submitted that it is one thing to structure investments in a manner that will provide access to ICSID arbitration in the event of a dispute and quite another thing to engage in restructuring, once a dispute has arisen, with the objective of introducing an international element into what would otherwise be a domestic dispute (involving in the present case a group of Turkish companies, a number of Turkish individuals, the Turkish state, and a battle for control between those Turkish protagonists over a single English subsidiary and its assets). In the latter case, the ICSID tribunal would or should decline jurisdiction, because in those circumstances there would no qualifying international investment of the kind that ICSID is concerned to protect. See *Phoenix Action Limited v Czech Republic* (ICSID Case No ARB/06/05) at [142]:

> "The evidence indeed shows that the Claimant made an "investment" not for the purpose of engaging in economic activity but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a bona fide transaction and cannot be a protected investment under the ICSID system."

104. Mr Crow further relied on *Pac Rim Cayman v El Salvador* (ICSID Case No ARB/09/12) at [2.99]-[2.100] ("[It] is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration.") and *Levy v Peru* (ICSID Case No ARB/11/17) at [183]-[185] (which cites two cases relied upon by Koza Limited).

105. I am not sure whether Lord Falconer disputed these points. I accept them anyway.

106. In any event, beyond those propositions the stances of the parties diverged widely.

107. Lord Falconer's starting point was to say that Koza Altin's arguments about the jurisdiction of the ICSID tribunal rest on two issues, one of fact (whether the SPA is backdated) and one of law (what qualifies as an "investment" for purposes of Article 25(1) of the ICSID Convention), both of which are contested, and it is not for this court to pre-judge the ICSID proceedings on issues of contested fact or contested law. However, if an exploration of the merits of those issues is required, Koza Altin's points are without merit. There is no material sufficient to support the serious allegation of fraud that is made with regard to the back-dating of the SPA. There is ample ICSID case law which supports Koza Limited's stance regarding Article 25(1). Moreover, Koza Altin does not suggest that there is no merit in the substance of the complaints that IIL would hope to raise in the proposed ICSID arbitration. Further, as indeed I have already accepted, successful pursuit of those complaints would benefit Koza Limited.

108. Article 25(1) of the ICSID Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State".

109. In support of Koza Limited's case that the SPA gave rise to a "qualifying investment" for these purposes, Lord Falconer submitted that it is always important to have regard to the State parties' articulation in the material BIT as to what constitutes an investment, and that nothing more than the mere ownership of shares was required in the present case. Among other cases, he referred me to *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) at [313]-[314], *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (ICSID Case No ARB/08/08) at [130]-[131], and *Awdi v Romania* (ICSID Case No ARB/10/13) at [197]-[201]. In the latter case, the ICSID tribunal "noted the controversies surrounding the term "investment" as used in Article 25 of the ICSID Convention", stated that "the definition of "investment" in a treaty will determine its content in an exclusive way, with no room for additions or subtractions", held that "the term "contribution", as used sometime by the Parties in the context of investment, concerns the requirement that the investor commits a certain amount of resources, economic or otherwise", and stated that it was satisfied

on the facts of that case that the claimants had made indirectly investments covered by the relevant BIT (between the USA and Romania) "via notably share purchases and monetary injections".

110. Mr Crow also referred me to a number of ICSID cases, including *Standard Chartered Bank v Tanzania* (ICSID Case No ARB/10/12) at [222]-[232]. In that case, the relevant BIT was between the United Kingdom and Tanzania. The definition of "investment" in Article 1(a) of that BIT embraced every kind of asset admitted in accordance with the laws of the Contracting Party "in which the investment is made". The third sentence of Article 14 of that BIT extended the protection of the treaty for 20 years "after termination of investments made whilst this Agreement is in force". Article 8(1) of that BIT provided for the submission to arbitration of a legal dispute arising between a Contracting Party and a national or company of the other Contracting Party "concerning an investment of the latter in territory of the former". At [222] the ICSID tribunal said that "the verb "made" implies some action in bringing about the investment, rather than purely passive ownership", at [225] that "the text of the BIT reveals that the treaty protects investments "made" by an investor in some active way, rather than simple passive ownership", at [230] that "the Tribunal interprets the BIT to require an active relationship between the investor and the investment. To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that … the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient", and at [232] that "for an investment to be "of" an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an act of transferring something of value (money, know-how, contacts or expertise) from one treaty-country to another".

