Neutral Citation Number: [2021] EWHC 786 (Ch)

Case No: HC-2016-002407

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31st March 2021

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

(1) KOZA LTD
(2) HAMDI AKIN IPEK

Claimants

- and -

KOZA ALTIN IŞLETMELERI AS

Defendant

- -
- -

Michael Bloch QC and Siward Atkins QC (instructed by **Latham & Watkins (London) LLP**) for the **Claimants**
Neil Kitchener QC and David Caplan (instructed by **Mishcon de Reya LLP**) for the **Defendant**

Hearing dates: 3rd and 4th March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This version of the judgment has been redacted for publication. The unredacted version of the judgment is confidential to the parties and their legal advisers.

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on 31 March 2021

Mr Justice Trower:

Introduction

1. This judgment is concerned with applications by the defendant, Koza Altin Işletmeleri AS ("Koza Altin") for injunctions to restrain the second claimant, Hamdi Akin Ipek ("Mr Ipek") from causing the first claimant, Koza Ltd ("Koza"):

   i) to use its money to continue to fund these proceedings;

   ii) to use its money to continue to fund a new set of legal proceedings (the "New Authority Claim") against Koza Altin; and

   iii) to commit $9 million on what Koza Altin contends to be a speculative mining exploration project in Alaska (the "SAM project").

2. Applications (i) and (iii) were issued on 7 December 2020 and application (ii) was issued on 15 February 2021. They are the latest in a long line of applications arising out of a dispute between Mr Ipek and Koza Altin relating to the control of Koza and the authority of those giving instructions on behalf of Koza Altin. Several of those earlier applications were also concerned both with the use to which Koza's assets can be put pending ultimate resolution of the dispute and with the true construction and effect of an order made by Asplin J on 21 December 2016 (the "Asplin order").

3. The application in relation to the SAM project was argued in private. It raised matters in respect of which I was satisfied that the provisions of CPR 39.2(3)(c) were met. This judgment includes the matters that are confidential to the SAM project in a section that can be redacted for publication.

Koza and Koza Altin

4. Koza is an English company of which Mr Ipek is now the sole director. Its share capital consists of 60 million ordinary shares held by Koza Altin and two "A" shares held by Mr Ipek and his brother. Koza Altin is a Turkish company, the shares in which are held partly by Mr Ipek and members of his family and partly by members of the public. It is listed on the Istanbul stock exchange.

5. The "A" shares in Koza were created and allotted by resolution passed in September 2015. Koza's Articles of Association (the "Articles") were also amended to introduce, amongst other matters, a new Article 26, pursuant to which the consent of the "A" shareholders is required for any amendment to the Articles, the appointment or removal of any person as a director of Koza, and the taking of any step to place Koza into administration, receivership or liquidation (save on the grounds of insolvency). Koza Altin disputes the validity of these resolutions. The effect of Article 26, if valid, is to entrench Mr Ipek as Koza's sole director, such that he cannot be removed without his own consent.

6. At the time that Article 26 was introduced, Koza and other entities in which Mr Ipek and his family were interested were embroiled in what Mr Ipek contends to be a politically motivated criminal investigation into the Koza group. In due course this resulted in the appointment by the Fifth Ankara Criminal Peace judge of a number of individuals as trustees of Koza Altin with power to control its affairs. In September 2016 the Trustees were replaced by the Savings Deposit Insurance Fund of Turkey, which has appointed the existing members of Koza Altin's board. For convenience, I will define those giving instructions on behalf of Koza Altin from time to time as "the Trustees", although Mr Ipek says that their status to do so should not be recognised in England and throughout the hearing Mr Michael Bloch QC, who represented Koza and Mr Ipek, referred to them as the purported appointees.

Commencement of the proceedings and the orders made by Snowden J and Asplin J

7. This dispute gave rise to litigation in Luxembourg over the sum of £60 million which had originally emanated from Koza Altin in 2014 as payment of its capital contribution on the allotment of its 60 million ordinary shares. Koza had sought to have this sum transferred from a branch of Garanti Bank in Luxembourg to the English solicitors then acting for it, Morgan Lewis & Bockius UK LLP ("Morgan Lewis"), but those monies were frozen in Luxembourg between November 2015 and July 2016. On 19 July 2016, the Luxembourg court gave judgment for Koza and ordered Garanti Bank to release the funds for payment to Morgan Lewis.

8. Immediately after the Luxembourg court had given judgment in favour of Koza, Koza Altin, acting by the Trustees, served notice on the directors of Koza under s.303 of Companies Act 2006 ("CA 2006") requisitioning a general meeting to consider resolutions for the removal and replacement of those directors. It also sought to direct the freezing of the money in Luxembourg pending the appointment of new directors.

9. The directors of Koza did not respond to the notices by calling the meeting sought by Koza Altin. There was, however, correspondence between Morgan Lewis and Koza Altin's solicitors, Mishcon de Reya LLP ("Mishcon"), from which two things in particular were apparent. The first was that Mr Ipek challenged the authority of the Trustees to act or give instructions on behalf of Koza Altin and the second was that there was some debate on the extent to which Koza was carrying on business. This was relevant to an argument by Koza Altin that Koza should not use any of the funds which had been unfrozen by order of the Luxembourg court pending resolution of the dispute.

10. On 10 August 2016, by which time it had become apparent that no such meeting would be called, Koza Altin served notice under s.305 of CA 2006 by which it itself convened a meeting to consider those resolutions. Mr Ipek, who was by then Koza's sole director, responded to the s.305 notice with an application for an injunction against the Trustees and Koza Altin to prevent the meeting from taking place. This application, which was issued in the names of Koza and Mr Ipek, came before Snowden J on 16 August 2016, who granted interim relief.

11. There were two bases on which the claim was advanced. The first was that the authority of the Trustees to act for Koza Altin as a shareholder of Koza should not be

recognised in this jurisdiction. The way that this point was expressed in Koza's evidence in support of the present application is that:

> "There is a dispute in these proceedings as to whether those purporting to act for Koza Altin have authority to do so. The claimants contend that they do not since they owe their appointments to a corrupt judgment of a "Judge" Süer, a so-called "Peace Criminal Judge", who was appointed by the Erdoğan regime as part of a widespread overthrow of the rule of law in Turkey. The claimants contend that the English Courts should not recognise such an appointment on public policy grounds."

12. This came to be known as the Authority Issue and was then advanced by what Koza Altin called in its submissions the Old Authority Claim (a phrase that I shall adopt in this judgment for convenience to distinguish it from the New Authority Claim). Mr Bloch QC stressed that, so far as his clients were concerned, it was an important point from the outset and explained why they commenced the proceedings in the first place. They wanted to ensure that the question of who was able to represent Koza's 100% ordinary shareholder was resolved by the English court. Koza Altin's response was to contest the English court's jurisdiction to determine it. In due course it arose in a slightly different context when on 3 November 2016 Koza and Mr Ipek applied to strike out Koza Altin's statements of case on the basis that Mishcon did not have authority to represent it.

13. The second basis for the claim was that Article 26 meant that Koza Altin was not entitled to pass a resolution to remove a director of Koza without the consent of the "A" shareholders and no such consent had been obtained. This came to be known as the English Company Law Issue.

14. Koza Altin's response to the English Company Law Issue was to dispute the validity of both the resolution amending the Articles to introduce Article 26 and the board resolution pursuant to which the two "A" shares were issued. It counterclaimed seeking declarations that these resolutions were ineffective. It said that they were not made bona fide for the benefit of the company as a whole or were made for an improper purpose and that they were ineffective to prevent the resolutions set out in the statutory notices as an unlawful fetter on the powers conferred by statute.

15. The injunctive relief initially granted by Snowden J on 16 August was eventually included in the terms of an order dated 26 August 2016 (the "Snowden order"), which reflected correspondence between the parties' solicitors. This order included a set of injunctions and cross-undertakings designed to hold the ring pending an inter partes hearing of applications by Koza and Mr Ipek for wider injunctive relief and Koza Altin's intended jurisdiction challenge.

16. The wider relief sought by Koza and Mr Ipek was to restrict Koza Altin from requisitioning any general meeting of Koza on the grounds that those responsible for managing the affairs of Koza Altin should not be recognised by the English court as empowered to do so. The Koza Altin jurisdiction challenge was also concerned with the Authority Issue. It was contended that the English court had no jurisdiction under article 24(2) of Regulation (EU) No 1215/2012 ("the Recast Regulation") to determine the Old Authority Claim.

17. Koza drew specific attention to two aspects of the Snowden order. The first was that it reflected what Koza describes as a gradual acceptance by the Trustees that it should be allowed to continue to trade without any undue interference from them. This was said to be illustrated by the fact that the regime agreed as part of the Snowden order permitted Koza to continue trading in the ordinary and proper course of its business whilst requiring it to notify the Trustees of expenditure over certain thresholds, and providing further information where reasonable.

