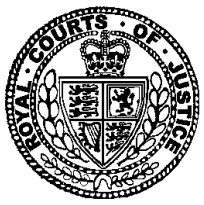

Neutral Citation Number: [2016] EWHC 3358 (Ch)

Case No: HC-2016-002407

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Building
London, EC4A 1NL

Date: 21/12/2016

Before:

MRS JUSTICE ASPLIN DBE

- -

Between:

(1) KOZA LIMITED **(2) HAMDI AKIN IPEK**	**Claimants**
- and -	
(1) MUSTAFA AKCIL **(2) HAYRULLAH DAGISTAN** **(3) MAHMUT HIKMET KELES** **(4) HAMZA YANIK** **(5) ARIF YALCIN** **(6) KOZA ALTIN ISLETMELERI AS**	**Defendants**

- -
- -

MR RICHARD MORGAN QC, MR SIWARD ATKINS and MR THOMAS MUNBY (instructed by **Morgan Lewis & Bockius UK LLP**) for the **Claimants**

MR STEPHEN AULD QC and MR DAVID CAPLAN (instructed by **Mishcon de Reya LLP**) for the **Defendants**

Hearing Dates: 14th, 15th and 16th December 2016

- -

APPROVED JUDGMENT

(Computer-aided Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MRS JUSTICE ASPLIN :

Introduction

1. I have before me seven applications which arise out of a dispute concerning the ownership of the assets and the management of the First Claimant, Koza Ltd, ('Koza Ltd') an English private company limited by shares. The Second Claimant is a natural person of Turkish nationality, Mr Hamdi Ipek ('Mr Ipek'), a director of Koza Ltd and a member of the family which owns and controls the corporate group to which Koza Ltd belongs.

2. The Defendants are five individuals of Turkish nationality, Messrs Mustafa Akçil, Hayrullah Dağistan, Mahmut Keleş, Hamza Yanik, and Arif Yalçin ('Defendants 1-5'), and one Turkish joint stock company, Koza Altin Işletmeleri A.S. ('Koza Altin'). The Koza Group is a large Turkish-based mining and media conglomerate, which was substantially owned and controlled by the Ipek family, but which had some publicly-traded stock. Koza Ltd is a wholly-owned subsidiary of Koza Altin. It was incorporated in England and Wales on 24 March 2014 with a substantial capitalisation of 60 million fully paid up £1 ordinary shares.

3. Following a police raid of the Koza Group's headquarters in Ankara, Turkey, in September 2015, allegations were brought against the Group of involvement in financing terrorism. On 26 October 2015, Ankara Peace Criminal Judge Mr Yunus Suer made an order under Art. 133(1) of the Turkish Criminal Procedure Code replacing the board of Koza Altin and 21 other companies in the Koza Group with officers, referred to in these proceedings as 'trustees', who were required to manage the companies' boards pending further investigations. The decision was appealed to Peace Judge Sava Sahinbay on 2 November 2015. It was dealt with on paper and rejected on 12 November 2015 on the basis that "according to Article 133 inspection is continuing and the legal procedure is continuing." An appeal dated 18 November 2015 was lodged with the Constitutional Court but has not been dealt with. The Defendants' expert states, however, that the delay in dealing with the case is not unusual. In any event, Mr Ipek's brother also attempted to file an appeal with the European Court of Human Rights in Strasbourg, but the Claimant says his papers were intercepted and he was and remains imprisoned without charge.

4. The current applications relate to the steps purportedly taken by Koza Altin, as shareholder of Koza Ltd, since the trustees were appointed. Broadly, the Claimants say that the integrity of the Turkish justice system has been compromised by recent developments in that country, and that the appointment of the trustees cannot be taken at face value. They say that the Peace Criminal Judges did not exercise their judicial functions in good faith and for proper purposes, but rather as an instrument of the Turkish government to put control of the Koza Group's assets into its hands and that the acts are a breach of human rights and, in particular, Article 6 ECHR. The Defendants refute such an inference and submit that this case requires the normal application of English Company law and that matters concerning the appointment of the trustees are subject both to Turkish law and jurisdiction.

5. The immediate issues between the parties arise from: a notice dated 19 July 2016 under section 303 Companies Act 2006 (the "2006 Act") purportedly served on behalf of the Sixth Defendant, Koza Altin, requisitioning a general meeting of Koza

Ltd to pass resolutions replacing its directors (including Mr Ipek) with the First, Second and Third Defendants (the "s. 303 Notice"); and a further notice dated 10 August 2016, also purportedly served on behalf of the Sixth Defendant calling a general meeting of Koza Ltd under section 305 of the 2006 Act for the purpose of passing the resolutions (the "s. 305 Notice"). The Proxy Form which accompanied the s305 Notice was signed by three of the Defendants "for and on behalf of Koza Altin . . .".

Background in more detail

6. The Claimants contend that tension between the Koza Group and the Turkish government began in 2013 when some of its newspapers reported on the corruption allegations against President Erdoğan's Justice and Development Party, the 'AKP', and the then Prime Minister, Mr Erdoğan himself. On 1 September 2015, the group's *Bugün* newspaper published a story critical of the government. It was that day that the police searched the headquarters of the Koza Group and the order was made by Peace Criminal Judge Yunus Suer appointing 25 trustees, under s. 133(1) of the Turkish Criminal Procedure Code.

7. The Claimants also contend that the former institution of Peace Criminal Courts were abolished in 2014 and replaced by a much smaller number of 'Peace Criminal Judges' which they say are not independent of the Turkish government and are unable to deal effectively with the case load before them. The Peace Criminal Judges, they say, have greater powers of detention and confiscation, and those brought before them have more limited procedural rights. However, in his evidence, the Defendants' expert stated that the Peace Criminal Judges are properly appointed and independent and that they have no powers of confiscation, rather they are required to preserve property pending full investigation.

8. In any event, on 28 October 2015, police entered the Koza Group media headquarters and, the Claimants say, shut down its media operations, albeit that the operations were subsequently resumed under the editorial control of the trustees. The Claimants contend that the trustees were incompetent in their management of the group and that, although their appointment under Article 133(1) must be on an 'interim' basis pending investigation, no investigation has in fact been commenced. On 13 January 2016, the number of trustees was reduced from 25 to 9, and subsequently to the five who are named as defendants.

9. Meanwhile, in September 2015, the board of Koza Ltd allotted a £1 'A' ordinary share, with certain additional rights over board composition and winding up, to each of Mr Ipek and his brother. Further changes were made to Koza Ltd's Articles of Association to entrench the rights of 'A' shareholders. Koza Ltd's share capital was held by the Luxembourg branch of Garanti Bank, a Turkish bank substantially owned by Koza Ltd's erstwhile London bankers, Spanish bank BBVA. It was held in interest bearing current accounts.

10. On 30 September 2015, Koza Ltd decided to bring its funds back to London. However, Garanti Luxembourg did not comply with its instruction.

11. On 6 November 2015, Koza Ltd issued an application for summary judgment in the Luxembourg courts. However, the accounts were then subject to a freezing order of

the Luxembourg *Cellule de Renseignement Financier* pending investigations for allegations of financing terrorism.

12. In January 2016, Defendants 1-5 applied to the 7th Commercial Court of First Instance in Ankara seeking orders against Koza Ltd that (i) the resolution establishing the "A" shares in Koza Ltd be cancelled; (ii) Koza Ltd return its £60 million share capital from Luxembourg to the control of the trustees in Turkey; and (iii) that an interim injunction be granted restraining Koza Ltd from using the £60 million until after a full trial on the merits in Turkey. An interim injunction was made on 5 February 2016.

13. On 11 February 2016, Koza Ltd issued new instructions to Garanti to transfer the funds instead to the client account of its London solicitors, Morgan Lewis. Garanti failed to comply with this instruction. However, on 19 July 2016, the Luxembourg court gave judgment for Koza Ltd and ordered Garanti to make Koza Ltd's funds available.