111. The BIT which is material in the present case is the treaty between England and Turkey. Article 1(a) of that BIT defines "investment" as "every kind of asset and in particular, though not exclusively …. shares in and stock and debentures of a company and any other form of participation in a company". That definition does not use the verb "made". Further, the treaty contains no definition of "investor", which might shed light on what qualifies as an "investment" for purposes of the treaty. Article 2(1) states that: "Each Contracting Party shall encourage and create favourable conditions for the investments of nationals or companies of the other Contracting Party in its territory". This, in common with the language used in much of the remainder of the treaty, provides no help as to whether only active investments are in contemplation. However, the third sentence of Article 14 extends the protection of the treaty for 10 years "after termination of investments made whilst this Agreement is in force".

112. On that basis, although on more slender grounds, the analysis in *Standard Chartered Bank v Tanzania* suggests that in the present case the qualifying investments of nationals or companies of each Contracting State should be construed as requiring

more than purely passive ownership of shares. Even if that is right, however, it raises further questions as to whether, assuming IIL obtained 100% ownership of the shares in Koza Holding, that amounted to purely passive ownership. According to the analysis in *Standard Chartered Bank v Tanzania*, this involves asking questions as to whether IIL funded the investment, and whether, having obtained 100% ownership, IIL has sought to exercise control over Koza Holding in an active and direct manner.

113. In discussing these arguments, I have not overlooked the reliance that Koza Altin sought to place on the statement in *Salini v Morocco* (ICSID Case No ARB/00/04) at [50]-[52] that the characteristics of an investment "… generally … infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction … In regarding the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition." It is clear to me that, although some ICSID tribunals have adopted some or all of these characteristics and have applied them compulsorily, others have treated them as non-binding and non-exclusive aids to identification (rather than definition) of what constitutes an "investment". I am of the opinion that the latter is the better view, as I believe Mr Crow was ultimately inclined to accept.

114. Mr Crow's answer to Lord Falconer's other points was, broadly, to the diametrically opposite effect. While questions of validity and efficacy surrounding the SPA cannot be conclusively resolved on the present application, in assessing whether or not to permit the expenditure of substantial funds belonging to Koza Limited on the proposed arbitration it is necessary for the court to consider the live issues surrounding the SPA and the jurisdiction of the ICSID tribunal. That consideration points to the conclusion that the SPA is a highly questionable document and that the proposed arbitration is at best tenuous from a jurisdictional perspective. Further, the claimed benefits of the ICSID arbitration, if they materialise at all, will largely if not entirely be reaped by persons other than Koza Limited. Indeed, even taking at its highest Koza Limited's case regarding both (a) the *bona fides* of the SPA and (b) the relevant criteria as to the jurisdiction of the ICSID tribunal, all that has happened is that Mr Ipek and his family have transferred their shares in Koza Holding to IIL in exchange for shares in IIL, which does not involve IIL making any investment into anything.

115. In support of this last point, Mr Crow relied on the decision of Teare J in *Gold Reserve Inc v Venezuela* [2016] 1 WLR 2829. In that case, the relevant BIT was made between Venezuela and Canada. It defined "investment" as "any kind of asset owned or controlled by an investor of one contracting party either directly or indirectly, including through an investor of a third state, in the territory of the other contracting party in accordance with the latter's laws" and stated that this included, in particular "shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture". It defined "investor" in the case of Canada as (among other things) a person who "makes the investment in the territory of Venezuela". The case concerned mining concessions and mining rights in Venezuela

("the Brisas Project") held indirectly by a Canadian company ("GRI"). The two concessions forming the Brisas Project were originally granted to a Venezuelan company ("CAB"). CAB was subsequently acquired by Gold Reserve de Venezuela, a subsidiary of Gold Reserve Corpn, a company incorporated in the state of Washington, USA, which thereby became the indirect owner of the Brisas Project. Later, GRI became the parent company of Gold Reserve Corpn and thus the indirect owner of the Brisas Project as a result of a restructuring of GRI and Gold Reserve Corpn whereby (i) Gold Reserve Corpn merged with a subsidiary of GRI (another US company) and (ii) shareholders in Gold Reserve Corpn transferred their shares to GRI in return for shares in GRI itself. There was evidence that "upon the merger … the shareholders, management, employees, company headquarters and company operations of the Gold Reserve group of companies was left completely unchanged".