18. The second is that the order reflected what Koza submitted was a shared assumption that it and the Trustees were active and substantive parties to a dispute, and that Koza would be spending its own money on that dispute. It submitted that this was apparent from the fact that it was expressly provided that the notification provisions would not extend to Koza's "payment of or incurring of liability in respect of legal fees in connection with this litigation".

19. Koza Altin contended that this carveout from the notification provisions was only intended to cover Koza's legal costs as a relatively inactive neutral party to the proceedings. Koza submitted that this contention could not be correct because this carveout was designed to deal with issues of privilege and they would only arise as against Koza Altin as a shareholder, if Koza's role in the proceedings was as a substantive party to the dispute. This is a point to which I shall return.

20. A number of aspects of the dispute were listed for hearing before Asplin J in December 2016. Two are of particular relevance for present purposes. The first was the inter partes hearing for the continuation of the injunction granted by Snowden J on 26 August 2016. The second was the jurisdiction challenge.

21. As to the application for continuation of the injunction, the Asplin order provided that until trial or further order Koza Altin must not call or purport to call any general meeting of Koza or purport to effect or pass any shareholder resolution of or on behalf of Koza Altin at any such meeting or in any other way. This form of order extended beyond a protection of the rights of the "A" shareholders under Article 26, because those rights were limited to a need for "A" shareholder consent to the passing of a resolution for the removal of any director. The more general form of injunctive relief was founded on the Authority Issue, as reflected in the Old Authority Claim.

22. In granting this injunction over trial, Asplin J accepted certain undertakings given by Koza, which were recorded in the first schedule to the Asplin order, and in many respects reflected the Snowden order. They are at the centre of much of the argument with which I have been concerned.

23. The first was a cross-undertaking in damages in conventional form which Mr Bloch QC submitted would not have been given by Koza if the parties had assumed that it would be a neutral party. The next undertakings were as follows:

> "2 … [Koza] undertakes that, save as set out below, until trial or further order:
>
> (1) [Koza] will not dispose of, deal with or diminish the value of any funds belonging to [Koza] or held to [Koza's] order other than in the ordinary and proper course of its business.

> (2) [Koza] will give to [… Koza Altin] 7 days' advance written notice of any proposed expenditure on new projects to be commenced by [Koza]. For the purposes of this undertaking "new projects" shall mean anything other than those projects listed at paragraphs 13 and 14 of the witness statement of Hamdi Akin Ipek dated 15 August 2016. If [… Koza Altin does] not consent to the proposed expenditure within the 7 day period, [Koza] may (but need not) apply to court for permission to make the expenditure.
>
> (3) [Koza] will give to [… Koza Altin] 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 liability in respect of legal fees in connection with this litigation, for which no notification will be required. Recurring payments need only be notified once, provided that all occurrences are detailed on the original notification to [… Koza Altin].
>
> (4) [Koza] will comply with any reasonable request [… Koza Altin] may make for more information about any payment in excess of £100,000.
>
> 3 These undertakings do not prohibit [Koza] from spending a reasonable sum on legal advice and representation, provided that the funds spent or liabilities incurred in this connection properly relate to legal advice and representation for [Koza's] benefit."

24. Koza Altin also gave certain undertakings recorded in the second schedule to the Asplin order. They included a cross-undertaking in damages in relation to the undertakings given by Koza in the first schedule and, by paragraph 6, an undertaking that it would give proper consideration to any request for consent made under paragraph 2(2) of the first schedule and would not withhold consent to the proposed expenditure unreasonably. It also undertook that, for the purposes of considering the request and deciding whether to give consent, it would have regard to s.172 of CA 2006.

The Jurisdiction Challenge

25. As to the jurisdiction challenge, Koza Altin was unsuccessful before Asplin J (see *Koza Ltd v Akçil* [2016] EWHC 3358 (Ch)). It appealed her decision and failed in the Court of Appeal ([2017] EWCA Civ 1609), but was eventually successful in the Supreme Court (*Koza Ltd v Akçil* [2019] UKSC 40).

26. By its order dated 29 July 2019, the Supreme Court declared that the English courts have no jurisdiction under article 24(2) of the Recast Regulation over the Trustees in relation to any part of the proceedings and no jurisdiction over Koza Altin in relation to the Old Authority Claim. The Supreme Court went on to order that the proceedings as against the Trustees in their entirety and as against Koza Altin insofar as they relate to the Old Authority Claim be dismissed for want of jurisdiction. It later ordered that Mr Ipek be liable to pay the costs of Koza Altin and the Trustees. No such order was made against Koza.

27. The consequence of the Supreme Court decision was to knock out the Old Authority Claim. This had the effect of removing that part of these proceedings as then formulated, which had provided the foundation for those parts of the Asplin order restraining Koza Altin from exercising all of its shareholder rights. The order of the Supreme Court did not make reference to the strike out application issued by Koza on 3 November 2016. That application has not yet been determined, but Koza Altin has applied for it to be summarily dismissed, an application which is due to be heard during the course of May 2021.

Applications relating to the Asplin Order

28. Both before and after the decision of the Supreme Court, there were a number of further applications relating to other aspects of the Asplin order. They all related to some extent to expenditure which Koza (through Mr Ipek) wished to make from its assets. It is convenient to summarise them in order to put the present applications in their proper context and to describe matters which have a direct bearing on the issue with which I am now concerned.

29. The first of these was an application made by Koza in June 2017 for declarations that certain categories of proposed expenditure were in the ordinary and proper course of Koza's business as that phrase was used in paragraph 2(1) of the first schedule to the Asplin order:

    i) The first item of expenditure was the funding of up to £1.5 million for fees and disbursements in a proposed arbitration before the International Centre for Settlement of Investment Disputes ("ICSID"). The claimant in the arbitration was Ipek Investment Ltd ("IIL"), an English company, which was said to have become the ultimate holding company of the Koza group pursuant to a share purchase agreement dated 7 June 2015 ("the SPA").

    ii) The second item of expenditure was up to £30,000 per month on services to be provided by PR consultants.

    iii) The third item of expenditure was payment of £650,000 per annum to Mr Ipek for his work as CEO of Koza.

30. In a judgment handed down on 16 November 2017 (*Koza Ltd v Akçil* [2017] EWHC 2889 (Ch)), Mr Richard Spearman QC concluded that some of that expenditure (but not including the costs of the ICSID arbitration and the full amount sought for Mr Ipek) should be authorised.

31. The next relevant application was made by Koza Altin on 16 June 2018. It issued an application for a declaration that the proposed payment of £75,000 to solicitors for legal advice to be provided to Mr Ipek in connection with an extradition request issued by the Turkish criminal courts was prohibited under the terms of the Asplin order.

32. Morgan J, sitting in the interim applications court, made declarations that such payments would not be in the ordinary and proper course of Koza's business, within

the meaning of paragraph 2(1) of the first schedule to the Asplin order and would not constitute payments that properly relate to legal advice and representation for Koza's benefit within paragraph 3 of the first schedule to the Asplin order. In making that order, Morgan J concluded that Mr Ipek could afford to pay for the extradition case himself and that this in effect determined the application (see *Koza Ltd v Akçil* [2018] EWHC 1612 (Ch)).

33. The decisions of Morgan J and Mr Spearman QC, insofar as it related to the costs of the ICSID arbitration, were both appealed by Koza. The appeals were heard together and the Court of Appeal delivered its judgment on 23 May 2019 (*Koza Ltd v Akçil* [2019] EWCA Civ 891).

34. The Court of Appeal set aside Mr Spearman QC's declaration that the proposed ICSID arbitration funding would not be in the ordinary and proper course of Koza's business, but declined to make a positive declaration that it would, because there were doubts about the authenticity of the SPA. If those doubts were to be substantiated this would have undermined ICSID's jurisdiction to deal with the dispute. The Court of Appeal also reversed Morgan J's decision.

35. In his judgment (with which Patten LJ and Peter Jackson LJ agreed), Floyd LJ examined the meaning of the phrase "ordinary and proper course of business" where it appears in the first schedule to the Asplin order. In paragraph 27 of his judgment, Floyd LJ said:

> "27. I would draw from these authorities the following propositions of relevance to the present case:
>
> i) The question of whether a transaction is in the ordinary and proper course of a company's business is a mixed question of fact and law;
>
> ii) "Ordinary" and "proper" are separate, cumulative requirements;
>
> iii) The test is an objective one, making it necessary to consider the question against accepted commercial standards and practices for the running of a business;
>
> iv) The question is not whether the transaction is ordinary or proper, but whether it is carried out in the ordinary and proper course of the company's business;
>
> v) The questions are to be answered in the specific factual context in which they arise."

36. The Court of Appeal also considered the meaning of the phrase "legal advice or representation for the company's benefit" where it appeared in paragraph 3 of the first schedule to the Asplin order. As to this, Floyd LJ stressed (in paragraph 74 of his judgment) that the purpose of the undertaking was to allow Koza to continue to trade and that it would be wrong to create any distinction between direct and indirect benefit to Koza. He said that this deflected attention from the real issue, which was whether what was proposed was in the ordinary course of Koza's business.