14. On the same day, as judgment was given in Luxembourg, the s. 303 Notice was purportedly served on behalf of Koza Altin. It was signed by two of D1 - 5 on behalf of Koza Altin. Thereafter, by a letter to the directors of Koza Ltd dated 21 July 2016, which was stated to be "on behalf of Koza Altin . . ." and signed by each of D1-5, the directors were instructed to cease dealing with the company's assets. Koza Ltd's board did not call a meeting under the 19 July 2016 notice, that is the s. 303 Notice, and on 10 August 2016 the s. 305 Notice purporting to call a meeting on behalf of Koza Altin as the sole shareholder of Koza Ltd's ordinary shares was served.

15. The Claimants issued a Claim Form on 16 August 2016 seeking: a declaration that the s. 303 Notice was ineffective; a declaration that the s. 305 Notice was also ineffective; an injunction preventing the Defendants or any of them from holding any meeting of Koza Ltd pursuant to the s. 303 Notice and the s. 305 Notice; an injunction to restrain D1 – 5 and any of them from holding themselves out as having the authority to act for or to bind Koza Altin as a shareholder of Koza Ltd and from causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Ltd.

16. The relief was stated to have been sought on two grounds: the first was that by Article 26 of Koza Ltd's Articles of Association the resolutions to which the s. 303 Notice and the s. 305 Notice related could not be passed without the consent of Mr Ipek as an "A" shareholder of Koza Ltd, and he does not consent (the "Company Law Claim"); and secondly, that the court should not recognise any authority of D1-5 to cause Koza Altin to serve the s. 303 Notice and the s. 305 Notice or any further notices, or to take any other steps as shareholder of Koza Ltd (the "Authority Claim").

17. On the same day, the Claimants sought an *ex parte* injunction to prevent such a meeting from taking place. Snowden J granted the injunction, held that there was jurisdiction over the Defendants because both limbs of the claim fell within Article 24(2) of the Jurisdiction and Recognition of Judgments Regulation (EC) No 1215/2012, (the "Recast Judgments Regulation") and that as a result, the Claimants could serve the Defendants out of the jurisdiction without the permission of the court to do so, under CPR 6.33 and Article 24(2). He made an order for alternative service

permitting the Claimants to serve D1- 5 at the offices of Mishcon de Reya LLP and to serve Koza Altin at those offices and in respect of certain documents at its email address. In the light of his conclusion in relation to CPR 6.33, Snowden J did not consider whether permission to serve out of the jurisdiction could have been granted under CPR 6.36.

18. The Claimants sought further injunctive relief on notice by a further application of 17 August 2016 (the "Second Injunction Application"). At the inter partes hearing before Snowden J on 25 August 2016, an order was made by consent continuing the relief granted on 16 August over until the hearing of the Second Injunction Application or further order and making directions for service of evidence in relation to the Second Injunction Application.

19. The dispute as to the authority of the Mishcon de Reya LLP to act as the solicitor to Koza Altin was referred to expressly in the third recital to the Order and the seventh recital contained an express recitation of the Defendants' right to challenge "the court's jurisdiction in these proceedings and the grant and/or continuing of the orders of Snowden J dated 16 August 2016." In addition, in the second schedule to the Order, amongst other things, D1-5 provided a cross- undertaking should the order have caused loss to the Claimants. They also undertook to use their best endeavours to procure the transfer of the funds held in Koza Ltd's accounts in the Luxembourg branch of Garanti Bank to the client account of Koza Ltd's solicitors and to withdraw proceedings against Koza Ltd which had been commenced by the Defendants in Luxembourg. The Claimants also gave undertakings: to use their best endeavours to procure the transfer of the £60-odd million from Luxembourg to the account of Morgan Lewis; not to dispose of, deal with or diminish the value of any funds belonging to Koza Ltd other than in the ordinary course of business; to give the trustees 7 days advance written notice of expenditure on new projects (which was defined); to the give the same notice of a single payment of more than £25,000; and to comply with any reasonable request the trustees might make for information about any payment in excess of £100,000.

20. On 31 August 2016, Particulars of Claim were served. In summary, the relief sought in paragraph 45 of the pleading is: (1) a declaration that the s. 303 Notice and hence the s. 305 Notice were ineffective; (2) an injunction to restrain the Defendants from holding a meeting of Koza Ltd pursuant to the s. 303 Notice or from taking any steps to remove the current board of directors in breach of Article 26 of the Articles of Association; (3) a declaration that the English courts "do not recognise any authority of the trustees (or any of them) to cause Koza Altin to call any general meetings of [Koza Ltd] or to do or permit the doing of anything else as a shareholder of [Koza Ltd]"; and (4) an injunction to restrain the trustees from holding themselves out as having authority to act for or bind Koza Altin as shareholder of [Koza Ltd] and from causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Ltd.

21. In the body of the pleading, having referred to the parties, the Authority Claim is set out in summary at paragraph 5. It is stated that the English court should not recognise the authority of the trustees to cause Koza Altin to call a general meeting or act as a shareholder of Koza Ltd because: their appointment was unlawful as a matter of Turkish law and there is no way of redress by way of appeal; the judicial process by which the trustees were appointed was contrary to natural justice and

Article 6 of the ECHR; and the purpose for which the trustees were appointed was to assist in the expropriation of assets which was an abuse of the Turkish criminal justice system and it would be contrary to public policy to recognise the appointment.

22. The Authority Claim is then elaborated over numerous paragraphs. Matters are dealt with in chronological order and reference is made to the s. 303 Notice and the s. 305 Notice from paragraph 31. Under the heading, "Claimants' case on why the s. 303 Notice was invalid", at paragraph 34 the Authority Claim and the Company Law Claim are relied upon. The remainder of the pleading concerns the Company Law Claim and the injunctive relief.

23. On 1 September 2016, Decree Law No. 674 was passed in Turkey, transferring control of the Koza Group companies from the trustees to appointees of the Savings Deposit Insurance Fund of Turkey ('SDIF'), a statutory financial regulation authority which holds significant assets. Further, on 6 September 2016, the Decree was implemented, save that it was held that the trustees would remain in office until their powers were transferred to the SDIF. On 22 September 2016, the SDIF purported to appoint a new board of directors of Koza Altin comprising seven appointees, including the Fourth Defendant.

24. In the meantime, on 14 September 2016, Defendants 1-5 and Koza Altin filed an Acknowledgment of Service in which it was stated that they intended to contest the jurisdiction. Mishcon de Reya LLP has stated in correspondence that it is instructed by the SDIF Appointees in addition to Defendants 1-5 and Koza Altin, but the SDIF Appointees have not consented to be joined as parties to these proceedings. The Claimants state that members of the Ipek family have applied to have the order under which the SDIF directors were appointed reviewed, but the application has not been successful.

25. On 28 September 2016, Master Matthews made a consent order extending various deadlines in relation to the directions for the hearing of the proposed jurisdiction application. It was stated expressly in the fifth recital that the Defendants reserved their right to challenge the jurisdiction of the court, notwithstanding the consent order.

26. Those deadlines were further extended by a consent order made by Mann J on 3 November 2016 which contained a recital in a very similar form. In the meantime, on 7 October 2016, that application, (the "Jurisdiction Application") was issued and on the same day a Defence and Counterclaim was filed and served on behalf of Koza Altin. Once again, it is stated in the Defence that it is served subject to a jurisdictional challenge on the part of Koza Altin as to the Authority Claim and by D1-5 as to both the Authority and the Company Law Claims. It is stated expressly that the Defence and Counterclaim is served on behalf of Koza Altin only and in relation to the Company Law Claim only "(and certain ancillary matters which are incidental thereto)." Further, at paragraph 1.3(4) it is stated that:

> "This Defence is not intended to and does not waive or in any way prejudice the outstanding jurisdictional challenges that any of the Defendants have made."

