Neutral Citation Number: [2021] EWHC 2131 (Ch)

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: 28 July 2021

Before :

THE HONOURABLE MR JUSTICE TROWER

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Claim No HC-2016-002407

Between :

(1) KOZA LTD
(2) HAMDI AKIN IPEK

Claimants

- and -

KOZA ALTIN IŞLETMELERI AS

Defendant

Claim No BL-2021-000516

And Between:

(1) KOZA LTD
(2) HAMDI AKIN IPEK

Claimants

- and -

(1) KOZA ALTIN IŞLETMELERI AS
(2) FATIN RŰŞTŰ KARAKAŞ
(3) ISMAIL GŰLER
(4) ENIS GŰÇLŰ ŞIRIN
(5) ISMET DEMIR
(6) PERSONS UNKNOWN

Defendants

- -
- -

Siward Atkins QC and Andrew Trotter (instructed by **Latham & Watkins (London) LLP**) for the **Claimants**

Jonathan Crow QC and David Caplan (instructed by **Mishcon de Reya LLP**) for the **First to Fifth Defendants**

Hearing dates: 17th and 18th May 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.

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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. The date and time for hand-down is deemed to be 10.30pm on 28 July 2021

Mr Justice Trower:

1. The applications with which this judgment is concerned are made in two separate but linked actions. The first action in point of time was commenced by claim form issued on 17 August 2016 (the "2016 proceedings"). The second action was commenced more than 4½ years later by claim form issued on 22 March 2021 (the "2021 proceedings"). Both actions relate to a dispute over the control of an English company, Koza Ltd ("Koza"), which was incorporated in March 2014 for the purposes of pursuing international mining operations.

2. In both actions the claimants are Koza and Hamdi Akin Ipek ("Mr Ipek"), Koza's sole director and the holder of one of its two "A" shares. Koza's only ordinary shareholder, Koza Altin Işletmeleri AS ("Koza Altin"), a Turkish listed company incorporated by Mr Ipek in 2005, is now the sole defendant in the 2016 proceedings and one of six defendants in the 2021 proceedings. Koza Altin is part of a group of companies founded by Mr Ipek's father which was, until 2015, managed under the ultimate control of the Ipek family. It seems that 41% of the ordinary shares in Koza Altin are still held directly or indirectly by members of the family.

3. The remaining defendants in the 2021 proceedings are the four existing Turkish directors of Koza Altin (the "individual defendants"), each of whom is resident in Turkey, and Persons Unknown, intended to be the persons who may be appointed as directors of Koza Altin from time to time. The principal issue with which these applications are concerned is whether the authority of the individual defendants to cause Koza Altin to take steps as a shareholder of Koza, should be recognised in England.

4. At the time of issue of the 2016 proceedings, there were five further individual defendants (the "trustees") who had been appointed in Turkey as trustees in relation to Koza Altin. They are no longer parties to the 2016 proceedings in circumstances which I will describe in due course.

Background to the Dispute

5. The background to the dispute is complicated and contentious, but for present purposes can be stated quite shortly. The claimants contend that in 2013 President Erdoğan and his Justice and Development Party, the AKP, began what they called his campaign to purge Turkey of a "parallel state" comprised of the Hizmet organisation of Fethullah Gülen, an Islamic preacher resident in the USA. At that stage some of the Koza-Ipek group's newspapers reported on corruption allegations against the AKP and President Erdoğan himself.

6. On 1 September 2015, the Koza-Ipek group's Bugün newspaper published a story critical of the Turkish government claiming that arms were being transferred from Turkey to the Islamic state in Syria with the full knowledge of Turkish customs officials. On the same day there was a police search of the group's headquarters conducted under a search warrant issued by a judge of an investigating court known as a criminal peace judge. The allegations said to justify the search related to what were

said to be unlawful transfers and receipts of money that had been acquired illegally. The illegality relied on included accusations that the Koza-Ipek group had financed and promoted terrorism, an offence that has a wide meaning in Turkish law.