37. The use by Koza of its assets for the purpose of funding litigation arose again on a further application made by Koza Altin on 9 December 2019. This time it sought an injunction restraining Koza and Mr Ipek from using £3 million of Koza's assets to fund the ICSID arbitration.

38. Koza Altin was successful in front of Mr Jeremy Cousins QC. In his judgment delivered on 23 March 2020 (*Koza Ltd v Koza Altin Işletmeleri AS* [2020] EWHC 654 (Ch)), Mr Cousins QC rejected an argument based on *Henderson v. Henderson* abuse of process. He held that, in light of the circumstances and manner in which Koza had issued and pursued its applications for declaratory relief relating to the ICSID arbitration funding, it was not an abuse of process for Koza Altin to seek the injunction that it did in December 2019. In particular, the Court of Appeal's doubts as to the authenticity of the SPA were the reason why, even though it had set aside the negative declaration made at first instance, it declined to make a positive declaration that the funding of the ICSID arbitration would not be a breach of the undertakings given by Koza in the Asplin order. The point therefore remained live and available for determination in the context of a fresh application by Koza Altin for an injunction. Mr Cousins QC also rejected arguments that the application amounted to a collateral attack on the decision of the Court of Appeal and the relief it sought was impermissible because it took the form of an injunction upon an injunction.

39. In reaching his conclusion that the various factors mentioned by Lord Hoffmann in *National Commercial Bank Jamaica Limited v Olint Corporation Ltd* [2009] 1 WLR 1405 at [16] – [21] pointed clearly in favour of the grant of the injunction sought by Koza Altin, Mr Cousins QC placed considerable weight on his conclusion that there was a serious issue to be tried on the question of whether the funding of the ICSID arbitration was improper because the SPA was forged. He relied on the very serious doubt which Mr Spearman QC had entertained on this issue and the conclusion of the Court of Appeal that Mr Spearman QC was plainly correct on this point.

40. In his judgment on costs ([2020] EWHC 1092 (Ch)), Mr Cousins QC made an order for costs against Mr Ipek alone holding (at paragraphs 28 and 29) that it would be unjust for an order to be made against Koza as well. The reasons for this included his conclusions that Koza was both the object of the litigation and was effectively controlled by Mr Ipek.

41. The decision of Mr Cousins QC was upheld by the Court of Appeal on 31 July 2020. In its judgment (*Koza Ltd v Koza Altin Işletmeleri AS* [2020] EWCA Civ 2018), the Court of Appeal reached a number of conclusions on which Koza Altin relied in the present application. The first two were expressed in the judgment of the majority delivered by Popplewell LJ, with which Asplin LJ agreed:

    i) They rejected Koza's challenge to the finding of Mr Cousins QC that he had a high degree of assurance that the SPA, on which the jurisdiction of ICSID was founded, was not authentic (paragraph [100]);

    ii) They held that the judge was entitled to conclude, on the basis of all the evidence before him, that, if Mr Ipek were to be restrained from using Koza's funds to fund the ICSID arbitration, alternative sources of funding were likely to be available (paragraph [104]).

42. The Court of Appeal also delivered a separate judgment on costs ([2020] EWCA Civ 1263), in which it held (at [7]-[10]), in a passage which is of particular relevance to part of the relief sought on the present applications, as follows:

> "7. The appellants do not argue that a costs order should not be made against Mr Ipek. The argument is that it should also be made on a joint and several basis against Koza Ltd, who made common cause against Koza Altin with Mr Ipek, and whose interests were equally if not more affected by the outcome of the appeal.
>
> 8 However I would accept the argument on behalf of Koza Altin that Koza Ltd was the object of the application, just as control of Koza Ltd is the object of the litigation. The issue in the application was whether Koza Ltd rather than Mr Ipek should be permitted to make the funding. It would be inconsistent with the objective underpinning the grant of the injunction, designed to prevent dissipation of Koza Ltd's assets, that Koza Ltd should pay the costs of the application which obtained that very relief.
>
> 9 There is also force in a number of the further submissions made by Koza Altin on this issue. Koza Altin will remain 100% shareholder of Koza Ltd whatever the outcome of the litigation; accordingly any order that Koza Ltd bear the costs is in substance an order that Koza Altin will bear the costs itself through diminution in the value of its shareholding in Koza Ltd. Moreover, the appellants' argument involves Koza Ltd inviting the court to impose a liability on itself, which it plainly would not ask the court to do but for Mr Ipek's control; this illustrates that the imposition of such costs liability is sought solely for the benefit of Mr Ipek, not the company. Further the effect of the order sought is to insulate Mr Ipek from the result of his litigation decisions; the correspondence gives rise to a legitimate inference that Koza Ltd rather than Mr Ipek is in fact funding all the costs of the proceedings, and will pay the costs order if made against it. The application was brought in relation to funding which would be of immediate and primary benefit to Mr Ipek and his family rather than Koza Ltd, albeit that the decision of this court in the Funding Application recognised that it might also consequentially benefit Koza Ltd to some unquantifiable extent which was sufficient to bring it within the "ordinary and proper course of its business".
>
> 10 This outcome is consistent with the decision of the Supreme Court on costs following the appeal on jurisdiction in which Mr Ipek and Koza Ltd lost on the Authority Issue, albeit that the Supreme Court declined to give reasons. Mr Ipek alone was ordered to bear the costs, following similar rival submissions as those made in the current context."

The Current Applications

43. Before dealing with the two substantive matters with which I am concerned, I should refer to two other heads of relief which were contained in the original application notice, but which were not pursued at the hearing. The first was an application for the provision by Koza of its amended particulars of claim.

44. The amended particulars were provided at the beginning of January and I am not asked to grant any further relief under this head. However, the amendments were largely concerned with the consequences of the decision of the Supreme Court, which had been delivered almost 18 months earlier and there was no convincing explanation from Koza and Mr Ipek as to why more progress in advancing their claim had not been made earlier. The delay in their service underpinned a submission by Koza Altin that Koza was warehousing the proceedings. What it meant by this was explained in evidence adduced from a partner in Mishcon in the following terms: "Koza Altin considers that Mr Ipek is choosing to leave the claim in abeyance so that he can continue to exercise control over Koza and its assets for as long as possible."

45. If the allegation of warehousing were to be made out it would be an abuse of process. I was referred by Koza Altin to the recent decision of the Court of Appeal in *Alibrahim v Asturion* [2020] 1 WLR 1267, in which Arnold LJ said as follows at [61]:

> "In my judgment the decisions in *Grovit*, *Arbuthnot*, *Realkredit* and *Braunstein* show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay."

46. Although I am not asked to determine that issue at this hearing, it is relevant to Koza Altin's case that the delays which have occurred since the Asplin order mean that this court should now take a very different approach to the way in which the ring should be held pending trial. As to that, Koza and Mr Ipek contended that the delay is not their fault. They said that it has not been caused by them, but by Koza Altin itself which has spent a huge amount of time and effort on challenging jurisdiction, when the Authority Issue can and should be determined in England. Indeed they said that the whole exercise was pointless in any event, because until the Authority Issue is resolved the Trustees will never be able to establish their right to represent Koza Altin when seeking to exercise its rights as a shareholder of Koza in England.

47. At the same time as the draft amended particulars of claim were served, Latham & Watkins (London) LLP ("Latham"), who now act for Koza and Mr Ipek, served draft particulars of claim in relation to the New Authority Claim. These are new proceedings that Koza (but not Mr Ipek) intended to commence and have consolidated with the present proceedings. These particulars sought injunctive and declaratory relief in respect of the Authority Issue.

48. Latham contended that, although the Supreme Court has determined that the English courts have no jurisdiction over Koza in relation to the Old Authority Claim, it was only concerned with questions of exclusive jurisdiction. Latham relied on a passage from the judgment of Lord Sales JSC (*Koza Ltd v Akçil* [2019] UKSC 40 at [44]) in support of an argument that the Recast Regulation did not prevent the English court

"from assuming jurisdiction in relation to the authority claim on some other basis, if one exists under the general English regime in the Civil Procedure Rules".

49. Mishcon are not instructed to accept service of the New Authority Claim. The parties have agreed that Koza's application for permission to serve the claim form out of the jurisdiction will be heard alongside the summary dismissal application in May 2021. Koza Altin submitted that the fact that the May hearing may result in it regaining practical control of Koza is a highly material factor to keep in mind on the present application.

50. The second head of relief sought in the application notice, but on which (subject only to one point) I was not asked to adjudicate, was that Koza Altin sought the provision by Koza of financial information as to its assets. This application came before Mann J on 11 December 2020 when he made an order by consent that Koza should provide to Koza Altin (a) a list of all of its assets together with the actual or estimated value of the same, (b) confirmation of the balance remaining of the £60 million with which it was capitalised and (c) its latest management accounts and cash flow forecast.