27. At paragraph 2.4 of the Defence, without prejudice to the jurisdictional challenge, and in response to the allegation that D1-5 purport to be trustees of Koza Altin, amongst other things, it is stated that D1-5 were appointed as trustees under Turkish law and that they have the same powers and capacity to bind Koza Altin as any other director under Turkish law. The content of the Defence is repeated in the usual way in the Counterclaim. In addition, it is expressly stated that the Counterclaim is not intended to waive the jurisdictional challenges. The Counterclaim also contains two express claims for relief as follows:

> (1) A declaration that the changes purportedly effected to the Company's Articles of Association by the September 2015 Resolution were invalid and ineffective and/or that Article 26 is unenforceable or otherwise ineffective; and/or
>
> (2) A declaration that the resolution purportedly passed by the Company's directors at the board meeting of 11 September 2015 and/or the purported issue and allotment of A Ordinary Shares to Mr Ipek and Tekin Ipek were invalid and ineffective."

28. On 3 November 2016, the Claimants issued two applications: the first sought to strike out the Acknowledgment of Service, Defence and Counterclaim and all other documents filed purportedly on behalf of Koza Altin on the basis of want of authority and abuse of process (the "Strike Out Application"); and the second seeks directions for the trial of the Strike Out Application (the "Directions Application").

29. An Amended Reply and Defence to Counterclaim was served on 9 November 2016. At paragraph 2, it is stated that the pleading is served subject and without prejudice to the Claimants' right to impugn the authority of what are described as the purported officers of Koza Altin to cause it to serve the Defence and Counterclaim and to apply to strike out that pleading upon that basis. The paragraph goes on:

> "Accordingly, where the D& CC states that it is the statement of case of Koza Altin, or that actions were allegedly taken by Koza Altin, the Claimants respond generally that those actions should instead be regarded as the actions of those put into purported control of Koza Altin and that the English Court should not recognise those actions as being the actions of Koza Altin."

The same matters are repeated at the first paragraph to the Defence to Counterclaim and it is stated that because those purporting to act on behalf of Koza Altin have no valid authority recognisable by the court in this jurisdiction to give instructions on behalf of Koza Altin, ". . . the Counterclaim should be struck out or otherwise stayed as an abuse of process."

30. The following day, 10 November 2016, Rose J gave directions in relation to the Jurisdiction Application, the Strike Out Application, the form and duration of the interim injunctive relief and all case management issues including the Directions Application. She also dealt with the informal intimation by the Defendants that they intended to apply to strike out the Strike Out Application (the Dismissal Application). Those directions led to the hearing before me.

31. Subsequently, a further issue arose in relation to the £60m odd which had been transferred from Luxembourg to the client account of Morgan Lewis & Brockius LLP. The Claimants gave written notice that they wished to transfer the £60m odd to accounts under the management of Hanson Asset Management ('Hanson'). Koza Altin (then acting through the SDIF Appointees) made an application seeking to restrain Koza Ltd from doing so (the "Hanson Application"). That application came before the Applications Court on 30 November 2016 and was adjourned over to be dealt with the other applications at this hearing.

Present position

32. The Defendants do not oppose the Continuation Application as against Koza Altin, although there are issues as to the nature and form of undertakings to be given as a result of the changes in the composition of Koza Altin's board. For similar reasons, the Defendants submit that the Further Injunction Application should be stayed over until trial or further order with which the Claimants are content. The other applications, however, are more contentious. I have heard lengthy and complex submissions in relation to the Jurisdiction Application, the Dismissal Application and the Hanson Application. I propose to give judgment in relation to each of them before turning to the case management issues and form of injunctive relief which arise.

The Jurisdiction Application

(i) Article 24

33. I will turn first to the Jurisdiction Application. The question here is whether, as Snowden J held, both the Company Law Claim and the Authority Claim fall within Article 24 of the Recast Judgment Regulation and whether otherwise, the Defendants have submitted to the jurisdiction.

34. The Recast Judgment Regulation, Article 24 provides where relevant as follows:

> "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
>
> …
>
> (2) in proceedings which have as their object the validity of the constitution, the nullity or dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law."

It is not in dispute that the terms of the Recast Judgment Regulation apply in this case despite the fact that Koza Altin and D1-5 are not domiciled in an EU Member State. This arises from the opening phrase of Article 24, which provides that the court of the relevant Member State shall have exclusive jurisdiction regardless of the

domicile of the parties when read with recital (14) to the Recast Judgment Regulation, which provides:

> "A person not domiciled in a member state should in general be subject to national rules of jurisdiction applicable in the territory or the member state of the court seised.
>
> However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction, and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile."

I agree with Snowden J that when read together it is clear that the framers of the Recast Judgment Regulation intended Article 24(2) to apply regardless of whether a defendant to proceedings was domiciled in a Member State or not.

35. Mr Auld QC on behalf of the Defendants submits that, whilst Koza Altin does not contest that the Company Law Claim falls within the Article, the Authority Claim does not and therefore, the English court has no jurisdiction in that regard against Koza Altin. D1-5 contend, however, that the English court has no jurisdiction over them whether in relation to the Company Law Claim or the Authority Claim. Mr Auld emphasised that Article 24 provides for exclusive jurisdiction and is a derogation for the general principle set out at preamble (14) to the Recast Judgment Regulation that a defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised and preamble (15) which states that the rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and that jurisdiction should always be available on that ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously and avoid conflicts of jurisdiction. It is not in dispute that, for the purposes of the Regulation, Article 63 provides that a company's domicile is the place where it has its statutory seat; its central administration; or its principal place of business, and in the United Kingdom "statutory seat" means its registered office.

36. Mr Auld also stated that the ECJ has made clear that Article 24 must be construed strictly. In ***Hasset v South Eastern Health Board*** [2009] ILPr 28 the ECJ was concerned with Article 22 Regulation 44/2001, which was the forerunner of Article 24 and which was in materially identical form. The case concerned a claim for indemnity by two Irish doctors who had been joined as third parties in a medical negligence claim. The Medical Defence Union Ltd and its associated company refused the indemnity/contribution on the basis of its Articles of Association providing that any decision concerning a request for an indemnity came within its discretion. The doctors claimed that the refusals infringed their rights under the Articles of Association and applied to the Irish High Court to join the MDU as a third party. The application was granted and subsequently the MDU sought to have it set aside on the grounds of lack of jurisdiction under Article 22. The Irish Supreme Court stayed the proceedings and referred the question to the European Court of Justice.

37. It was held that the provisions of the Regulation must be interpreted independently by reference to its scheme and purpose (para 17), and that as stated in the 11th recital (in substantially the same form as the 15th recital to the Recast Judgment Regulation) jurisdiction based on the defendant's domicile, in accordance with the general rule, must always be available save in a few well-defined situations (para 18). It was also noted that the court had adopted such an interpretation in relation to the Brussels Convention which was in substantially the same form as Article 22. It had held that the provisions of the Brussels Convention introduced an exception to the general rule and must not be "given an interpretation broader than is required by their objective, since their effect is to deprive the parties of the choice of forum which would otherwise be theirs. . .": (para 19). Further it was held that:

> "20. . . . as was confirmed by the Jenard Report on the Brussels Convention . . . by introducing such an exception in the case of companies, whereby exclusive jurisdiction is attributed to the courts of the Member State in which the company has its seat, the essential objective pursued is one of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decision of its organs.
>
> 21. As that report also indicates, the courts of the Member State in which the company has its seat appear to be those best placed to deal with such disputes, inter alia because it is in that State that information about the company will have been notified and made public. Exclusive jurisdiction is thus attributed to those courts in the interests of the sound administration of justice . . .
>
> . . . .
>
> 26. It follows that . . . that provision must be interpreted as covering only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association."

38. It was held that the challenge was to the manner in which a power of the Board of Management of the MDU was exercised and not whether the Board was empowered under the Articles of Association to adopt the decision rejecting their claim. Accordingly, it did not fall within Article 22(2): (paras 28-30). It was insufficient that the legal action involved "some link with a decision adopted by an organ of a company": (para 22).