7. Mr Ipek and the Koza-Ipek group contended that the search was part of a sustained campaign by the Turkish government to silence criticism made by its political opponents and to expropriate their assets. They sought to challenge the warrants, and contended that the allegations on which they were founded were wholly baseless. They were unsuccessful on grounds that are said by the claimants to be unconstitutional.

8. Shortly thereafter, steps were taken which had the effect of strengthening Mr Ipek's control of Koza. It allotted two newly issued £1 "A" shares to Mr Ipek and his brother and amended its articles of association to entrench the rights of the "A" shareholders. Pursuant to a newly formulated article 26, Koza's "A" shares now confer on their holders a class right by which certain resolutions (including a resolution to appoint or remove members of the board) cannot be passed without their consent.

9. At about the same time Koza took the first steps to preserve £60 million which had been introduced by Koza Altin in March 2014 by way of payment of a capital contribution for its ordinary shareholding and which was held in the Luxembourg branch of Garanti Bank, a Turkish subsidiary of the Spanish bank, BBVA. This led to proceedings in Luxembourg in the course of which Garanti Bank informed the Luxembourg court that the Luxembourg Financial Investigation Bureau had frozen the relevant accounts while they investigated allegations of financing terrorism. The trustees also took proceedings in Turkey to freeze the £60 million in Luxembourg and to cancel amendments to Koza's articles of association and the allotment of the "A" shares.

10. The next stage in what is said by Mr Ipek to be the Turkish government's campaign against him and his family was that, on 26 October 2015, Judge Yunus Süer, a criminal peace judge sitting in the 5th Ankara Criminal Court of Peace, appointed a number of individuals, including the trustees, as directors of various companies in the group controlled by Mr Ipek, including Koza Altin. He did so pursuant to article 133 of the Turkish Criminal Procedure Code ("TCPC"), which permits the court to appoint trustees for the administration of a company with the aim of running its business. There must be strong grounds of suspicion that one or more of a number of scheduled crimes is being committed within the activities of the company and it must be necessary for revealing the factual truth during a criminal investigation or criminal case.

11. I shall revert later in this judgment to the criticisms made of the Süer judgment by the claimants, but in summary it is said by them to be contrary to Turkish law and corrupt. It is also said that the basis of the Süer judgment was the evidence of Professor Doctor Safak Ertan Çomakli, and that the report he prepared was both partisan and deeply flawed.

12. On 12 November 2015, an appeal against the decision of Judge Süer was determined on the papers by another criminal peace judge, Judge Savas Sahinbey, and rejected. Mr Ipek then appealed to the Turkish Constitutional Court and on 8 April 2016 filed an application with the European Court of Human Rights ("ECtHR") seeking to challenge the appointment of the trustees as a breach of the European Convention on Human Rights ("ECHR"). The application to the ECtHR was declared inadmissible on 11 May 2017 for failure to exhaust all domestic remedies, and eventually, in a judgment

delivered on 24 May 2018, Mr Ipek's appeal to the Turkish Constitutional Court was dismissed. Since that dismissal he has filed a further application with the ECtHR, seeking to challenge the appointment of the trustees. This was filed on 12 December 2018 and is still pending.

13. Meanwhile, on 28 October 2015, i.e. shortly after the Süer judgment, police entered the Koza Group media headquarters and shut down its media operations, albeit that the operations were subsequently resumed for a short period under the editorial control of the individuals who had been appointed to the relevant companies at the time the trustees were appointed in respect of Koza Altin.

14. More generally, the composition of the body of trustees appointed as directors of Koza Altin has changed from time to time. Thus, orders made by the criminal peace court on 13 January 2016 and 3 March 2016 increased and then reduced the number of trustees and directors of Koza Altin. By the time of the commencement of the 2016 proceedings, some but not all of the trustees were the same individuals as those appointed by the Süer judgment.

15. In July 2016 a state of emergency was declared in Turkey after the failure of an attempted coup. One of the consequences of this was that the Koza-Ipek media companies were shut down and their assets were transferred to the Turkish treasury. At about the same time the Luxembourg litigation in relation to the £60 million used to capitalise Koza came to a head. On 19 July 2016, the Luxembourg court ordered Garanti Bank to release the £60 million to Koza.