51. Koza Altin now seeks that same information on a quarterly basis. Koza and Mr Ipek have not submitted to me that this would be inappropriate or unduly onerous. In light of the nature of the dispute, Koza Altin's economic interest in the shares of Koza and the time that is taking to obtain a substantive resolution of the matters in issue, I am satisfied that such an order should be made.

52. The information ordered by Mann J was provided by a witness statement from Mr Ipek dated 28 January 2021. The headline figures showed assets broadly falling into three categories. The first was Koza's interests in a number of gold mining projects valued at in excess of £44 million, substantially the bulk of which was attributed to the SAM project. The second was cash in hand of £1.1 million and the third was investments held by Menhaden Capital and Alderic valued at £23.3 million. The total value of all assets disclosed in the list of assets was £68,994,380. The list also disclosed what Koza Altin called a rapid depletion in Koza's liquid assets (from £67 million to £24.6 million), which is far removed from what it supposed would be a holding of the ring in accordance with the Asplin order.

53. The total amount of almost £69 million was also substantially more than the aggregate asset position totalling £41,468,021 shown in Koza's management accounts. Mr Ipek explained that the difference in these figures is attributable to the fact that the management accounts value Koza's assets at "cost less impairment" and do not reflect the estimated value of its mining investments as valued in accordance with standard international mining valuation methodologies. The management accounts therefore reflected the amount that Koza has expended on its investments rather than their actual or estimated value, which is the amount disclosed in the list of assets.

54. Although Mr Ipek gave a certain amount of additional detail in relation to the asset list, and in particular the value of Koza's investment in its various gold mining projects, he gave no additional details of what was disclosed by Koza's management accounts. Koza Altin points to a number of matters disclosed by those accounts, including the facts that Koza has not generated any income from any of its mining projects since incorporation, and that several of them show minimal budgeted spend in 2021 indicating that they may have been abandoned.

55. Koza Altin has also analysed the management accounts in conjunction with the notifications that have been given by Koza in accordance with paragraph 2 of the first schedule to the Asplin order. It said that this analysis supports its submission that Mr Ipek has been misusing company money to fight his corner in these proceedings. The way the point is put in its skeleton argument is that "the level of legal spend that has now been revealed really lays bare what has been going on: Mr Ipek regards [Koza] as less of a mining company and more as a "fighting fund" that he can spend on furthering his own personal interests".

56. From the notifications given in accordance with the Asplin order, Koza Altin has been able to calculate that Koza has spent c.£12.5 million on exploration costs for the SAM project, no more than c.£6.5 million on other mining projects and c.£1.9 million on the purchase of shares in the common stock of Great American Minerals Exploration Inc ("GAME"), an entity which is also involved in the SAM project. This, therefore, is project-related expenditure totalling c.£21 million, which is to be contrasted with a reduction in its liquid assets of approximately twice that amount. Koza Altin submitted that this evidence demonstrated that a very significant proportion of the non-project related expenditure which has made such a significant contribution to the reduction in Koza's liquid assets has been spent on legal proceedings.

57. This submission is supported by the figures disclosed in Koza's published and management accounts for the period from incorporation to June 2020. They disclosed that (excluding the year ended 31 December 2018 in respect of which no figures are given) c.£18.7 million has been spent on administrative expenses. Koza Altin infers that Koza has in fact spent c.£25 million on administrative expenses for the full period. It also made a compelling case on the evidence that, of that amount, somewhere not far short of £17 million has been spent on legal fees. Mr Ipek asks the court to treat that figure with caution, but he did not explain with any particularity why that was the case, and gave no further details of what the position in fact is.

58. On the basis of this evidence, I am satisfied that administrative expenses for the period in fact exceeded £20 million and that the likelihood is that a material proportion of that figure, almost certainly amounting to very substantially in excess of £10 million, and quite possibly as much as £17 million, has been spent by a Koza on legal advice and representation including these proceedings.

59. Indeed Mr Ipek and Koza did not really dispute that substantial amounts of Koza's money have been spent on these legal proceedings and the contest with Koza Altin and the Trustees more generally. The core of their case is that this is a perfectly proper use of Koza's money and that Koza Altin has known for a long time that this is what has been happening. They also submitted that the Asplin order contemplated that this expenditure by Koza was permissible and that nothing which has happened since that order was made 4½ years ago should cause the court to vary the regime imposed by it.

The Legal Costs Applications

60. The first two applications with which I am concerned are for orders restraining Mr Ipek from causing Koza to continue to pay for the legal costs both of the existing

proceedings and of the New Authority Claim. There is no issue that, if Mr Ipek is not restrained from procuring Koza to pay those costs, that is what he will continue to do. Koza has borne the entirety of the costs of these proceedings to date. Mr Ipek has made no contribution, although through Latham he has now agreed to indemnify Koza for its costs of the litigation if the English Company Law Issue or the Authority Issue is determined in favour of the Trustees.

61. Koza Altin's submission was that the continuing (and indeed past) payment of these costs by Koza is and will continue to be a misuse of Koza's funds in the context of a dispute which, as the Court of Appeal has already held ([2020] EWCA Civ 1263 at paragraph [9]), has control of Koza as its object. It also relied on the fact that the expenditure which has already been incurred and paid by Koza in relation to the New Authority Claim was incurred and paid in what it said was a flagrant breach of the undertakings given by Koza in paragraph 2(3) of the first schedule to the Asplin order. It said that, on any view, those costs cannot amount to "legal fees in connection with this litigation", and therefore advance notification of any such payments should have been given. Koza Altin said that that no such notice was given and, if it had been, an application to restrain payment would have been made.

62. Koza Altin also submitted that the payment of the legal costs of these proceedings and of the New Authority Claim do not amount to payments made "in the ordinary and proper course of its business" within the meaning of paragraph 2(1) of the first schedule to the Asplin order and do not relate to "legal advice and representation for [Koza's] benefit", within the meaning of paragraph 3 of that schedule. It submitted that this is clear, and is linked to the well-recognised general principle of company law that a company's funds should not be expended upon disputes between stakeholders (the "legal costs principle"). It also submitted that the regime reflected in the Asplin order is no longer justified because the Old Authority Claim has been dismissed and the New Authority Claim is liable to be struck out at the May hearing.

63. Koza and Mr Ipek submitted that the notification provisions contained in paragraph 2(3) of the first schedule to the Asplin order are part of the analysis as to why this is wrong. I will come back to that issue after explaining my conclusions on the relevance and application of the legal costs principle, but it was an important part of Mr Ipek's case that the regime imposed by the Asplin order contemplated that, however the burden of costs might ultimately be borne as between Koza and Mr Ipek, Koza would be participating in the proceedings as an active protagonist and would be funding the claimants' own costs of the proceedings pending trial.

64. The law as to the legal costs principle has recently been reviewed by Mr Andrew Lenon QC in *Gott v Hauge* [2020] EWHC 1473, in a judgment given on an application for injunctive relief in unfair prejudice proceedings brought by a minority shareholder. At paragraph 53 of his judgment Mr Lenon QC described the essential principle as being that a company's money should not be spent on disputes between shareholders and that its controlling shareholders should be restrained by injunction from permitting it to incur expenditure on legal or other professional services, both for the purposes of the petition and for any other aspect of that dispute.

65. In further support of the submission that payment of the legal costs of these proceedings would breach the legal costs principle, Mr Neil Kitchener QC, who appeared for Koza Altin, cited the decision of the Court of Appeal in *Ross River Ltd v*

Waverley Commercial Ltd [2014] 1 BCLC 454, which considered it in a slightly different context. This was a case in which the real contest was between two joint venturers (Ross River and Mr Barnett), but the joint venture company itself (WCL) did not need to be an active participant. Lloyd LJ explained the position as follows at [110]:

> "As it is, however, it seems to me that Mr Caplan's submission is correct that, because the real contest was between Ross River and Mr Barnett, to which WCL was a necessary party but not one which had any separate interest of its own in resisting the claims, therefore it was a breach of the fiduciary obligation for WCL to spend its own money on defending the proceedings, and for Mr Barnett to procure that it should do so. The fiduciary obligation required Mr Barnett to spend his own money in defending the proceedings, if he wished to do so, and he should not have caused WCL to become jointly or severally liable together with him for Geoffrey Leaver's bills."

66. It is clear from these judgments that, whatever the procedural context in which the issue arises, the court is concerned to identify the true substance of the proceedings and that which constitutes the real contest. If the real contest is between parties other than the company itself, it will be a misfeasance for the company's directors to cause its funds to be expended on the legal costs of that contest. That does not of course mean to say that there may not be some legal expenditure which it is proper for the company itself to incur in the context of a shareholders' dispute. The incurring of legal costs in relation to the company's obligation as a party to give disclosure is one such example. There will be others, but they are limited to those aspects of the dispute in respect of which the company has its own independent interest to protect.