39. The forerunner of Article 24 was also considered by the ECJ in ***Berliner Verkehrsbetriebe v JP Morgan Chase Bank NA*** [2011] 1 WLR 2087, a case in which a German public transport authority brought proceedings in Germany for a declaration that a swap contract which it had entered into with an American bank, and in respect of which the bank had brought enforcement proceedings in England pursuant to an English jurisdiction clause in the contract, was void because the subject matter was ultra vires the authority's own statutes and that by virtue of Article 22 the subject matter was one over which the courts of Germany, being the state in which it had its seat, had exclusive jurisdiction. It was held that Article 22

must be interpreted by taking account of matters other than its wording, in particular, the purpose and the general scheme of that regulation: (para 29); that Article 22 must be construed strictly and no more broadly than is required by the objective and that it should be recalled that the article is a derogation from the general rule that the courts of the member state in which the defendant is domiciled are to have jurisdiction: (para 30). Further:

> "32. . . . a strict interpretation of article 22(2) which does not go beyond what is required by the objectives pursued by it is particularly necessary because the jurisdiction rule which it lays down is exclusive, so that its application would deny the parties to a contract all autonomy to choose another forum.
>
> . . .
>
> 34. If all disputes relating to a decision by an organ of a company were to come within the scope of article 22(2) . . . that would in reality mean that a legal action brought against a company – whether in matters relating to a contract, or to tort or delict, or any other matter – could almost always come within the jurisdiction of the courts of the member state in which the company has its seat. . .
>
> . . .
>
> 37. Thus article 22(2) . . . confers jurisdiction to adjudicate on disputes which relate to the validity of a decision of a company's organs upon the courts where the company has its seat. . . .
>
> 38. However, in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis.
>
> . . .
>
> 44. Thus, the divergence noted in para 26 of the present judgment between the language version of article 22(2) . . . is to be resolved by interpreting that provision as covering only proceedings whose principle subject matter comprises the validity of the constitution, the nullity or the dissolution of the company, legal person or association or the validity of the decisions if its organs."

40. It was also held at [43] that exclusive jurisdiction under Article 22 applied in proceedings which are "in substance" concerned with the validity of the constitution, the nullity or the dissolution of the company, legal person or association, or with the validity of the decisions of its organs. It was held therefore, that Article 22(2) did not apply.

41. Mr Auld submits, therefore, that the Authority Claim has nothing to do with English Company law, a conclusion that Article 24(2) applies will lead to conflicting judgments, the entirety of the Authority Claim amounts to an attack on the Turkish court, is completely separate and cannot be brought within the sub-article by tagging on the phrase "as a shareholder of Koza Ltd". He says that the Authority Claim is not limited to the validity of the s. 303 and s. 305 Notices at all but is very wide. In this regard, he reminded me of what he says is the wide form of the declaration sought at paragraph 45(3) of the Particulars of Claim. He says that this is exactly what the European Court of Justice intended to preclude as a result of a strict interpretation of Article 24 and Article 22 before it and that, if anything, only one aspect of the Authority Claim relates to the Notices which cannot be enough for the purposes of Article 24. In fact, he submits that the circumstances of this case are closer to that in ***Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd & Ors*** [1980] 1 AC 368 in which English and Spanish companies sought to recover property to which it was alleged they were entitled before the enactment of Spanish decrees by which the property was expropriated and in which it was held that the English court would recognise the compulsory acquisition law of a foreign state.

42. He also took me to passages in the judgments of Aikens LJ in the Court of Appeal in the ***BVG*** case in which he used a variety of phrases to describe the link necessary to cause proceedings to fall within Article 22 as it then was. As that decision was superseded by that of the ECJ, I do not propose to set out passages from that judgment. Suffice it to say that he mentioned proceedings being "principally concerned with" or which 'have their object" in Article 22 and endorsed the approach of Mance J (as he then was) in the ***Grupo Torras*** [1996] 1 LLR 7 that the court should undertake an "overall classification" of what a case is "principally concerned with". Aikens LJ also stated at [88] that overall the proceedings should be "so closely connected with matters of local company law and internal corporate decision making . . . that the proceedings should not be tried anywhere but in the courts of the state where the company has its seat." I was also referred to ***Worldview Capital Management SA v Petroceltic International plc*** [2015] EWHC 2185 (Comm) which, whilst being another example of the consideration of Article 24, takes the matter no further forward.

43. Mr Morgan QC, on the other hand, says that it is quite clear from the Claim Form that the relief sought relates directly to the validity of the s. 303 and s. 305 Notices and therefore to the validity of the constitution or the validity of the decisions of the organs of Koza Limited being its shareholders in general meeting and its board of directors. He says the same is true of the relief sought in the Particulars of Claim. He submits that, if the Authority Claim does not fall within the sub-article, it would never be possible to examine the question of whether a foreign shareholder of an English company was competent to act as such. He says that the principal subject matter of the claim is the validity of the Notices and, therefore, it falls squarely within the article and the explanation provided at [44] of the ***BVG*** decision in the ECJ. He also submits that what can be gleaned from the approach of Aikens LJ in the Court of Appeal in ***BVG*** is that, in order to fall within the article, the proceedings must be inward looking, which is the case here.

Conclusion:

44. First, the Company Law Claim falls within Article 24 which is not in dispute. It is concerned with the interpretation of and validity of amendments to the Articles of Association of Koza Ltd and directly affects the validity of the s. 303 and s. 305 Notices. In my judgment, that is equally the case in relation to the Authority Claim. It goes directly to the validity of the s. 303 and s. 305 Notices which are served under the Companies Act 2006 and relates directly to the validity of the decisions of an organ of an English company and its constitution. It seems to me that the two issues are inextricably linked. It is not possible to determine whether the s. 303 and s. 305 Notices are valid without also considering whether the shareholder by whom they were served had capacity to do so and in turn, therefore, whether those who served the Notices on behalf of the shareholder had authority to cause the shareholder to do so. In my judgment, it is entirely artificial to seek to separate the issues out. To do so and to conclude that the Authority Claim was outwith Article 24(2) would lead to a situation in which it was not possible to determine whether a foreign person who serves a notice under the Companies Act 2006 in relation to an English company, which has consequences in relation to the validity of the decisions of the organs of the company had proper authority or capacity to do so. Such an outcome cannot be correct. In my judgment, therefore, the proceedings are in substance concerned with the matters set out in Article 24(2) or, to put it another way, the principal subject matter of the proceedings falls within the sub-article.

45. It is important in this regard to distinguish between matters of jurisdiction and choice of law. The question of the validity of the Notices, the constitution of the English company and the validity of the decisions of its organs are matters both for the exclusive jurisdiction of the English court and for English law. However, where there is a foreign shareholder of an English company, it may well be that, when applying the principles of private international law, it is necessary to hear evidence as to foreign law to determine as a question of fact whether the foreign person has authority to serve the notice under English Company law. At the next stage, it may also be necessary to hear evidence and to determine as a matter of public policy whether that authority is to be recognised. In my judgment, neither the reference to foreign law in relation to the authority of the foreign shareholder nor the possibility of public policy considerations arising can prevent the matter from falling within Article 24(2) in the first place if the principal subject matter of the proceedings falls within the sub-article.

46. It seems to me that this case is entirely different from the circumstances considered in the ***Hassett*** and ***BVG*** cases. I agree with Mr Morgan that the subject matter of those proceedings were both outward facing, whereas these proceedings are inward looking because they are concerned with the constitution of the shareholders in general meeting and the validity of the Notices. ***Hassett*** was concerned with exercise of a power of the Board of Management and not whether the power existed under the Articles of Association to adopt a decision rejecting the doctors' claim, whereas the proceedings in the ***BVG*** case had at their heart the validity and enforceability of a contract with a third party. In my judgment, in this case issues as to the constitution and validity of the organs of an English company are at the heart of the dispute.

47. I also disagree with Mr Auld that my conclusion will lead to conflicting judgments. That will only be the case if, at a stage after jurisdiction has been determined, the

English courts decide as a matter of public policy not to recognise the steps taken by D1-5 and their successors, and as a result, by Koza Altin in relation to the shareholders' meeting and the appointment of directors. It seems to me that it is illegitimate to seek to pray in aid such a possibility in order to seek to avoid jurisdiction in the first place.