16. Steps were then taken by Koza Altin, as sole ordinary shareholder of Koza, to attempt to replace Koza's current board. On the day on which the Luxembourg order was made, Koza Altin, acting through the trustees, served notice under section 303 of the Companies Act 2006 (the "2006 Act") seeking to require Koza to call a general meeting with a view to removing its directors, including Mr Ipek, and replacing the board with three of the trustees. The trustees also sought to direct the board of Koza to freeze the £60 million in Luxembourg pending their own appointment as directors.

17. On 10 August 2016, Koza Altin, again acting by the trustees, served a statutory notice under section 305 of the 2006 Act convening a general meeting of Koza to be held on 17 August 2016 to pass the resolutions proposed in the section 303 notice. This second statutory notice was the immediate catalyst for the 2016 proceedings, the course of which it is necessary to describe in a little detail in order to put in context the issues I have to decide.

The 2016 proceedings

18. In the 2016 proceedings, the claimants seek declaratory relief that the statutory notices served by Koza Altin under sections 303 and 305 of the 2006 Act were ineffective. They also seek an injunction to restrain Koza Altin from taking any other steps to remove any director of Koza without "A" shareholder consent. These heads of relief have been called the English company law claim and are concerned with a number of linked English company law issues that have been raised during the course of the dispute.

19. At the heart of the case advanced by the claimants in the English company law claim is their contention that the resolutions proposed in the section 303 notice cannot properly be moved because they would, if passed, be ineffective by reason of the provisions of article 26.

20. The 2016 proceedings also raised what is called the authority issue. The claim raising the authority issue is now called the old authority claim in the form in which it was made in the 2016 proceedings. By the old authority claim, the claimants sought an injunction to restrain the trustees from holding themselves out as having the authority to act for or to bind Koza Altin as a shareholder of Koza and from causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza in England, including the service of the section 303 and section 305 statutory notices.

21. On 16 August 2016, immediately before the 2016 proceedings were issued, the claimants obtained a without notice interim injunction from Snowden J restraining the holding of the meeting called by the section 305 notice. Snowden J also made an order for alternative service permitting the claimants to serve the trustees and Koza Altin at the offices of Mishcon de Reya ("Mishcon") in London, even though they were outside the jurisdiction. It also made provision for service of all documents in the 2016 proceedings to be effected on Koza Altin via Mishcon.

22. As part of his determination that an order for alternative service on Mishcon was appropriate, Snowden J concluded that both limbs of the claim fell within article 24(2) of the Jurisdiction and Recognition of Judgments Regulation (EC) No 1215/2012 ("article 24(2)"), which provides as follows:

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

The effect of Snowden J's conclusion on the application of article 24(2) was that service out of the jurisdiction was available under CPR 6.33 without obtaining the permission of the court under CPR 6.36.

23. The claimants had also submitted by way of alternative that a number of the gateways identified in paragraph 3.1 of PD 6B (as applied by CPR 6.36) were available. CPR 6.36 provides that:

> "In any proceedings to which rule … 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply".

In light of his conclusion on the article 24(2) point, Snowden J decided that he did not need to determine whether or not the gateways then relied on would have established a ground for service of the claim form out of the jurisdiction with the permission of the court if article 24(2) had not applied.

24. The injunction granted by Snowden J on 16 August 2016 was continued by a further order made by him on 25 August 2016. This order recorded the existence and nature of the old authority claim by reciting that the claimants disputed the authority of Mishcon to act on behalf of Koza Altin. Snowden J also gave directions for a substantive hearing of the application by the claimants for injunctive relief.

25. On 7 October 2016, the trustees issued an application contesting jurisdiction in relation to the 2016 proceedings. At the same time Koza Altin, acting by its newly appointed directors, issued an application to contest jurisdiction in relation to the old authority claim, but filed a defence and counterclaim to the English company law claim. By its counterclaim Koza Altin sought declarations that the resolutions by which article 26 was introduced into Koza's articles of association and by which the two "A" shares were originally allotted to Mr Ipek were invalid and ineffective as improper attempts to entrench Mr Ipek as controller of Koza. This counterclaim therefore advanced Koza Altin's positive case as to why the English company law issues ought to be decided in its favour.