67. The procedural context in which the issue arises can vary. Thus in *Re a Company (No 1126 of 1992)* [1994] 2 BCLC 146 the context was an application by the company itself for an order that it be at liberty to participate actively in an unfair prejudice petition and that the directors be at liberty to pay the costs of such participation out of the company's funds. The court refused the relief sought on the grounds that the company had not proved by cogent evidence that its proposals were necessary or expedient in the interests of the company as a whole. In the course of his judgment Lindsay J referred (at page 156 a-b) to the fact as he described it that "the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency". He went on to say:

> "The chorus of disapproval in the cases puts a heavy onus on the company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expediency in the particular case."

68. However Lindsay J also rejected (at page 157 h-i) the submission that there can never be approval in advance. It was not a case in which an injunction was sought, but he made clear that, in declining to authorise the expenditure, he was not to be taken as having ruled that participation was not necessary or expedient in the interests of the company as a whole. The directors were left to proceed at their own risk.

69. Another context is illustrated by Hoffmann J in *Re Crossmore Electrical and Civil Engineering Ltd* [1989] 5 BCC 37. In that case, the question arose in the context of an application by the company under s.127 of Insolvency Act 1986 for the validation

of payments out of its bank account pending the hearing of a creditor's winding up petition and an unfair prejudice petition brought by the minority shareholder who was also the controlling director of the petitioning creditor. In granting relief in part, Hoffmann J permitted the use of funds to defend the creditor's winding up petition but refused to permit their use to pay the costs of the unfair prejudice petition.

70. In *Re a Company (No 004502 of 1988), ex parte Johnson* [1992] BCLC 701, the procedural context was an application for an injunction to restrain respondents to an unfair prejudice petition from causing or procuring the company to participate in the petition or incur any costs in relation to it (save for the obtaining of s.127 relief). Harman J approached the application on the basis that no company ought to be concerned in or incur costs by taking part in an unfair prejudice petition and he went on to say (at page 704 h-i) that:

> "if it is shown that directors of the company have been causing the company's money to be spent on financing the resistance either to a "pure" s.459 petition or, … in financing the company's resistance to a member's winding up petition based on the just and equitable ground, the court should prevent such expenditure. Such expenditure is a misfeasance, there is no excuse for it in law and it is not a question of an arguable case being raised showing that it may be right to permit misfeasances. Misfeasances are not matters that are permitted by the courts and there is no question of an arguable case at all."

71. *Ex parte Johnson* founded a submission by Koza Altin that the authorities do not speak with one voice on whether the *American Cyanamid* guidelines apply on an application for an interim injunction to restrain the use of a company's monies in the context of a shareholders' dispute. In my judgment that is not correct. The point made by Harman J was that it was clear beyond argument in the context of that case that the relevant expenditure would be a misfeasance. As that was established, it was not necessary for the court to go on to consider whether or not there might be an arguable basis for what was established as being a misfeasance to be permitted, because there could in law be no grounds for any such argument.

72. However, this will not always be the case. It will not always be clear beyond argument that the incurring of particular categories of legal expenditure in the context of a shareholders' dispute would indeed be a misfeasance. The court will then have to consider whether or not it is appropriate to grant injunctive relief applying conventional *American Cyanamid* principles.

73. This is well illustrated by *Gott v. Hauge* [2020] EWHC 1473. The issue arose because it was contended that the company's counterclaims against the petitioner minority shareholder for wrongs said to have been committed by him were not brought for a proper purpose in the interests of the company but were in fact in furtherance of the interests of the controlling members as part of the shareholder dispute.

74. Mr Lenon QC explained the general position at paragraph 52 of his judgment:

> "In *Re Milgate Developments Ltd* [1991] BCC 24 it was held that there was no justification for two companies, in relation to which s.459 petitions had been presented, from taking an independent part in litigating the shareholders'

> disputes, notwithstanding the fact that they might be affected by any share purchase order. In *ex parte Johnson* [1992] BCLC 701, the court observed that it might be proper for the company to incur costs on giving discovery or on making an application under s.127 but held that it would be misfeasance for the directors to cause the company's money to be spent on opposing the s.459 petition. In *Re a Company* [1994] BCLC 146 the court held that there was a heavy onus on a company to justify active participation in a petition and advance approval would only likely be given upon proof by cogent evidence of the most compelling circumstances."

75. He then went on to consider the decision of the Court of Appeal in *Jones v Jones* [2002] EWCA Civ 961 and recognised that, in cases where there may be an overlap between allegations made by way of defence to an unfair prejudice petition and by way of a separate claim by the company against the petitioner it will not necessarily be improper for the company to pursue its own claims. Having regard to the fact that the petitioner had established what he described as a clear case that the majority was in threatened breach of the principle that a company's money should not be spent on disputes between shareholders, he held that damages would not be an adequate remedy and that the balance of convenience came down clearly in favour of the grant of injunctive relief.

76. In my view, what these cases show is that the issue for the court is whether the claim or counterclaim was brought bona fide in the independent interests of the company or whether it was advanced as a response to or as part and parcel of the shareholders' dispute. The relevant question to ask is: is the company a genuine protagonist in proceedings against one of its members, or is the true nature of the dispute one in which it is the object over which its shareholders are themselves in dispute? In answering that question, the court will always have regard to the substance of the dispute.

77. If, on a proper characterisation of the proceedings, the legal costs principle is or may be engaged, the next question is whether the grant of an injunction is just and convenient. The cases show that it will very often be just and convenient to grant an interim injunction to restrain the misuse of a company's money in this context, but it still seems to me that the court will normally have to apply the conventional *American Cyanamid* principles. I do so, bearing in mind that (per Lord Hoffmann in *National Commercial Bank Jamaica v. Olint Corporation* [2009] 1 WLR 1405 at [17]), where it is hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice, "the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other".

78. Mr Bloch QC submitted that this application should have been made at the time the Asplin order was agreed, because, if it is true that Koza should be adopting a neutral stance that was as true then as it is today. Whether there is any force in that submission will be affected by the juridical basis on which Koza Altin seeks relief and on whether or not the Asplin order contemplated that such expenditure would be prohibited or permitted in any event.

79. The juridical bases on which Koza Altin seeks relief in the present application are twofold. The first is that the interim injunction would support and form part and parcel of the operation of the interim regime currently in place, because expenditure in contravention of the principles I have discussed would not be in the ordinary course of Koza's business, and would not be for its benefit. The second is that it would preserve the assets of Koza in support of Koza Altin's counterclaim as a stakeholder in the company. As Popplewell LJ explained in *Koza Ltd v Koza Altin Işletmeleri AS* [2020] EWCA Civ 2018 at [82], when upholding the juridical basis for the order made by Mr Jeremy Cousins QC:

> "I would also accept the existence of this alternative jurisdictional basis for the injunction granted by the Judge. Where there is a dispute over control of a company the court may make interim orders, including freezing orders, whose purpose is to preserve the value of the company in favour of a party who has a legitimate interest in preserving its value."

And then at [91]

> "if Koza Altin be right on the merits of the counterclaim, it should be in control of Koza Ltd now; and in those circumstances its proprietary interest in the value of its shareholding would not need the court's protection. It is that arguable existing right vested in Koza Altin to enjoy control of the company, and thereby to enjoy its proprietary rights to its shareholding in the company, which is what provides a jurisdictional basis for preserving the assets of Koza Ltd at Koza Altin's suit pending determination of the rights in issue in the counterclaim."

80. In the present case, it is obvious that Koza Altin's own standing to apply is clearly established. It is the party for whose benefit the undertakings in the first schedule to the Asplin order were given and will remain the 100% ordinary shareholder of Koza whatever the outcome of this litigation. As Popplewell LJ made clear in the passages of his judgment I have just cited, it has an arguable claim to enjoy control of Koza and it therefore has an interest in ensuring that Koza's assets are only applied for its benefit in accordance with the Asplin order and normal principles of company law, and are not dissipated in breach of duty.

81. The next question therefore is to identify the nature of the real contest between the parties (as the point was put by Lloyd LJ in *Ross River*). This informs the issue of whether the legal costs principle is engaged. It also informs (but on Mr Ipek's case will not necessarily answer) the issue of whether or not spending any of Koza's funds on the legal costs of these proceedings and the New Authority Claim is "in the ordinary and proper course of its business" as that phrase is used in paragraph 2(1) of the first schedule to the Asplin order or "relates to legal advice and representation for [Koza's] benefit" within the meaning of paragraph 3 of that schedule.

82. Koza Altin submitted that it is clear that the legal costs principle is engaged and that payment by Koza of the claimants' legal costs of these proceedings and the New Authority Claim are neither within the ordinary and proper course of Koza's business nor for its benefit. The reason is the simple one that the litigation is a shareholders' dispute in which Koza is the object of the proceedings, not properly a protagonist in its own right.