116. The question arose whether, as GRI contended, GRI was, within the terms of the BIT, an "investor" entitled to the protection afforded by the BIT, and thus entitled to submit its claim against Venezuela to an arbitration under the ICSID Additional Facility Rules. Venezuela maintained that GRI was not an "investor" and was thus not entitled to arbitrate a claim against Venezuela, with the result that the tribunal had no jurisdiction and for this and other reasons GRI had no right to enforce an arbitration award that GRI had obtained against Venezuela.

117. In addressing that question, Teare J held at [44] that GRI had not made an investment in the territory of Venezuela at the time when it acquired its indirect interest in the CAB shares and the Brisas Project:

> "The share swap was between shareholders of GRI and the shareholders of Gold Reserve Corpn. I accept that the shareholders of GRI transferred some benefit to the shareholders in return for obtaining shares in Gold Reserve Corpn, namely, their own shares in GRI. But to describe this as a transfer of benefit by GRI fails to distinguish between the legal personality of GRI and the legal personality of its shareholders. They are separate and distinct. There is no evidence that GRI made any payment or transferred anything of value to Gold Reserve Corpn in return for becoming the indirect owner or controller of the shares in CAB or of the Brisas Project. It may be that there was some "action" by the directors of GRI at the time of the company re-organisation but I was not referred to any evidence of such action, none was in evidence and it would not be right for me to speculate as to what that action might have been. Whilst GRI undoubtedly became the indirect owner or controller of the shares in CAB and of the Brisas Project I must conclude that it did not at that time make an investment in the assets in respect of which the protection of the BIT was sought."

118. The BIT that fell to be considered in that case was not cast in identical terms to the BIT between England and Turkey which is material in the present case. In my view, however, the differences are not material for purposes of the present analysis.

119. In the present case, in accordance with the SPA there was a share swap involving, on the one hand, shares in IIL which IIL agreed to issue to shareholders in Koza Holding in exchange for their shares in Koza Holding and, on the other hand, shares in Koza Holding which the shareholders in Koza Holding agreed to transfer to IIL in exchange for being issued shares in IIL. In these circumstances, it seems to me that the distinction between the legal personality of IIL and the legal personality of IIL's shareholders cannot be invoked in the same way as the like distinction was invoked by Teare J. On the face of it, the SPA did involve IIL, as opposed to shareholders in IIL, transferring, or at least agreeing to transfer, something to the shareholders in Koza Holding in return for IIL becoming the owner of the shares in Koza Holding and, thus, the controller of all the operations of the Koza Group. However, even if that is right, it seems to me difficult to say that the shares issued by IIL were of any real value. On Koza Limited's own case, IIL has no assets, and has never traded, but was instead set up solely as a vehicle for moving the headquarters of the Koza Group to England. IIL and shares in IIL may now have a value, but that value did not exist at the time the SPA was made: instead, it arose out of the performance of the SPA.

120. More importantly, this debate brings out what seems to me to be the essential artificiality of the entire SPA transaction, when viewed from the perspective of the ICSID system. For these purposes, it can be assumed that the SPA was genuine and did not involve any form of abuse vis-à-vis that system. It can further be assumed that it was the hope and intention of Mr Ipek and his family that, going forward, the business activities of the Koza Group would be conducted from England. Nevertheless, the substance of the matter is that, as regards the territory of Turkey, the SPA resulted in nothing more than a number of Turkish individuals exercising the same ownership and control of the Koza Group as they had previously been able to exercise through their shareholdings in Koza Holding, albeit more indirectly in that this was now to be exercised through shareholdings in the names of the same individuals and in the same proportions in IIL, which itself owned 100% of Koza Holding. Establishing IIL and moving the headquarters of the group to England so that operations can be run from a base in England instead of a base in Turkey involve no investment in Turkey and are thus immaterial for purposes of ICSID jurisdiction.