48. In my judgment, therefore, the entirety of the claim set out in the Claim Form falls within Article 24(2) when construed strictly and in accordance with its objectives. I agree with Mr Auld, however, that the way in which paragraph 45(3) of the Particulars of Claim is phrased could be read more widely than authority in relation to the Notices. However, if it is read in the context of the pleading as a whole and in the light of its structure, and, in particular, in relation to paragraph 34 which sets out both the Company Law Claim and the Authority Claim as the two bases for the invalidity of the Notices, it seems to me quite clear that that is the scope of the Authority Claim. If the Claimants were running a general "lack of authority" claim, I agree that it would fall outside Article 24(2). That is not the case here. The Authority Claim relates directly to the Notices and is an intrinsic part of determining their validity.

(ii) Submission to the Jurisdiction

49. I will also go on to consider whether the Defendants have submitted to the jurisdiction. As Mr Auld pointed out, scrupulous care has been taken in this case to include a reference to the challenge to the jurisdiction in all pleadings and documents in this case and to state that in so far as steps have been taken they have been without prejudice to that challenge. He referred me to ***SMAY Investments Ltd & Anr v Sachdev & Ors*** [2003] 1 WLR 1973 in which Patten J as he then was considered this matter. He stressed at [41] that, where a defendant has complied with CPR Pt 11 with a view to challenging the jurisdiction of the court and the time for making the application has not yet expired, "any conduct on his part said to amount to a submission to jurisdiction and therefore, a waiver of that right of challenge, must be wholly unequivocal." The passage was expressly approved by the Court of Appeal in ***Zumax Nigeria Ltd v First City Monument Bank plc*** [2016] EWCA Civ 567.

50. Mr Morgan on the other hand points to the Counterclaim filed by Koza Altin in this matter. He accepts that it contains the familiar and similar rubric. He points out, however, that under the CPR a counterclaim is treated as a separate claim which is a free standing action and, therefore, amounts to a submission to the rules of the English court for all purposes. He also submits that the declarations sought in the counterclaim go beyond the claim itself and the Company Law Claim in relation to which Koza Altin has submitted to the jurisdiction. He says that the counterclaim extends to questions concerning the validity of the changes to the Articles of Association to insert Article 26 and the validity of the resolution allotting the "A" shares.

51. In this regard, he referred me to the judgment of Lord Collins in ***Rubin & Anr v Eurofinance SA & Ors*** [2013] 1 AC 236 at [159] at which he stated that the general rule is that a party alleged to have submitted to the jurisdiction must have "'taken some step which is only necessary or only useful if' an objection to the jurisdiction 'has been actually waived . . .'". He also referred me to the judgment of the Privy

Council in ***Stichting Shell Pensioenfonds v Krys & Anr*** [2015] AC 616 at [31] at which it was stated that a "submission may consist of a procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim."

52. Mr Morgan also pointed out that in ***SMAY*** and in ***Zumax*** the defendant had only participated in the challenge to jurisdiction. He also referred me to ***Akai Pt Ltd v People's Insurance co Ltd*** [1998] LlR 90, which I did not find to be of direct assistance. Lastly, he took me to ***Glencore International AG v Exter Shipping Ltd & Ors*** [2002] CLC 1090 in which Rix LJ drew the distinction between a foreign party who invokes the jurisdiction of the English court by claiming here and one who is brought to the jurisdiction to answer a claim. In the latter case, the party can limit his submission on a claim by claim basis. It was also held that a foreign party which had claimed and counterclaimed was subject to the jurisdiction. Mr Morgan reminds me that, in addition to the counterclaim in this case, Koza Altin has also sought injunctive relief in the form of the Hanson Application.

53. Mr Auld says the counterclaim here is only reflective of the claim, although he was unable to define how one would determine whether a counterclaim is only a mirror of the claim and why, in fact, that should affect the position. In relation to the Hanson Application, he points out that it arises from the undertakings given before Snowden J on 25 August 2016 and that the Order on that occasion contained the same recital as to the challenge of the court's jurisdiction and that, in the Application Notice itself, reference was made to a hearing window for the Jurisdiction challenge.

Conclusion:

54. I entirely agree that it is necessary to look at form over substance and that any submission to the jurisdiction must be wholly unequivocal when viewed objectively. I also take note that Koza Altin has submitted to the jurisdiction as to the Company Law Claim and has been careful to reserve its position. However, in my judgment, the relief sought in the counterclaim cannot be characterised as "reflective" of the claim. It goes far beyond that and seeks to impugn the earlier resolutions of the board of directors which led to the change in the Articles of Association and the allotment of "A" shares. These matters whilst forming part of the direct background to the claim are not brought directly in issue in the claim as drawn and therefore the Company Law Claim as defined. Koza Altin has taken the opportunity open to it to submit to the jurisdiction on a claim by claim basis. However, it seems to me that the terms of the counterclaim go beyond the Company Law Claim.

55. Even if the content of the counterclaim were entirely reflective, I am very doubtful about the distinction which Mr Auld seeks to draw. Where are the boundaries for what is and what is not a reflective counterclaim? Furthermore, how is such a concept compatible with the authorities, which are to the effect that making a counterclaim amounts to a submission to the jurisdiction for all purposes because one is seeking to benefit from the rules of the court? There is no distinction made in the authorities about the type of counterclaim. Even if there were, as I have already stated, in my judgment, the relief sought in Koza Altin's counterclaim raises new issues. It does not confine itself, for example, to a declaration that the s. 303 and s.

305 Notices are valid and therefore, seek the opposite of what is claimed. In my judgment, therefore, objectively viewed, the counterclaim amounts to an unequivocal submission to the jurisdiction which goes beyond the Company Law claim. It consists of a step consistent only with the acceptance of the rules under which the court operates. I come to this conclusion despite the statement contained in the counterclaim that it is not intended to waive jurisdictional challenges. It seems to me that such a statement is incompatible with the relief sought. Given the content of the counterclaim, the mere repetition of the rubric cannot render the counterclaim equivocal.

56. I take a different view about the Hanson Application. Although express relief is sought from the court, the application flows from the Order of Snowden J of 25 August 2016 and the undertakings given on that occasion. If the Defendants were unable to issue an application of this kind, they would be wholly unable to enforce those undertakings given by the Claimants in the context of an express reservation of the rights of the Defendants to challenge the jurisdiction. There would have been no purpose in including the notice provisions in the undertakings. It seems to me, therefore, that, in the circumstances, the issue of the Hanson Application is not an unequivocal waiver of the right to challenge the jurisdiction.

The Dismissal Application

57. Although an intention to seek to strike out or dismiss the Strike Out Application had been intimated for some time and was aired before the court on 10 November 2016 when Rose J made case management directions for the hearing before me, including that the court should hear "the issue of whether the Strike Out Application should be summarily dismissed", the Dismissal Application remained vague until it was actually issued on the second day of this hearing. As a result, it became clear that, rather than reverse summary judgment, the Defendants seek to strike out the Strike Out Application on the basis of CPR 1.1, 1.2, 1.4(2)(c), (g) (h), (i) and (l) and CPR 3.1(2)(a), (k) and (m). In addition, they rely upon the court's inherent jurisdiction. CPR 1.1 contains the overriding objective of the CPR, which is to enable the court to deal with cases justly and at a proportionate cost, and CPR 1.2 sets out the well-known factors to be considered when seeking to deal with a case in that way. They include saving expense and ensuring that a case is dealt with expeditiously and fairly. CPR 1.4(1) provides that the court must further the overriding objective by actively managing cases, and the sub-rules to CPR 1.4(2) which are relied upon are in the following form:

> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> . . .
>
> (g) fixing timetable or otherwise controlling the progress of the case;
>
> (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) dealing with as many aspects of the case as it can on the same occasion;

. . .

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

CPR 3.1(2) contains a list of general case management powers. Those relied upon are as follows:

(a) extend or shorten the time for compliance with any rule . . .

(k) exclude an issue from consideration

(m) take any other step or make any other order for the purposes of managing the case and furthering the overriding objective . . .