83. Mr Ipek disputes this. It was initially submitted on his behalf that this is a case in which Koza needs to decide who to recognise as the authorised representative of its shareholder and that it is a fundamental mischaracterisation to say that Koza is the object of the dispute and not a protagonist. Mr Bloch QC subsequently reformulated that submission and said that characterisation of the dispute in that way was incomplete and that it would only be a fundamental mischaracterisation if treated as complete and sufficient. I disagree with both ways in which the submission was formulated.

84. In my view there can be no doubt that the real and substantive contest is between Mr Ipek and Koza Altin as to the control of Koza, and they do so in their capacity as holders of the two different classes of its issued shares. The Authority Issue (however advanced) is simply one aspect or manifestation of the dispute over control of Koza between the "A" shareholders relying for their existing control on Article 26 and the ordinary shareholder who seeks to gain control by a challenge to the operation of Article 26. This was made clear by the Court of Appeal in its recent judgment on the costs of the appeal from Mr Jeremy Cousins QC ([2020] EWCA Civ 1263). As Popplewell LJ said at [8]: "I would accept the argument on behalf of Koza Altin that Koza Ltd was the object of the application just as control of Koza Ltd is the object of the litigation".

85. Both the characterisation of the matters in issue, and the order for costs which the court went on to make, clearly demonstrate that this litigation involves a dispute between warring shareholders, Mr Ipek as an entrenched controlling "A" shareholder and Koza Altin as the sole ordinary shareholder, in respect of which the object is the company itself. It is also now clearly established that an order for the payment of costs by the company (as opposed to the person in practical control of its affairs) will not be made. Although reasons were not given, it seems quite likely from the order for costs which it made that the Supreme Court was also of the view that an order against Koza was inappropriate because it was the object of the litigation.

86. This remains the case now as much as it was when these judgments were given. Although the New Authority Claim had not then been intimated, I can see no basis for contending (anyway for this purpose) that the overall object of this new litigation is not simply an aspect or manifestation of the overall shareholder dispute to the same extent as the litigation in the form with which Popplewell LJ was directly concerned.

87. The question which then arises is whether it could be said that, even though it is the object of the litigation, Koza's interest in the outcome is such that it is appropriate for it to fund all or some part of it at the direction of Mr Ipek. The argument advanced by Mr Ipek is that Koza needs to know how to respond to Koza Altin's attempt to remove him as a director. In other words, it is said that the present proceedings are for Koza's benefit and are in its best interests, because Koza needs to know who is authorised to represent its shareholder in this jurisdiction in the extraordinary circumstances which have given rise to these proceedings.

88. Mr Ipek has made a witness statement in which he confirmed that this reflects his view. In that same witness statement he confirmed that he has continued to reconsider the position from time to time throughout the litigation and in particular has done so after the decisions of the Supreme Court in July 2019 and of the Court of Appeal when determining the costs of the ICSID arbitration application in October

2020 and that his view remains unchanged. His position is that none of these applications determined the Authority Issue, which it remains in Koza's best interests to have resolved.

89. The reason that he said that it is in Koza's best interests for the Authority Issue to be resolved as efficiently and expeditiously as possible is because the uncertainty caused by the Trustees' claims to represent Koza Altin is impairing Koza's ability to carry on its ordinary and proper business by attracting new investors and establishing new business relationships. He said that it is necessary for this issue to be determined in England, largely because of the inability to access proper justice in Turkey, but also because it concerns the authority of the Trustees to act on behalf of Koza Altin in England. Mr Bloch QC submitted that, at the root of the case, so far as Mr Ipek is concerned, is the fact that the Trustees are trying to obtain control of Koza without submitting to the jurisdiction in order to ask for it.

90. In his skeleton argument, Mr Bloch QC also put forward a number of other examples of instances in which there was no reason why expenditure that might also benefit Mr Ipek should not be paid for by Koza as a benefit to it as well. In particular, he referred to the decision of the Court of Appeal when considering the application to permit Koza to fund the cost of the extradition proceedings ([2019] EWCA Civ 891), where Floyd LJ said (at paragraph [72]):

> "It seems to me that the meaning of "legal advice or representation for the Company's benefit" is clear, and the only requirement for the payments to be permitted is the legal advice and representation should be of benefit to Koza Ltd. It therefore seems to me that the expenditure on advice to and representation of Mr Ipek in defending him against the extradition request fell squarely within the legal expenses exception in paragraph 3 of the undertaking."

91. In my view, Floyd LJ was dealing with a very different point which had nothing to do with the question of how incurring expenditure in relation to a shareholders' dispute might benefit Koza. Of course expenditure by a company will sometimes be of direct benefit to a particular member, particularly where the member concerned is himself an important company employee. That does not assist on the question of whether the expenditure is directed towards assisting a member to fight his own corner in a shareholders' dispute and is incurred in taking steps that are part and parcel of that dispute.

92. Mr Ipek also said that he himself is "not able to commit funds necessary to fund the litigation myself". The argument was that, in these circumstances, as it was in Koza's interests for these issues to be resolved, it should pay for their resolution because nobody else was going to do so.

93. On the question of his ability to commit funds, Mr Ipek gave no further detail of his own personal finances and the context in which he advanced that contention was a more general submission that it would not be fair or just to expect him to contribute such resources as he has to fund these proceedings himself. He relied strongly on his assertion that the Trustees are acting in furtherance of the Turkish state's campaign of oppression against him and his family, including what he asserted to be the unlawful imprisonment of members of his family and the unlawful seizure of their assets.

94. The position which Mr Ipek maintained on this aspect of the dispute was expressed in strong terms. He said that he and his family have suffered very serious wrongs and I have no reason to doubt that his belief to that effect is genuinely held. However, the sense of injustice which he feels reinforces the need to consider the evidence on his ability to fund the proceedings personally with some care. There are obvious dangers that the relevant question, which is whether he is able to do so, may be infected by an unwillingness which is driven by the strength of his feelings in relation to the unfair way in which he said he has been treated by the Turkish state.

95. In assessing the evidence on this point, I have regard to the fact that, although Mr Ipek said that he would not be in a position to fund the ICSID arbitration without the use of Koza assets, that arbitration continues to proceed. I also bear in mind the conclusions of the Court of Appeal ([2020] EWCA Civ 1018 at [104]) that Mr Cousins QC was entitled to conclude ([2020] EWHC 654 (Ch) at paragraphs [96]-[105]) that alternative sources of funding were likely to be available to fund that arbitration, and indeed that this was a conclusion that the Court of Appeal itself would have reached.

96. But in my judgment, the clearest evidence on this point comes from the inferences to be drawn from (a) the absence of any evidence or particularisation as to the extent of Mr Ipek's assets outside Turkey, despite the fact that this has been a known issue in the dispute for some time, and (b) the way in which Mr Ipek expresses himself in his own witness statement in these proceedings. The way he explained his position was as follows:

> "However, in the light of the heavy price I have already paid, I am not willing to contribute such resources as I have towards the funding of these proceedings. Moreover, the Authority Issue has a much wider bearing than the notices (and thus my own position as a director) and it is imperative that it is resolved for the sake of Koza Ltd and all its stakeholders more generally. I therefore see it as proper that the company should apply its funds for the resolution of the issue."

97. It is noteworthy that, although Mr Ipek said that he is not able to "commit funds necessary to fight the litigation myself", he gave no detail of what his funds outside Turkey in fact are, and does not say in terms that he does not have access to resources outside Turkey from which it would be possible for him to fund both these proceedings and a determination of the New Authority Claim should he choose to do so. In my view, while his unwillingness to do so is in some respects explicable in light of the strength of his views about the way he and his family have been treated, it remains very surprising given the criticism to which his evidence on this point has already been subjected by Mr Cousins QC and the Court of Appeal. I would have expected transparency if there was nothing to hide and that has not occurred. Overall I am satisfied that the evidence does not support a conclusion that he is unable to supply or procure the funding if that is what he chooses to do.

98. The consequence of this is that I am not satisfied that the argument that there is no other alternative for Koza but to seek to have the Authority Issue determined by the English courts at its own cost, and that therefore a decision to that effect would not amount to a breach of duty, has any legitimate foundation in fact. In other words, it is not established that a restriction on Koza's ability to fund the proceedings will be the cause of any stifling of them.

99. I should add that, in any event, I agree with Koza Altin's submission that, even if that were not to be the case, the impecuniosity of one party to a dispute over the control of a company provides no justification in itself for the company to incur the cost of making positive arguments in support of that party's position. The most that could be said is that in an appropriate case it might affect the balance of prejudice, causing the court to pause before granting interim injunctive relief.