26. In mounting their jurisdiction challenge, Koza Altin and the trustees attacked Snowden J's conclusion that article 24(2) gave the English court jurisdiction in relation to the old authority claim. They also joined issue with the alternative argument that had been advanced before Snowden J (but not determined by him), asserting that there were no grounds on which permission to serve out of the jurisdiction could be granted in respect of either the English company law claim or the old authority claim.

27. On 3 November 2016, the claimants filed an application (the "strike out application") to strike out the acknowledgment of service and defence and counterclaim served on behalf of Koza Altin by Mishcon and sought its determination as a preliminary issue. In the strike out application, the claimants contend that the English court should not recognise the authority of Koza Altin's Turkish directors to cause it to be represented in the 2016 proceedings. This raised questions that were similar to those raised in the old authority claim, although as Koza Altin said, it would have had a more extreme effect because it amounted to a contention that it was not entitled to participate in the 2016 proceedings despite having been sued by the claimants. They also sought directions for the trial of the strike out application which they anticipated would require pleadings, disclosure and expert evidence on the basis that the court would have to determine the issue of authority as a substantive matter at the outset of the proceedings: *John Shaw & Sons (Salford) Limited v Peter Shaw* [1935] 2 KB 113, 130-132 and *Airways Limited v Bowen* [1985] BCLC 355, 359.

The Hearing before Asplin J

28. A number of applications were listed for hearing before Asplin J in December 2016. They included the jurisdiction challenges made by the trustees and Koza Altin and the strike out application made by the claimants. Asplin J also heard and determined an

application by Koza Altin for the summary dismissal of the strike out application (the "initial summary dismissal application"). This had been aired at an earlier case management hearing but was only issued on 15 December, after the hearing before Asplin J had started.

29. The argument advanced by Koza Altin on the initial summary dismissal application was that it was absurd and abusive for the claimants to serve proceedings on Koza Altin but then to contend that it had no right to defend the claim. It said that it could not possibly be right that the claimants had sought and obtained an order for alternative service on Koza Altin via Mishcon, only to turn round and assert that Mishcon had no authority to act on its behalf.

30. So far as the jurisdiction challenges by Koza Altin and the trustees were concerned, their primary case was that Snowden J was wrong to conclude that article 24(2) gave the English court jurisdiction in respect of the old authority claim against all defendants and the English company law claim as against the trustees. However, in their evidence and skeleton arguments in support of their applications, they also submitted that, because article 24(2) did not give the court jurisdiction, the claimants needed to obtain permission to serve out and, for a number of reasons, permission should not be granted.

31. In taking that course Koza Altin and the trustees made clear through Mishcon their view that the question of jurisdiction should be dealt with as a whole at the hearing. They said it was wholly inappropriate for the court to be invited to deal with questions of jurisdiction in a manner that Mishcon described as 'piecemeal'. They submitted that it would be an abuse of process if all jurisdiction points were not dealt with as a whole, more particularly where the claimants had addressed both their arguments on article 24(2) and permission to serve out at the hearing before Snowden J. Notwithstanding that submission, the claimants did not seek permission to serve out to guard against the possibility that they might fail on their article 24(2) argument.

32. Asplin J delivered judgment on 21 December 2016 (*Koza Limited and Ipek v Akçil and others* [2016] EWHC 3358 (Ch)). She continued the injunctions granted by Snowden J. Koza Altin and the trustees were unsuccessful in their jurisdiction challenge which was dismissed. Asplin J decided that Snowden J was correct to reach the conclusion that he did on article 24(2) and so any permission application would have been moot, even if made, which it was not. She also stood over the strike out application to be heard together with the old authority claim, which she had just determined the English court had jurisdiction to resolve. The initial summary dismissal application was dismissed.