121. I therefore consider that the thrust of Mr Crow's submission is correct. Assuming it was genuine, the SPA involved Mr Ipek and members of his family switching their investments (or, in the language of their reply in the proceedings in the Commercial Court in Turkey, their "partnership structure") so that the same operated through shareholdings in a newly created ultimate holding company, IIL, instead of through shareholdings in the previous ultimate holding company, Koza Holding. That involved an acquisition of ownership by the "partners" in new shares (in IIL) and a change of ownership (from the "partners" to IIL) of the shares in Koza Holding. However, it did not involve the introduction or injection of any new or additional money or value, whether by the partners or by IIL (which had no assets of its own, and which was merely, for purposes of the present analysis, a vehicle for the "partners"). In my

opinion, that is not an investment for the purposes of the BIT or the ICSID Convention, even applying the approach which is most favourable to Koza Limited that I consider arguable based on the ICSID cases to which I have been referred.

122. The facts of *KT Asia Investment Group BV v Kazakhstan* (ICSID Case No ARB/09/8) are very different to those of the present case. However, I agree with the views of the tribunal in that case (Professor Gabrielle Kaufmann-Kohler, Ian Glick QC and Christopher Thomas QC) at [166] that assets such as those listed in Article 1(a) of the BIT in the present case "are the result of an act of investing" and that "[t]hey presuppose an investment in the sense of a commitment of resources" and at [173] that "the objective definition of investment under the ICSID Convention and the BIT comprises elements of a contribution or allocation of resources, duration, and risk, which includes the expectation (albeit not necessarily fulfilled) of commercial return". I do not consider that, even on Koza Limited's case, the SPA satisfies those criteria.

123. I have already dealt with the fourth and fifth grounds on which Koza Altin opposes the application for expenditure on an ICSID arbitration to be sanctioned by the court.

124. As to the sixth ground, I accept Mr Crow's submission that Koza Limited has not shown "good grounds" for varying the Undertaking to allow that expenditure to be made. Koza Limited contends that the SPA was made in June 2015. Further, Koza Limited's pleaded case, in short, is that by the time these proceedings were commenced, let alone when the Order was made, the Turkish government, both through the agency of the Trustees and more generally, had embarked over many months on implementing a "larger plan to destroy the Koza Group, Mr Ipek and his family". In these circumstances, it seems to me that, contrary to what is said in Ipek 4, at the time the Undertaking was given IIL was in a position to articulate a claim to be submitted to ICSID arbitration. In particular, to the extent that the campaign of the Turkish government was targeted against Koza Limited, its full intensity was or should have been apparent because the whole basis of the proceedings was that attempts had been made to take control of Koza Limited and to seize all its assets, and it was Koza Limited's case that the Turkish government was behind these attempts.

125. Moreover, to the extent that the events identified by Mr Ipek which have occurred since the date when the Undertaking was given relate to the seizure of personal assets belonging to him and other members of his family, they do not assist in providing Koza Limited with "good grounds" for being released from the Undertaking. The basis on which it is said to be appropriate to permit Koza Limited to fund the proposed ICSID arbitration is that this would benefit Koza Limited, not Mr Ipek and his family. If and to the extent that the seizure of personal assets would form the basis of the proposed arbitration, it should be funded by the individuals and not by Koza Limited.

126. Pulling all these strands together, I conclude as follows with regard to the first class of expenditure:

(1) Funding the successful pursuit of an ICSID arbitration by IIL would be of benefit to Koza Limited, and thus in the ordinary and proper course of business.

(2) However, even if its authenticity was not in issue, the SPA did not give rise to a qualifying investment under the ICSID Convention and the material BIT.

(3) Moreover, there are good grounds to doubt the authenticity of the SPA, not least in light of Mr Ipek's failure to address that in his evidence in these proceedings.

(4) Those concerns are relevant not only to whether the expenditure would be made in good faith, consonant with Mr Ipek's fiduciary duty to Koza Limited, and in the ordinary and proper course of business, but also to whether or not the ICSID tribunal would have jurisdiction based on the SPA; and it is right for the court to take them into account when determining this aspect of the application.

(5) Further, based on Mr Ipek's evidence and the lack of evidence about whether litigation funding has been explored, I am not satisfied that there is no available source of funding other than the assets of Koza Limited, and, in particular, that if this aspect of the application is refused it will not be possible to commence an ICSID arbitration to seek redress in respect of the alleged egregious conduct of the government of Turkey in respect of which Koza Altin has filed no evidence.

(6) I am not persuaded that the circumstances which are said to justify this proposed expenditure are so different from those which appear to me to have been contemplated or intended to be governed by the Undertaking at the time that it was given that it would be appropriate to release Koza Limited from the burden of the Undertaking which it chose to give as an uncontested part of the Order.