58. In brief, it is said: that it is absurd and abusive to serve proceedings on a defendant and then contend that it has no right to defend the claim; that the Claimants have accepted that the authority of those instructing Mishcon De Reya LLP on behalf of Koza Altin is valid in Turkey but nevertheless contend that Mishcon is neither entitled nor able to take instructions; the Claimants sought and obtained an alternative order for service on Koza Altin via Mishcon; and have entered into correspondence and consent orders with Koza Altin through Mishcon.

59. Mr Auld points out that the possibility of the Strike Out Application was raised for the first time on 1 November 2016, and by that Application issued on 3 November 2016 the Claimants seek to strike out the Acknowledgment of Service, Defence and Counterclaim "and other documents" filed by Mishcon on behalf of Koza Altin "because those who have instructed [Mishcon] . . . on behalf of the Sixth Defendant have no authority to do so which should be recognised or enforced by the Court of England and Wales and accordingly the steps taken purportedly on behalf of the Sixth Defendant are an abuse of the court's process . . .". In the accompanying Directions Application, the Claimants seek to have the Strike Out Application tried as a separate issue and that all further proceedings in the case should be stayed pending the outcome of the Strike Out Application. It is accepted that it would be necessary to complete a full disclosure exercise, to have pleadings and witness evidence at such a trial, which the Claimants estimated would take 10 days and that a CMC could be brought on in the Spring of 2017. The Defendants, on the other hand, say that it would take 8-10 weeks to hear. Mr Auld points out that the Claimants' draft Statement of Case for such a hearing is a substantial document containing very serious allegations which has been expanded to cover the position of the SDIF, which is not a party to the proceedings.

60. Mr Auld submits, therefore, that the Strike Out Application is wholly inappropriate and in any event, would lead to a lengthy and expensive trial, which would relate only to Koza Altin. He also says that it makes a nonsense of the order for alternative service made by Snowden J and all of the correspondence and consensual court orders. He also says that the Claimants cannot have it both ways: in one breath, they say that the counterclaim amounts to a submission to the jurisdiction; and in the next they contend that it should be struck out for want of authority on the part of Mishcons.

61. In fact, Mr Morgan made it clear during oral submissions that no attack upon Mishcon for breach of warranty of authority similar to that in ***Yonge v Toynbee*** [1910] 1 KB 215 was, in fact, intended. On that basis, Mr Auld stated that if the Strike Out Application was not heard, in effect, as a preliminary issue, the Defendants would not take the point at trial that the alleged lack of authority on the part of Koza Altin had not been taken earlier.

62. The timing issue arises from dicta in a decision of the Court of Appeal in ***John Shaw & Sons (Salford) Ltd v Peter Shaw and John Shaw*** [1935] 2 KB 113 to the effect that, as a rule, objection to the right to bring an action should be taken not at trial but by interlocutory summons, and if that course was not followed the court should not entertain an application at trial to dismiss the action. That was a case in which it was alleged that the plaintiff company had no authority to bring the action to recover debts from two directors in the light of a dispute as to directors' voting rights, proceedings having been issued to recover the debts. The same issue was also considered by the Privy Council in ***Daimler Ltd v Continental Tyre and Rubber Company (Great Britain) Ltd*** [1916] 2 AC 307 and in the Court of Appeal in ***Airways Ltd v Bowen & Anr*** [1985] BCLC 355. In the ***Daimler*** case, an action was commenced in the name of the company after the commencement of the First World War. The Defendant was successful in contending that the company was an enemy alien and that the action had been commenced without authority because there was no one capable of managing its affairs.

63. In the ***Airways Ltd*** case, Kerr LJ held at 359 a – e:

> " . . . a contention that an action is not properly constituted, due to lack of authority from the named plaintiffs to bring it, is one which cannot be raised by way of defence. It must be raised at the outset, and it must therefore be dealt with at the outset. The only qualification is that even if it is not raised at the outset, but if it then comes to the notice of the court or of the defendants in the course of the proceedings, then it can still be raised as an issue at that stage, but not by way of defence to the action. . . . The judge should therefore, have borne in mind that this issue had to be decided at the outset, subject only to the possibility of adjourning the application. Once the issue has been raised, it is, with respect, plainly wrong to decline to decide the issue on the ground that the rights and wrongs as to the control of the company and the propriety of the proceedings may be in doubt, and then to allow the action to go on by dismissing the application without having decided it on the merits . . . ".

64. Mr Morgan on behalf of the Claimants says that it would be both expedient and proportionate to deal with the Strike Out Application first, because, if it is successful, it is determinative and the Company Law Claim might never arise. He also characterises the Application as the negative side of the Authority Claim in the pleadings themselves, the Authority Claim being against the trustees and the Strike Out being against Koza Altin for participation in the action despite lack of authority. He also submits that the Strike Out Application route is attractive because Koza Altin need be the only defendant actively involved and the precise identity of those purporting to authorise its actions, whether the trustees or any appointees of SDIF, would not matter. He also stated quite candidly that the Strike Out Application had

the advantage that it would not be subject to any adverse finding as to jurisdiction in relation to the Authority Claim. He also submitted that there might be difficulties in seeking to amend the Particulars of Claim in order to include a want of authority claim, whereas such complications would not arise in relation to the Strike Out Application itself. In that regard, I note the references both in the Amended Reply and in the Defence to Counterclaim to the "negative" Authority claim and expressly that the Counterclaim should be struck out as an abuse of process on the ground that those in control of Koza Altin had no authority to give instructions on its behalf. Mr Morgan accepted, however, that, in reality, whether the issue was progressed within the claim or as a matter of strike out would make little practical difference.

65. However, in relation to the Counterclaim, Mr Morgan says that he made clear that his submissions in relation to it made in relation to the Jurisdiction Application had been without prejudice to the Claimants' contention that the counterclaim is not Koza Altin's in any event. He also says that Koza Altin should be treated in the same way as a claimant in relation to the Counterclaim: the Strike Out Application should be heard and that, once it is decided that it was incompetent to bring that counterclaim, all other matters would fall away. In relation to the order for alternative service, he says that it was obtained on the basis that the opposing camps, being D1-5 and the Claimants should be fully aware of the proceedings and that the key documents should also be served at an email address on Koza Altin's website. He also points to the third recital to the Order made by consent by Snowden J on 25 August 2016, which makes express reference to the dispute as to whether Mishcon acts for Koza Altin in addition to the trustees. He submits, therefore, that the Strike Out Application has, as its root, the objections to authority arising from Article 6 ECHR which cannot be waived and which should be decided first.

Conclusion:

66. In my judgment, this is a different situation from those considered in the authorities to which I have been referred. In those cases, the question of whether an action had been commenced by a party which was incompetent and, therefore, whether the proceedings were not properly constituted and an abuse of process, was entirely separate from the subject matter of the action itself. In this case, the question of authority is inherent in the claim and the question of whether D1-5 had authority to direct the management of Koza Altin, and in turn whether Koza Altin was competent to serve the Notices, is one of the questions with which the proceedings are primarily concerned. Those issues are already referred to in the pleadings both in what has been referred to as the "positive" and the "negative" sense. I agree with Mr Auld that in fact there is only one issue here, which is that of authority. Characterising the issue as positive (do the trustees and their successors have authority to control Koza Altin?) or negative (does Koza Altin have capacity to serve the Notices and take part in the proceedings?) does not change the position. The negative is the obvious consequence of the positive case. They are sides of the same coin.

67. Furthermore, the authorities are concerned with circumstances in which a claim is commenced by a party which lacks competence and is an abuse of process as a result. In those circumstances, the defendant is precluded from taking the point unless he does so at the first opportunity. As I have already mentioned, Koza Altin is a defendant and as such was brought before the court by the Claimants. It seems to me that it would be a nonsense if, having done so, the Claimant could contend that

the Acknowledgement 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. I do not consider, however, that the lengthy correspondence between solicitors and the order for alternative service take the matter much further forward. Both were on the basis that the issue of authority in both forms had arisen.