100. Mr Ipek accepted that he has a personal interest in Koza's response to these issues but said that he has endeavoured to disregard that interest when determining how to act in what he believes to be Koza's best interests. He said that his decision to cause Koza to litigate and pay the costs of doing so out of its own resources was taken after he went through the following decision making process:

> "As Koza Ltd's director, it was incumbent on me to decide how Koza Ltd should respond to the Purported Trustees and whether Koza Ltd should recognise them as authorised representatives of Koza Altin as its sole voting shareholder. The other director of Koza Ltd at the time these proceedings were issued was my sister, Ms. Pelin Zenginer, who is also a co-owner of IIL and therefore of the Koza Group and so was in the same position as me that I have described in paragraph 13 above. As such, there were no other board members to whom we could leave the decision and we could not seek any authority or approval from the company's shareholder. It therefore fell to us alone to take the decision what to do to protect the company."

101. Of course, the court will have full regard to bona fide decisions taken by a company's directors as to what is in its best interests and whether or not the taking of particular steps or the incurring of expenditure is properly to be characterised as for its benefit. However, it is clear to me that in the present case the views expressed by Mr Ipek himself should not be given very much weight.

102. It is not evident that he gave any proper regard to why it was appropriate for he himself to bear none of the costs even though he was receiving much of the benefit. More fundamentally, as he himself recognised, he had a clear conflict of interest in making the decision he has made. In my view Koza Altin was justified in making the submission that arguments from obviously interested parties that funding proceedings are in the best interests of a company are unlikely to be persuasive. This is clear from numerous cases including *Re Kenyon Swansea Ltd* [1987] BCLC 514 at 521; *Re a Company (No 001126 of 1992)* [1994] 2 BCLC 146 at 157 and *Arrow Trading & Investments Est 1920 v Edwardian Group Ltd (No 1)* [2003] EWHC 2863 at [16]. I consider that this is the situation in the present case.

103. It follows that the considerations which Mr Ipek appears to have taken into account are not an answer to the objection raised by Koza Altin. It will often be the case that a dispute between members of a company (the substance of which relates to its control or how its affairs are being conducted) will be unsettling to the smooth operation of its business. To that extent resolution of the dispute in an expeditious manner will be of benefit to the company, and it will be perfectly proper for it to incur legal costs in participating to the extent that it is necessary for a neutral or nominal party to do so. However, such considerations cannot of themselves justify steps being taken by the company itself to support one of the protagonists, let alone commit any part of its

funds in support of his position. The real contest remains the shareholders' dispute; resolution of it may be of benefit to Koza, but taking sides in it is not.

104. This conclusion does not, however, always answer the question of whether or not it is appropriate to grant an injunction, although where one of the protagonists to a dispute between shareholders is in control of the company's resources, there are obvious policy reasons why it should do so. They were graphically expressed in Mr Kitchener QC's skeleton argument as being the unjust creation of a "heads I win, tails you lose" for Mr Ipek's benefit. The reason for this is that, win or lose, any payment of the costs of the litigation by Koza would fall on Koza Altin, while Mr Ipek will be in a position to use Koza's resources as a fighting fund with no personal risk to himself.

105. However, it was said by Mr Ipek that the regime imposed by the Asplin order contemplated that the legal costs principle would not be engaged in relation to these proceedings. He relied on the notification provisions in paragraph 2(3) of the first schedule which contemplate that notice does not have to be given by Koza to Koza Altin of "the payment of or incurring of liability in respect of legal fees in connection with this litigation, for which no notification will be required." Mr Bloch QC submitted that, taken together with the provisions of paragraphs 2(1) and 3, it was possible to discern an intention by the parties that Koza was entitled to spend its own money on any legal fees so long as they were incurred in connection with this litigation.

106. Koza Altin contended that this carveout from the notification provisions was only intended to cover Koza's legal costs as a relatively inactive neutral party to the proceedings. But Koza submitted that this could not be correct because the carveout was designed to deal with issues of privilege which would only arise as against Koza Altin as a shareholder if Koza's role in the proceedings was as a substantive party to the dispute. It pointed out that it is well known that a company cannot assert privilege in legal advice obtained for it against one of its own shareholders unless the shareholder is in hostile litigation with it: see *Sharp v Blank* [2015] EWHC 2681 (Ch) at [11]-[13].

107. It seems that questions of privilege underlay the inclusion of paragraph 2(3). Furthermore, and contrary to the submission made by Koza Altin, I think that the incurring of legal fees in connection with this litigation is capable of being wide enough to cover fees incurred in relation to the conduct of the New Authority Claim. The phrase "in connection with" is wide and, although the New Authority Claim is being commenced by separate process, its subject matter relates to the ability of those directing Koza Altin to procure it to exercise its shareholder rights so as to challenge Article 26 and the control of Koza that Mr Ipek continues to enjoy.

108. In my view, however, that is only the case if those fees would otherwise be properly payable by Koza, having regard to the legal costs principle. The mere fact that the first schedule to the Asplin order contemplates that some legal costs in connection with these proceedings (and as I see it now the New Authority Claim as well) may properly be incurred and paid by Koza says nothing about their quantum or extent, and certainly does not authorise what would otherwise be an improper payment, applying the principles discussed in *Gott v Hauge*. As Mr Bloch QC's submission on this point amounted to a contention that the parties intended, whether pending trial or

more generally, that what would otherwise be an improper use of Koza's monies was to be permitted, much clearer words would have been required.

109. Mr Bloch QC also submitted that the correspondence prior to the making of the Asplin order showed that there was disagreement between the parties as to whether or not payment of legal costs by Koza as a protagonist in the proceedings would be in the ordinary or proper course of its business. That may be right, but the relevant question for present purposes is whether it is. In my view, having regard to the legal costs principle, it almost certainly is not.

110. However, he then went on to submit that the interim regime imposed by the Asplin order recognised the parties' disagreement as to whether or not payment of the legal costs of the proceedings would be in the ordinary and proper course of Koza's business, but quite deliberately put off the resolution of that issue until trial or further order. In other words, the propriety of the expenditure being incurred and paid by Koza would not be addressed by the terms of the Asplin order, but pending its determination at trial the expenditure could be incurred and paid by Koza.

111. As I have already foreshadowed, I do not agree. Nothing in the Asplin order is sufficiently explicit to amount to an agreement to vary the legal costs principle or indeed to signal that it was not intended to apply in this case. Furthermore, I do not consider that any part of the first or second schedules to the Asplin order reflect an agreement or intention that even if the legal costs principle were to be capable of applying as a matter of principle in due course, Koza could continue to fund the resolution of the Authority Issue and the English Company Law Issue pending trial.

112. I think that it is too much of a leap therefore to conclude that it follows from the wording of paragraph 2(3) that the parties must have had in mind the possibility that Koza would be incurring and paying for significant legal costs in these proceedings. It forms no part of the definition of what can and cannot be paid or incurred and is far too tenuous a basis for Koza to contend that what would otherwise be a breach of the legal costs principle should not be one in this case. It also follows that I do not accept the submission that, on the true construction of the first schedule, the Asplin order authorised their payment.

113. In all the circumstances I am satisfied that there is a serious issue to be tried that, in procuring Koza to pay all the legal costs of these proceedings and the New Authority Claim, Mr Ipek would be acting in breach of the legal costs principle and in breach of his duty as a director of Koza. To that extent, it follows that payments made in breach of the legal expenses principle cannot be treated as the expenditure of funds that properly relate to legal advice and representation for Koza's benefit, nor do I think that they are capable of being payments in the ordinary and proper course of its business. It cannot be part of the ordinary and proper course of a company's business to make a payment in breach of an established principle of company law.

114. In reaching that conclusion, I am satisfied that the principle which would otherwise apply has not been modified by the terms of the Asplin order or the circumstances in which it came into effect. On all of these points, I take the view that the arguments advanced by Koza Altin on this application are significantly more compelling than those put forward by Koza and Mr Ipek. For the reasons I have explained, the much better argument is that the costs of legal advice and representation are only authorised

for payment by the Asplin order to the extent that they relate to Koza's own interests independent of its participation together with Mr Ipek as a protagonist in the dispute of which Koza is the object.

115. It follows from this conclusion that I do not accept the premise on which many of the oral submissions made by Mr Bloch QC at the hearing were founded. He said that the Trustees had shown no good reason to tear up the regime imposed by the Asplin order. They included the fact that Koza Altin had had the benefit of the order for 4½ years, its unwillingness to submit to the jurisdiction in relation to the Authority Issue during that period and a number of matters relating to the injustice of the campaign of oppression to which Mr Ipek and his family had been subjected. In my view, these considerations do not affect the analysis which I consider to be the correct one. It was always the case that Koza and Mr Ipek were vulnerable to a challenge by Koza Altin based on the legal costs principle and a contention that payment by Koza of their costs of this litigation would not be in the ordinary and proper course of its business or for Koza's benefit.