(7) In light of those factors, I do not consider that the proposed expenditure falls within the scope of the Undertaking, or that it would accord with the interests of justice overall to approve the expenditure, or that the balance of justice between the parties would make it appropriate to vary the Undertaking to permit it.

(8) Accordingly, this part of the application fails and must be dismissed.

Second item of expenditure – retention of PR consultants

127. Approval is sought to expend up to £30,000 per month on services to be provided at a standard hourly rate by Lexington Communications, an independent firm of PR consultants. That firm's continuing retainer will be kept under review with the prospect that another firm will be appointed if it does not produce value for Koza Limited. Accordingly, Koza Limited contends that this expenditure will be for the

benefit of the company and that it is plainly within the ordinary and proper course of business, as reflected in the Board Minutes dated 5 April 2017:

> "The chairman noted that the Company has no internal or external relations resource but the company requires such a function so it can establish its position in a competitive market, protect its reputation and attract and retain joint venture partners."

128. Koza Limited contends that this class of expenditure would be justified anyway, as appears from Lexington Communications' letter dated 15 June 2017:

> "Koza Ltd has no internal public relations resource, and no spokesperson to respond to media enquiries. … Whilst you have experience of the Turkish media environment, the primary area of your operations has been Turkey, and you have relatively little experience of working with the UK media."

129. In addition, Koza Limited contends that it has an enhanced need for PR services in this case. First, because it is operating in a hostile climate. Mr Ipek's evidence is that the government of Turkey and its agents have accused him and the Koza Group under his management of being involved or implicated in "financing terrorism", "making propaganda of a terrorist organisation", environmental damage caused by reckless mismanagement of toxic chemicals, money laundering and trafficking, misappropriation of oil deposits, and other criminal mismanagement. Second, because its business depends on joint venture partners having confidence in it, especially as its own ability to fund new enterprises is hampered by its restricted access to finance.

130. The problems which Koza Limited has been experiencing in raising external finance and in other ways, including the loss of business opportunities, are detailed in Mr Evran's evidence, which also explains the overall context:

> "When a company which owns such a project is considering Koza Ltd as a long-term business partner that will not be making an immediate significant financial contribution, it inevitably scrutinises every other aspect of Koza Ltd and its business. This means that negative perception in the mining industry of Mr Ipek or the Koza brand assumes increased importance, and becomes a real obstacle to accessing potentially valuable projects."

131. Koza Limited emphasises that Lexington Communications would not be instructed solely for purpose of countering misinformation, but also to assist with the more conventional PR needs of the company: as the Board Minutes record, the purpose of the retainer would be "to assist in countering this serious threat to its business, as well as addressing other public relations matters (such as general company promotion and media relating to the current legal proceedings)".

132. It would seem that it was envisaged that PR services in relation to legal proceedings

would extend to publicising the commencement and progress of the proceedings before the European Court of Human Rights and the proposed ICSID arbitration, and plainly that aspect will fall away in the event that those proceedings do not take place. The applications before the European Court of Human Rights are presently in abeyance, and in accordance with my ruling on the first class of expenditure which forms the subject of the present application Koza Limited will not be able to use its assets to fund an ICSID arbitration. In those circumstances, the proposed arbitration may well not take place. However, that is not necessarily so, because my reasoning recognises the possibility that it will be funded from other sources, including by means of litigation funding.

133. Koza Limited contends that these considerations do not affect the principle of whether expenditure on PR consultants should be allowed: if and to the extent that any proceedings do not go ahead, no related PR expenditure will be incurred.

134. Koza Altin's first ground of objection to this proposed expenditure is that it is clear that what is proposed is a PR campaign that will not be limited to Koza Limited, but will extend to the wider dispute between Mr Ipek and the Turkish state. Mr Ipek should pay for that campaign, and for Koza Limited to fund it would not be in the ordinary and proper course of business of the company. Koza Limited's answer to that objection is that it is impossible to sustain in light of Koza Limited's evidence that the expenditure is needed for the company's legitimate business purposes.

135. Second, Koza Altin points out that Koza Limited does not operate in Turkey, and that it is not suggested that any PR campaign will have any effect there in any event. Koza Limited's answer to this objection is that it contains a *non sequitur*: the evidence of both Mr Ipek and Mr Evran is clear that false statements disseminated through the Turkish media have a direct impact on the business of Koza Limited.