68. Is the position different in relation to the counterclaim? I have already found that it is concerned with separate, albeit related issues which go beyond the Company Law Claim as pleaded. However, the question of whether Koza Altin is competent to bring the Counterclaim is based upon the same authority issue which is at the heart of the proceedings themselves.

69. In addition, in my judgment 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) and questions of submission to the jurisdiction by seeking to re-characterise the issue and bring a strike out claim on the basis of lack of competence. Such an outcome militates against the conclusion that, in these circumstances, the Strike Out Application can be viewed as having a different basis from the Authority Claim.

70. In the circumstances, and for all the reasons to which I have already referred, it seems to me, therefore, that this is not a situation in which a bar to raising the issue at a later stage would arise even if the Defendants had not agreed not to rely on the point.

71. When considering the court's case management powers and the furtherance of the overriding objective, I take all those matters into consideration. I also take into account: that the issues raised in the draft Statement of Case for the purposes of a trial of the Strike Out Application are wide ranging and appear to expand upon those contained in the pleadings; the draft Response would also be likely to be substantial; full disclosure would be necessary were the Strike Out Application to be heard and the action stayed; that it seems to me to be likely that the hearing of that Application would amount to a substantial trial which would not come on for a considerable time; and that all of the issues are already contained in the pleadings and can be dealt with at trial. In those circumstances, it seems to me that it would not further the overriding objective were the competence issue to be determined separately from the proceedings themselves.

72. The remaining questions as to how best in the circumstances to manage the issues before the court in a proportionate way will be dealt with later and are a matter for further submissions, and include whether in fact the Authority issue should or should not be heard together with the remainder of the Claim.

The Hanson Application

73. The Hanson Application concerns Koza Ltd's £60m share capital, which has been the subject of litigation in Luxembourg and Turkey and is the subject of the undertakings given to the court and recorded in the order made by consent by Snowden J on 25 August 2016. Given the nature of the Hanson Application, it is important to have the relevant undertakings in mind. Koza Ltd's undertakings were contained in the First Schedule to the 25 August 2016 Order, and the undertakings of

D1-5 were set out in the Second Schedule. Koza Ltd's relevant undertakings were as follows:

"THE FIRST SCHEDULE

. . .

2. The Company undertakes that:

(1) The Company will not dispose of, deal with or diminish the value of any funds belonging to the Company or held to the Company's order other than in the ordinary and proper course of its business.

(2) The Company will give the Trustees 7 days' advance written notice of any proposed expenditure on new projects to be commenced by the Company …

(3) The Company will give the Trustees 72 hours' advance written notice of any single payment of more than £25,000, or of any transaction which would create a liability of over £25,000, apart from any payment of or incurring of any liability in respect of legal fees in connection with this litigation, for which no notification will be required. …

(4) The Company will comply with any reasonable request the Trustees may make for more information about any payment in excess of £100,000.

. . .

4. The Claimants shall use their best endeavours to procure (i) the transfer of all funds currently held in accounts in the name of the Company with the Luxembourg branch of Garanti Bank to the client account of Morgan Lewis as set out in the Company's instructions to Garanti Bank dated 11 February 2016 and (ii) the termination of the proceedings currently on foot between the Company and the Sixth Defendant in Luxembourg with no order as to costs.

. . . ."

74. In the Second Schedule to the Order, amongst other things, the trustees being D1-5 undertook: to keep any information provided under paragraphs 2(2), 2(3) and 2(4) of the First Schedule strictly confidential to themselves; to use their best endeavours to procure the transfer of Koza Ltd's funds from the Luxembourg branch of Garanti Bank to the client account of Morgan Lewis; to terminate the proceedings in Luxembourg and to withdraw any other proceedings commenced by them or Koza Altin in Luxembourg; and to give proper consideration for any request for consent made under paragraph 2(2) of the First Schedule.

75. On 13 October 2016, Morgan Lewis wrote to Mischon de Reya with an 'urgent' request that Koza Altin provide the materials necessary in order to assist with "Know Your Client" procedures in order to enable Koza Ltd to open one or more

current and investment accounts. It was stated that the company wished to open such accounts in the ordinary and proper course of its business and for the good management of its cash holdings. It was stated that it had had discussions with Hanson. Much correspondence ensued. In any event, on 7 November 2016, written notice was given under the terms of the undertakings in the 25 August 2016 Order that Koza Ltd intended to enter into an agreement with Hanson on 11 November 2016 pursuant to which Hanson would manage the substantial majority of Koza Ltd's funds and ancillary to that role would provide cash management and other payment services subject to an annual 1% fee. It was also stated that: Hanson is an English company authorised and regulated by the Financial Conduct Authority; as part of the arrangement, Credo Capital plc ("Credo") would handle custody, administration and execution on behalf of Hanson and Koza Ltd; and that Credo's primary sub-custodian would be Pershing Limited, a subsidiary of the Bank of New York Mellon ("Pershing"). In a further letter of the same date, Morgan Lewis stated that Koza Limited would have preferred to have a choice of banks available to it but, in the light of the lack of assistance from Koza Altin, no other institution had been willing to accept it as a client other than Hanson.

76. Further information was obtained as a result of detailed correspondence. By a letter of 11 November 2016, Morgan Lewis stated amongst other things that: there was no urgency and that the arrangements under the 25 August 2016 Order were satisfactory; that the Pershing Securities sterling and US Dollar accounts are with Royal Bank of Scotland plc and that the monies would be held in the United Kingdom; that there would be no breach of the 25 August 2016 Order, which was intended to normalise the company's operations in order that it could make "regular normal payments while also appropriately maximising the yield available to the Company in relation to its very substantial cash holdings, pending their appropriate deployment in and about the Company's business." It was also stated that the clear instructions to Hanson are and were that the funds should be invested on a low risk basis and should be held in "cash, cash equivalents and highly rated treasuries." It was also stated that the investments would be highly liquid and available at short notice to be deployed in and about the business of the company. A letter dated 9 November 2016 from Mr Patrick Teroerde, the managing director of Hanson ("Mr Teroerde"), to Koza Ltd had stated that the dollar funds would be held in an account with Citibank NA New York.

77. Further correspondence ensued, and by a letter of 14 November 2016, Morgan Lewis explained that the difficulties caused by Koza Altin's lack of co-operation had caused discussions with all other institutions unsuccessful, and a table of twelve such institutions was set out. A further written notice was served by a letter of 14 November 2016, the ultimate effect of which was the issue of the Hanson Application on 18 November 2016. An order is sought on behalf of Koza Altin that, pending further order, Koza Ltd must not enter into any agreement with or make any payment or transfer of its funds to Hanson, Credo or Pershing Limited. The Hanson Application came on before me in the Applications Court on 30 November 2016 and was adjourned over to be heard with the other applications at the December hearing on the basis of an undertaking not to proceed with the transfer pending the outcome of the hearing.

78. In addition to witness statements sworn by the parties' respective solicitors, a witness statement of Mr Teroerde has been filed. He states that, in accordance with instructions, Hanson will place the funds in cash deposits, highly rated and highly liquid government bonds and the bonds of high quality financial institutions and that the intention is to retain Koza Ltd's ability readily to access its funds and to make routine payments, to preserve capital value and maximise the yield on those funds. He also states that Credo, an English company based in London and regulated by the FCA, would act as the platform provider and that it would place assets with Pershing as custodian. He explains that Pershing is also an English company and a subsidiary of BNY Mellon and that funds would be held in segregated accounts held at RBS. He also states that Hanson is fully aware of the Order of 25 August 2016.

79. First, Mr Auld submits that the arrangement would not be 'in the ordinary and proper course of Koza Ltd's business' and therefore would be outwith the undertakings. He points to the evidence of Mr Plowman that Koza Ltd has not historically held investments; it was a mining company with a small number of nascent joint ventures. While the company had reported profits from investments such as holding foreign exchange accounts, Mr Auld submits that the investment of its entire share capital in the manner proposed would be to change, not to pursue, its ordinary and proper course of business. In substance, he says it would transform Koza Ltd into a personal wealth management vehicle. Furthermore, he says that Koza Ltd's intention to retain £6m odd with Morgan Lewis, indicated in a letter by Morgan Lewis of 2 August 2016, is anomalous. He says that it may be inferred that the intention was to use that money for the ordinary course of business whilst the balance was invested.