116. The next question is whether damages would be an adequate remedy for Koza Altin.

117. The first and perhaps obvious point is that damages against Koza itself would not be an adequate remedy. Koza Altin is the holder of 100% of the ordinary share capital in Koza, so it follows that in economic terms, recovery by Koza Altin of damages from Koza would amount to a recovery from itself. Furthermore, in circumstances in which Koza Altin is entitled to damages because it has won, the claim will be against an entity in which it not only has a 100% interest, but which it also controls.

118. As to damages against Mr Ipek, his own evidence is exceptionally coy about the extent of his own personal assets outside Turkey. As I have already explained, he relied on that in support of his argument that there is no funding available to litigate these proceedings apart from resources made available by Koza. However, on this issue it seems to me that it is not open to him to say that any claim in damages against him in due course if he were to fail in these proceedings (or in the New Authority Claim) would be adequate.

119. Mr Ipek submitted that on this question it is appropriate for the court to take into account assets which he has in Turkey, but to which he does not at present have access because they have been seized by the Turkish authorities. He has explained that the Turkish court has now made an order holding him and his brother personally liable for the £60 million sum with which Koza was capitalised on the basis that it was a concealed income transfer for their personal benefit. He said that he has been unable to appeal that decision, but points out that Koza Altin may be able to enforce that order against his assets in Turkey, which are currently confiscated by the Turkish state. These are also the assets in respect of which he said that the indemnity I referred to earlier in this judgment is capable of being enforced by Koza.

120. I do not consider that this comes anywhere near satisfying the court that damages would be an adequate remedy. In my view, an ability to enforce against those assets in circumstances in which Koza Altin or the Trustees have been successful in these proceedings is simply too speculative to be given any material weight.

121. In any event, in this as in many other cases, the effect of a breach of the legal costs principle is that a significant forensic and cash flow advantage is given to only one party. This is particularly striking in the present case where Koza Altin holds 100% of the economic interest in Koza. Even if there were to be sufficient evidence that Mr Ipek has sufficient available assets over which Koza Altin could execute, it will be necessary for the court to attempt to assess and quantify the adverse impact which that funding may have had on the position of the other protagonist. In my view that will be a very difficult exercise to carry out.

122. The other side of the coin is the adequacy of Koza Altin's cross-undertaking in damages. Its existing cross-undertaking has been fortified in the sum of £250,000 and I did not understand Koza or Mr Ipek to contend that, if it were to be held at some later date that Koza Altin had not been entitled to the relief that it seeks on this application, it would not be good for the money. In any event, the evidence is that as at 30 June 2020, Koza Altin's current assets were worth in excess of £561 million (at current exchange rates) and that it owns five apartments in London which were originally purchased for a combined price of £17 million.

123. As those apartments are apparently occupied by Mr Ipek and members of his family, I can see that there may be disputes as to whether or not the London assets are properly to be treated as assets of Koza Altin available for execution at the suit of Mr Ipek or Koza. Nonetheless, it seems to me that when balancing the adequacy of Koza Altin's claim for damages against Mr Ipek against Mr Ipek's claim for damages against Koza Altin, the balance of injustice or prejudice comes down in favour of the grant of the relief sought.

124. Turning to more general discretionary considerations and the balance of prejudice, there are a number of other matters on which Mr Ipek places reliance in support of his submissions relating to the justice of the case. They include a complaint that the Trustees are using Koza Altin's assets to fund these proceedings in circumstances in which he and his family were the ultimate beneficial owners of a majority interest in Koza Altin when it was, as he put it, "unlawfully seized by the Turkish state". He also submitted that the way in which Koza Altin has been conducting these proceedings has been designed to drive up the costs unnecessarily through making an expensive jurisdiction challenge, rather than joining with him in allowing the English courts to determine the Authority Issue. This despite the fact that, at the outset of the dispute, the Trustees seemed to be preparing to invoke the jurisdiction of the English court to assist in establishing their authority rather than challenging it.

125. Mr Bloch QC also submitted that Koza had been funding the litigation for the claimants for the past four years and that, although Koza Altin was aware of this, it had done nothing to seek to stop it until it made these applications in December 2020.

126. There is very little in this point so far as adverse costs orders are concerned. Koza Altin has been consistent in seeking orders that Mr Ipek alone should be liable. This is apparent from the applications for costs made to the Supreme Court, Mr Cousins QC and the Court of Appeal on appeal from his ruling and the orders made on those applications.

127. So far as payments by the claimants of their own costs are concerned, the reasoning of Popplewell LJ in the passages from his judgment reported at [2020] EWCA Civ 1263

that I have already cited apply as much to the circumstances in which it will be wrong in principle for the company to pay any part of the costs itself as they do to the circumstances in which the court will refuse to make an adverse costs order against a company which is the object of litigation. They reflect the fact that Koza Altin had for some time been submitting that Koza should not be spending its own money on advancing the position of whoever happened to be in control of it for the time being. Koza Altin said that it was only in the context of that decision that it realised for the first time that all of the costs were being paid by Koza and nothing was being paid by Mr Ipek. It also said that it was only when it saw the full extent of the amounts that had been spent on receipt of the disclosure that was made in accordance with the Mann J order that it appreciated the extent of the depletion in Koza's assets caused directly by administration expenses including legal expenditure.

128. While I remain slightly puzzled as why it is that Koza Altin did not bring matters to a head a little earlier, I accept Mr Kitchener QC's submission that there has been no specific prejudice to Mr Ipek as a result of any delay. Indeed he has benefited by being able to use Koza's resources on fighting his corner in the dispute for longer than might otherwise have been the case.

129. There are a number of other more general discretionary considerations to which I have had regard.

130. The first is a point to which I have already alluded. The evidence shows that Koza has incurred very substantial expenditure on legal costs in the context of a case in which there is no evidence that Mr Ipek has made any contribution in his own right. Even if he were able to establish that some level of expenditure by Koza was justified as being properly for Koza's own benefit (notwithstanding the legal costs principle), I can see no justification for expenditure by Koza at the level apparently incurred without any proportionate contribution being made by Mr Ipek. Koza Altin through its 100% economic interest in Koza is the person who will be more prejudiced by this state of affairs than Mr Ipek.

131. The second is that the continuing payment of the costs of this litigation and the New Authority Claim cuts across the maintenance of the status quo in relation to the conduct of Koza's activities for the purpose of preserving its assets, which was the essential purpose behind the Asplin order. It is one thing for Koza to incur expenditure on business activities directed at potentially profitable trading thereby assisting in its maintenance and development as a going concern. So long as those activities are in the ordinary and proper course of its business, and are at least capable of preserving the value of its net assets, expenditure on them can properly be regarded as holding the ring.

132. It is quite another thing for a company to incur expenditure on litigating about the identity of its own controllers. Even if that is capable of being characterised as for Koza's benefit, that is only the case for a qualitatively different reason. The only status quo with which it is concerned is the maintenance of the present position in which control is entrenched in the hands of one of the protagonists of the dispute - it cannot by its very nature be regarded as expenditure for the purpose of holding the ring so far as Koza's own activities are concerned.

133. The third factor is another aspect of the status quo, and is one which I have already mentioned in the context of damages not being an adequate remedy. It is one of the reasons why in this kind of dispute the court is often persuaded to grant injunctive relief. The effect of not restraining use of a company's monies in the way sought by Koza Altin, thereby permitting the controlling shareholder to continue to utilise the assets of the company in funding one side of the contest, is to give a significant forensic and cash flow advantage to one party to the exclusion of the other. Even if that advantage is reversed in the future (as would be the case if the indemnity offered by Mr Ipek were to be enforced), it would not reverse the distortion of the status quo as it applied at the commencement of the proceedings.

134. This is one of the reasons why the indemnity that is now offered by Mr Ipek does not in my judgment provide an answer. Not only is there the uncertainty I have already described about its value and the ability of Koza to enforce it in due course on the assumption that it becomes subject to Koza Altin's control, it also does not redress the illegitimacy of the advantage that Mr Ipek has obtained by being able to use Koza's resources in the ongoing conduct of the dispute.

135. The final factor is the approach that has been adopted by Mr Ipek in continuing to procure Koza to pay the legal costs of this dispute without making a contribution himself, in circumstances in which courts at every level have made quite clear that this is an inappropriate course for him to adopt. This fact alone is strongly suggestive of the probability that, if injunctive relief is not granted, he will continue to procure Koza to incur expenditure on legal costs without proper regard to the legal principles governing the circumstances in which that expenditure may be appropriate.

136. For all these reasons, I am satisfied that it is now just and convenient for the court to grant injunctive relief restraining Mr Ipek from causing or procuring Koza from expending any part of its funds on the legal costs of these proceedings or the New Authority Claim. The order can contain provision for Koza to pay the legal costs of complying with any genuinely independent obligation that it may have to participate in the proceedings, such as disclosure. In the first instance the parties should attempt to agree the terms of an order which reflects this judgment. I did not hear submissions on the precise form of order, but at first blush paragraphs 3 and 4 of the draft included in the bundles by Koza Altin seems to me to achieve the required result.

The SAM Expenditure Application

REDACTED