136. Third, Koza Altin contends that because Mr Ipek is already pursuing a PR campaign Koza Limited has no need for PR consultants, and for this reason and in any event the potential benefits to Koza Limited of the proposed campaign are wholly unclear. Koza Limited's answer to this objection is threefold: (a) the only evidence adduced by Koza Altin on this subject is that of Mr Plowman, who is not qualified to say whether a professional firm of PR consultants would provide any benefit to Koza Limited; (b) contrary to Mr Plowman's misgivings, Koza Limited is an operating mining company which has no interest in making payments to third party consultants unless these are assessed to bring corresponding value to the business; and (c) it is not a matter for this court to seek to seek to assess the effectiveness of the proposed PR services.

137. I accept that it does appear to be in contemplation that the PR campaign would not be confined to the business and affairs of Koza Limited alone, but would extend to the wider dispute between Mr Ipek and the Turkish state. In my judgment, however, to incur expense in defending or promoting the reputation of Mr Ipek would not

necessarily be an improper use of the resources of Koza Limited, just as it may be lawful for a local authority to pay the legal costs of defamation proceedings involving an officer where this is calculated to facilitate or is conducive or incidental to the discharge of any of the functions of the local authority (see *Comninos, R (on the application of) v Bedford Borough Council & Ors* [2003] EWHC 121 (Admin)). It all depends on the facts, which cannot be determined on the present application.

138. Conversely, if this class of expenditure is allowed, that does not permit Koza Limited to spend monies otherwise than for the benefit of the company and in the ordinary and proper course of business. Koza Limited will need to take care not to breach the Undertaking by paying for PR services that do not fall within it, especially as the company's prime decision maker is Mr Ipek and human nature being what it is that may enhance the risk of confusion between his interests and those of the company.

139. For these reasons, I do not consider that this is a good ground for disallowing this class of expenditure.

140. That point aside, I accept Koza Limited's submissions in relation to this class of expenditure. This part of the application therefore succeeds. I should emphasise, however, that I am not to be taken as ruling that expenditure up to the maximum level of £30,000 per month that has been applied for can necessarily be incurred by Koza Limited under this heading without breaching the Undertaking. On the contrary, it will be necessary for Koza Limited to make sure that expenditure on PR services is only made in compliance with the Undertaking. That maximum level was sought when it was envisaged that there would be a need to publicise proceedings which are not now taking place. Accordingly, it is to be expected that a lesser sum will now be required.

Third item of expenditure – paying for Mr Ipek's services

141. The third class of expenditure for which approval is sought is paying Mr Ipek £650,000 per annum for his work as CEO of Koza Limited. This aspect of the application is put forward on two bases. First, that it is within the ordinary and proper course of business for a company to remunerate its CEO, provided that the remuneration is not excessive, and, in the present case, the remuneration proposed for Mr Ipek is within benchmarks produced by an independent firm of remuneration consultants, Pearl Meyer. Second, and in the alternative, the Undertaking should be varied to allow the expenditure, because it represents fair remuneration for services rendered, and it is not a disguised form of dissipation of the assets of Koza Limited.

142. Koza Limited's case is that Mr Ipek carries out extensive work for the company and is, in effect, indispensable to its successful operation, not least due to his expertise and his contacts in the industry. Koza Altin has called into question Mr Ipek's technical

mining expertise, but in answer to that Mr Ipek has pointed out that he founded Koza Altin in 2005 and built it into a multi-billion dollar business. With regard to this dispute, it appears from the evidence before me that, however his precise skill set is properly to be classified, Mr Ipek is the, or at least a, key individual player in furthering Koza Limited's business. I consider it is neither necessary nor appropriate to attempt to go beyond that on this application.

143. As to the level of Mr Ipek's proposed remuneration, he would find difficulty in negotiating with himself over his remuneration package. In an effort to get round this difficulty, Koza Limited instructed Pearl Meyer to prepare a report on an appropriate remuneration package. Having considered the size and operations of Koza Limited and its level of capitalisation, Pearl Meyer advised that the level of remuneration "should lie between £460,000 (upper quartile FTSE AIM salary plus actual bonus) and £830,000 (upper quartile Mining Industry peers services fee/salary plus actual bonus)". The figure of £650,000 for which approval is sought by the application is roughly in the middle of the Pearl Meyer figures.