33. The reason that Asplin J decided to stand over the strike out application to be heard with the old authority claim, and to dismiss the initial summary dismissal application, was that the strike out application did not have a different basis from the old authority claim. It followed that, in light of her conclusion on the jurisdiction challenge, which meant that the old authority claim would proceed in any event, effective case management required the strike out application to be heard at the same time as the old authority claim. She did not therefore consider the initial summary dismissal application on its merits, because the underlying issues would by heard as part of the old authority claim in any event.

34. Appeals by the trustees and Koza Altin against Asplin J's decision on their jurisdiction challenges were unsuccessful in the Court of Appeal (*Koza Limited and Ipek v Akçil and others* [2017] EWCA Civ 1609) but they succeeded in the Supreme Court (*Koza Limited and another v Akçil and others* [2019] 1 WLR 4830, [2019] UKSC 40). The consequence was that by order made by the Supreme Court on 29 July 2019, the 2016 proceedings against the trustees and the old authority claim against Koza Altin were all dismissed for want of jurisdiction. This therefore removed the basis on which Asplin J had stood over the strike out application, because the old authority claim with which she had directed that it should be determined would no longer proceed.

35. Both before and after the decision of the Supreme Court, a number of other applications have been made and determined in the 2016 proceedings. Two of them went to the Court of Appeal. They were largely concerned with the extent to which Koza, acting by Mr Ipek, was entitled to use its resources for the purposes of litigating issues both in England and abroad relating to the Ipek family's original loss of control of the Koza-Ipek group. They are not of central relevance to the questions I have to decide, although they have some bearing on the complaint made by Koza Altin that the claimants are guilty of warehousing the 2016 proceedings.

36. The remaining issues in the 2016 proceedings (i.e. the English company law issues) were not progressed for a significant period of time after the decision of the Supreme Court had been handed down. Koza Altin is very critical of the time that it took the claimants to amend their pleadings to reflect that decision. In light of these delays, Koza Altin took two steps towards the end of 2020 to bring matters to a head. The first was that it issued a further summary dismissal application on 8 October 2020, effectively resurrecting the initial summary dismissal application in the new circumstances which then pertained. The second was that it applied for an unless order requiring the claimants to serve amended particulars of claim to reflect the decision of the Supreme Court. Eventually, the claimants served draft amended particulars of claim in the 2016 proceedings on 6 January 2021. This pleading simply deleted the old authority claim.

Developments in Turkey

37. While these interlocutory steps were taking place in the 2016 proceedings, there were further developments in Turkey which had an impact on the affairs of the Koza-Ipek group. On 1 September 2016, statutory decree 674 was promulgated enabling the powers of the trustees (like those of other trustees appointed in similar circumstances) to be transferred to a state organisation called the Savings Deposit and Insurance Fund ("SDIF"). This was given effect in relation to Koza Altin by an order made by another criminal peace judge (Judge Abdurrahman Gun) on 6 September 2016. Shortly thereafter, on 22 September 2016, the SDIF appointed a new board of directors for Koza Altin.

38. There was then a further decree which transferred the director-appointing powers of the SDIF to the Minister with whom the SDIF was affiliated. The Minister was then empowered to delegate the power back to the board of the SDIF, a power which was exercised in November 2016. In January 2019, the Ankara 24th High Criminal Court ordered the continuation of the trusteeship.

39. It is common ground that there has also been a number of further changes in the identity of the directors of Koza Altin since the SDIF took on the role of trustee, the most recent of which occurred by a decision of the SDIF dated 5 November 2020 as a result of which the board of Koza Altin came to comprise the individual defendants in the 2021 proceedings. Koza Altin's expert evidence makes plain that, as a matter of Turkish law, the individual defendants are the directors of Koza Altin. This is not contested by the claimants, nor is it contested that Turkish law treats court decisions as being valid and effective until set aside and none of the decisions relating to the appointments in the present case (including the Süer judgment) have been set aside.

40. Meanwhile, on 26 November 2016, the Turkish prosecution authorities sought and obtained from the Turkish court an order seizing the £60 million which the Luxembourg court had ordered to be released to Koza (the "seizure order"). Attempts have been made to enforce that order in England but they have been unsuccessful. There has also been other litigation in Turkey, including a successful claim by the Turkish Capital Markets Board (in which Koza Altin participated) against Mr Ipek and his brother which resulted in them becoming personally liable to restore the £60 million originally transferred by Koza Altin to capitalise Koza.