80. Secondly, Mr Auld says that the proposed arrangement with Hanson is unacceptable because there is nothing to justify the variation of the undertaking given, the arrangement is unacceptable to the Defendants and poses a risk of dissipation. In relation to the variation of undertakings, he took me to ***Emailgen Systems Corp v Exclaimer Ltd & Anr*** [2013] 1 WLR 2132. That was a case in which, a freezing injunction having been granted ex parte, at the inter partes hearing, undertakings were given over until trial or further order. The respondent later applied to be released from the undertaking on the basis that the freezing order should not have been granted without notice. Teare J held that, where undertakings had been given, there had to be good cause and typically a significant change of circumstances or the discovery of some new fact, before an application could be made to modify or change the undertaking. Mr Auld says that there is no such change here.

81. He also emphasises that Hanson is a minor family office which the evidence shows has had a recent history of loss-making, charges excessive fees for its services, and has a shareholder action threatening its own existence. He also points out that the proposed arrangement is 'discretionary' and, as a result, Hanson could manage the funds as it saw fit, and could instruct its custodians to send the money anywhere. He also says that the proposed arrangement was insufficiently transparent, particularly given the interposition of various 'strata' of financial intermediaries between Hanson and the bank (or banks) which would ultimately hold the deposits. The whole thing, he argued, was engineered to circumvent "Know Your Customer" ('KYC') compliance procedures. In support, he pointed to a letter of 2 December 2016, in which Mishcon wrote to Morgan Lewis requesting confirmation that Credo,

Pershing, and RBS had been served with the order of 25 August 2016. Morgan Lewis replied on 6 December 2016 confirming that Hanson was fully aware of the order, but expressing the view that service on Credo, Pershing, or RBS was premature. In the last paragraph of the letter from Morgan Lewis, Morgan Lewis ask whether, if Credo, Pershing and RBS were informed of the 25 August 2016 Order, the Defendants would consent to the arrangement. No response was received. During oral submissions Mr Morgan indicated that it remained the position that the Claimants would be willing to inform those institutions if, as a result, the Defendants gave their consent to the arrangement.

82. Before turning to the application itself, Mr Morgan emphasised that the Order of 25 August 2016 was not a freezing order which would contain the usual undertakings in relation to third parties if it were so and drew attention to Koza Altin's lack of co-operation, the repeated demands to return Koza Ltd's share capital, the failure of the Defendants to engage with the process of putting banking arrangements in place and the catalogue of demands contained in the correspondence. He submits that the position that Koza Ltd finds itself in is directly as a result of the Defendants' behaviour. He also drew attention to a letter of 22 November 2016 from Mishcon de Reya on behalf of the Defendants to the Group Litigation department of Morgan Lewis' bank, NatWest, by which the 25 August 2016 Order was served upon it. It was stated that the relevant account numbers were not known and the bank was put on notice of the intention to move the funds. Mr Morgan says, first, that the account numbers were known and that this is another example of seeking to stifle the legitimate ends of the Claimants. He also says that the action was in breach of the undertaking to keep matters confidential which was contained in the Second Schedule to the 25 August 2016 Order.

83. Mr Morgan submitted that having £60m odd sitting in a firm's client account was not a suitable banking arrangement for any appreciable length of time. He pointed to a letter of 28 July 2016 from Morgan Lewis to Mishcon de Reya in which it was stated that the longstanding instruction to Garanti Bank was that the funds would be transferred to the Morgan Lewis client account 'in the first instance' and a further letter from Morgan Lewis of 1 August 2016 which referred to the intention to transfer the funds into the custody of a 'reputable English bank'. He also submitted that it was in the 'ordinary and proper course' of Koza Ltd's business and for the benefit of all that such a large amount of money should be invested. He also pointed out that the evidence of Mr Sharp made clear that the £6m intended to be retained in Morgan Lewis' client account was for the purposes of meeting the legal fees relating to the litigation as well as the company's ordinary expenses.

84. Mr Morgan also submits that there is no cause of action which the injunctive relief sought is intended to protect and Koza Altin asserts no risk of dissipation or secretion of assets. It merely states that the arrangements are not acceptable to it. He also says that the proposed arrangements which enable a return on capital are "in the ordinary course of business", Koza Ltd having earned substantial interest on its capital before the litigation ensued. In short, therefore, he says that the application is misconceived and should be dismissed.

Conclusion:

85. First, it is important to determine the precise basis for the Hanson Application. As I have already mentioned when considering the Jurisdiction Application, in my judgment, the Hanson Application is the means by which Koza Altin seeks the Claimants' compliance with the undertakings contained in the First Schedule to the 25 August 2016 Order. The Application is a result of the notice mechanism in relation to payments or transactions in excess of £25,000 set out in the undertakings themselves. Those notice provisions are an adjunct of the undertaking at paragraph 2(1) not to dispose of, deal with, or diminish the value of the Company's funds, other than in the ordinary course of its business. Although the undertakings read as a whole are obviously intended to protect those funds in the short term, and although a freezing order was sought in Luxembourg and similar orders were made in Turkey, the 25 August 2016 Order was not a freezing order and the undertakings were not given in that context. Although Mr Auld's submissions on behalf of Koza Altin at least suggest that there is a fear of dissipation of assets if the banking arrangements are altered, that is not the basis for the Hanson Application and there is no evidence to that effect before the court.

86. In fact, it seems to me that the entirety of the application turns upon whether the change in banking arrangements falls within the undertaking at paragraph 2(1) of the First Schedule not to dispose of funds other than in the ordinary and proper course of [its] business" (the "Ordinary Course of Business Undertaking"). Mr Morgan on behalf of the Claimants says that it does and Mr Auld on behalf of Koza Altin says that it does not. The question of whether the undertaking should be varied, it seems to me, does not arise.

87. When determining whether the proposed arrangements fall within the Ordinary Course of Business Undertaking it is also important not to become side-tracked by the mutual undertaking to use best endeavours to transfer the funds in question to the client account of Morgan Lewis. It seems to me that Mr Auld sought to elevate those best endeavours and the resultant transfer to the client account into an arrangement which in itself could not be replaced without the consent of Koza Altin. It is also of no relevance that the monies could remain in the Morgan Lewis client account.

88. The question is whether the transfer of £60m odd of Koza Ltd's share capital to be held by Hanson on the terms set out in the witness statements of Messrs Sharp and Teroerde fall within the terms of the Ordinary Course of Business Undertaking. In my judgment, it does. First, Koza Ltd was earning substantial interest on its capital before the dispute arose, and it seems to me, therefore, that there is nothing to suggest that doing so is other than in the ordinary course of business. The fact that the company is concerned with mining and is involved in joint ventures does not prevent it, in the ordinary course of business, from seeking a proper return on its capital, whilst preserving liquidity. It is clear from the evidence before the court that the instructions to Hanson is to invest in cash, cash equivalents and highly rated treasuries and that the investments would be highly liquid and available at short notice to be deployed in and about the business of the company. In such circumstances, it seems to me that the proposal falls squarely within the Ordinary Course of Business Undertaking.

89. This is so even though Hanson demands a considerable annual fee. It seems to me that the fee is a usual part of such an arrangement and the fact that Koza Ltd has been unable to make arrangements directly with mainstream banks or investment institutions because of the effect of the litigation itself and the fact that Koza Altin has been un-co-operative and, therefore, has only Hanson to choose from should not be held against it. I also take the same view despite the fact that Hanson is a small private office which has been loss making of late. There is nothing to suggest any impropriety and both it and Credo are regulated by the FCA. It is aware of the terms of the 25 August 2016 Order, and both Credo and Pershing will act on its instructions and ultimately on those of Koza Ltd.

90. For all the reasons to which I have referred, I dismiss the Hanson Application.

91. It may well be possible for counsel to agree the detail of the form of Order in this matter. I will be happy to determine any matters which remain outstanding.

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