144. The Board of Koza Limited considered the matter at a meeting on 5 April 2017. That consideration focussed on a draft Consultancy Agreement ("the Consultancy Agreement") between Koza Limited and a company called Encore Mining Consultancy Limited ("EMCL"), under the terms of which the services of Mr Ipek would be provided by EMCL for "the general control and management of the business of the Company" (more fully described in Schedule 1) in return for a payment of £650,000 per annum. The Board gave its approval for the Consultancy Agreement to be executed.

145. Koza Limited contends that, in these circumstances, the proposed level of remuneration is not excessive.

146. Koza Altin objects to this expenditure on the following principal grounds.

147. First, Koza Altin contends that if this expenditure was to be allowed that would alter the *status quo* which the Order was designed to keep in place pending resolution of the dispute in these proceedings as to whether Mr Ipek is entitled to retain his current position of having sole control of Koza Limited. To allow Mr Ipek to put in place an arrangement which he has essentially agreed with himself, and which involves him being paid very significant amounts out of the company, would not preserve the *status quo*, but would change it significantly in his favour.

148. In this regard, on the one hand Mr Ipek has not previously received payment for his services as CEO, whether by way of salary of by way of being paid dividends directly relating to Koza Limited. Moreover, he has not said that he will no longer work for Koza Limited unless he is paid to do so. On the other hand, Mr Ipek's case is that he has not previously sought remuneration for working as CEO because he

expected to be rewarded by various payments from companies in the Koza Group, to which he is currently no longer able to look forward. Mr Ipek received a basic salary in each of the Koza Group companies, and dividend payments as a member of the board of directors of these companies and in respect of his shareholding in certain of the companies of the Koza Group. On Mr Ipek's case, however, the vast majority of his assets are in Turkey and are out of his reach because they have been seized by the Turkish state.

149. Second, Koza Altin contends that the structure of the arrangement is unsatisfactory and outside of the norm. In substance, what is proposed is that Mr Ipek should be paid a very high CEO's fee, but be insulated from the consequences of holding a CEO position. Koza Limited had previously signed a detailed service agreement in relation to Mr Kara, who it wished to retain as an executive. That agreement contained the kind of provisions that would be usual, such as those covering hours of work, restrictive covenants, and confidentiality. None of that is contained in the proposed Consultancy Agreement, which is extremely cursory, despite it providing for EMCL to be paid 13 times as much as Mr Kara. Further, Mr Ipek is not a party to the Consultancy Agreement, and it is not clear what recourse there could be in practice in relation to breaches, because Koza Altin believes that EMCL is nothing more than an empty shell company.

150. Third, Koza Altin contends that the proposed fee is extraordinarily high. It is far higher than senior executives of Koza Altin, which is a larger and more complex business than Koza Limited; far higher than Mr Ipek's previous remuneration as Chairman of Koza Altin (and indeed the combined total of Mr Ipek's remuneration from other group companies as well); and far (13 times) higher than what was agreed in relation to Mr Kara, who had significant mining experience.

151. Koza Altin contends that the evidence from Pearl Meyer does not, on proper analysis, justify the proposed fee. Pearl Meyer based its remuneration recommendations on two peer groups: Mining Industry (upper quartile) and FTSE AIM (upper quartile). The former was described as "UK listed companies with a global presence", the upper quartile of which had an average market capitalisation of £215m and average total assets of £333m. The latter was described as containing data from "all companies, of all sectors, listed on [AIM]", the upper quartile of which had average total revenue of £54m and 300 employees. However, Koza Limited has only 7 employees, including Mr Ipek and two interns; is not listed; has very little (if anything) in the way of revenue; and has assets made up almost exclusively of the money with which it was capitalised and the bulk of which is sitting dormant in Gibson Dunn's client account. In these circumstances, Pearl Meyer's recommendation that remuneration for the CEO of Koza Limited should be set between the average CEO remuneration for FTSE AIM (upper quartile) (£460,000) and Mining Industry (upper quartile) (£860,000) does not withstand scrutiny. Further, the attempts by Pearl Meyer to defend their analysis in a

letter submitted as part of Koza Limited's reply evidence do not assist the company, and, if anything, further weaken its position, as Pearl Meyer here makes reference to median figures, rather than the upper quartile figures to which it originally referred.

152. Koza Limited answers these criticisms by making three main points. First, Pearl Meyer is an independent expert, and Koza Altin has not adduced any expert evidence in response to the evidence of Pearl Meyer. Second, Pearl Meyer states that Koza Altin's reliance on the remuneration environment in Turkey is misplaced, in essence for two reasons: (a) remuneration levels for positions in Turkey bear no relation to those for positions in London, and (b) Koza Altin's case is based on a misunderstanding of the remuneration structure in Turkish companies, and does not taken into account substantial performance–related elements to directors' remuneration. Third, in answer to the suggestion that neither the FTSE AIM peer group nor the Mining Industry peer group are relevant comparators, Pearl Meyer states that it is standard industry methodology to use market capitalisation as the basis for assessing remuneration and that the median market capitalisations for both peer groups are well below that of Koza Limited.

153. I accept that it is within the ordinary and proper course of business for a company like Koza Limited to remunerate its CEO, provided that the remuneration is not excessive. Indeed, I do not understand this proposition to be disputed by Koza Altin.

154. In my view, this aspect of the application therefore turns on whether the remuneration proposed for Mr Ipek falls within the ambit of the Undertaking.

155. If and to the extent that it does not, I am not persuaded that there is any legitimate basis for varying the Undertaking to allow payments that are outside the ordinary and proper course of business to be made.

156. I do not consider that it is necessary for Koza Altin to file expert evidence in order to be in a position to suggest that the approach adopted by Pearl Meyer is flawed and should be rejected. However, Koza Limited is entitled to ask the court to take into account in its favour the fact that there is no rival independent expert view.

157. I consider that there is force in the arguments put forward by Koza Altin concerning the size of Koza Limited and the scale of its operations. I also consider that there are a number of highly unusual features of the present case which mean that it is difficult to make reliable comparisons with ordinary circumstances. On the one hand, I understand the difficulties which Mr Ipek faces as a result of what is said to be oppression and wrongful expropriation of assets by the Turkish state. I also take into account that, although Koza Altin says that nothing can or should be extracted from this, the fact remains that Koza Limited's evidence in that regard has not been answered on this application. On the other hand, Mr Ipek faces the difficulty that in

fixing the remuneration between Koza Limited and himself as CEO he would in effect be acting for both sides. No such negotiation has been carried out. If it was to take place, it is difficult to assess what significance should be attached to the fact that Mr Ipek has not said that unless he is paid he will not carry on providing the services to Koza Limited that he has previously provided without remuneration from it. It seems to me that Pearl Meyer's advice does not properly reflect these highly material factors.

158. For these reasons, I have reached the conclusion that Pearl Meyer's advice that the level of remuneration for Mr Ipek "should lie between £460,000 (upper quartile FTSE AIM salary plus actual bonus) and £830,000 (upper quartile Mining Industry peers services fee/salary plus actual bonus)" is not dependable. For that reason, and in any event, the figure of £650,000 per annum for which approval is sought is excessive.

159. Doing the best I can, and applying the guidance provided by the authorities discussed above, I take the view that appropriate remuneration for Mr Ipek would be no more than £250,000. I am reluctant to condone payment to EMCL, as I suspect that this has as least as much to do with the avoidance of tax as the omission of typical employee obligations identified by Koza Altin, and I consider that persons based in and operating from England, whether companies or individuals, ought to pay taxes due. At the same time, I do not consider that I can or should require payment to be made personally to Mr Ipek, or on terms that he submits to employee obligations of the kind that Koza Altin suggests would be appropriate. I consider it must be left to the legal, and perhaps accountancy, advisers of Koza Limited to advise it whether the particular mode of payment proposed by Mr Ipek is indeed within the words of the Undertaking.

Conclusion

160. The application fails with regard to expenditure on funding a proposed ICSID arbitration, succeeds with regard to expenditure on PR advisers, and succeeds to the extent of allowing expenditure of no more than £250,000 per annum on remuneration for Mr Ipek with regard to that class of expenditure. I ask Counsel to agree an order which reflects these rulings. I will hear submissions on any points which remain in dispute as to the form of the order, and on any other issues such as costs and permission to appeal, either when judgment is handed down, or at some other convenient date.