41. The claimants have also continued to challenge the appointment of trustees in respect of Koza-Ipek group companies (including Koza Altin) in Turkey, contending that they have been incompetent in their management of the group, and have made a number of unsuccessful applications to have them discharged on this basis. It is also said that, although their appointment under article 133(1) of the TCPC must be on an 'interim' basis pending investigation, no investigation has in fact been commenced.

The 2021 proceedings

42. On the same day that the claimants served draft re-amended particulars of claim in the 2016 proceedings, their solicitors also sent Mishcon draft particulars of claim in the new 2021 proceedings. This pleading was considerably more detailed than the particulars of claim served in the 2016 proceedings, but raised the authority issue and sought what was in substance the same relief. It is convenient to call the claim made in the 2021 proceedings the "new authority claim". It included in particular claims for declarations that the English courts do not recognise the authority of the trustees to cause Koza Altin to do anything as a shareholder of Koza in this jurisdiction.

43. The current form of the claim form (as reamended on 12 May 2021) also seeks:

> "an injunction to restrain the [individual defendants] or Koza Altin from taking any further action upon the s 303 Notice or the s 305 Notice, or any further notices under ss 303 or 305 of the Act, and (ii) the [individual defendants] from holding themselves out as having any authority to act for Koza Altin as a shareholder of Koza Ltd and from otherwise causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Ltd in this jurisdiction."

44. In advancing the new authority claim, the claimants do not dispute the proposition that Turkish law, as the law of Koza Altin's incorporation, governs the relevant aspects of its relationship with its directors from time to time, including the validity of their

appointment. They also do not dispute that the authority of the trustees was (and the authority of the individual defendants is) valid and effective as a matter of Turkish law so as to procure Koza Altin to take the steps that they seek to restrain in England.

45. However they say that, because the authority of the trustees and now the individual defendants derives from a corrupt Turkish judgment which should not be recognised in England, the English court should not recognise that authority either as a matter of public policy. It is also alleged that the appointment of the individual defendants, or their predecessors, subsequent to the transfer to the SDIF was in breach of the rules of natural justice and article 6 of the ECHR because of the way in which it was done. Those appointments are also said to be steps taken in the expropriation of the Koza-Ipek group from members of the Ipek family in breach of article 1 to the first protocol.

46. There are three principal differences between the new authority claim and the old authority claim. The first relates to the identity of the parties. Initially Koza was the only claimant and the defendants other than Koza Altin were its current directors, who are not the same individuals as the trustees named as defendants in the 2016 proceedings. Since the 2021 proceedings have been issued, an amended pleading has been provided in which Mr Ipek is joined as a co-claimant together with Koza. His solicitors continue to maintain that the new authority claim is pursued by Koza for its own benefit but say that, although Mr Ipek is not himself seeking relief, he has been joined to bring to an end an arid debate on the question of the identity of the proper claimant.

47. The second difference is that Koza seeks a declaration that the English court should not just decline to recognise the authority of the individual defendants, but should also recognise Mr Ipek, and a number of other persons associated with him as authorised to cause Koza Altin to act as a shareholder of Koza in this jurisdiction. They are the members of the board of Koza Altin who were in office immediately before the Süer judgment was given.

48. The third difference is that the claimants allege that any action by or in the name of Koza Altin to enforce the statutory notices would amount to the indirect enforcement of a Turkish penal law. The way the case is put is that it is to be inferred that the purpose and effect of replacing the board of Koza as a result of the exercise by Koza Altin of its shareholder rights would be to enforce the seizure order and the penal provisions of Turkish law pursuant to which it was made.

The applications

49. There are two application before the court, one in the 2016 proceedings and one in the 2021 proceedings.

50. The application in the 2016 proceedings (the "further summary dismissal application") is made by Koza Altin. It was issued on 8 October 2020 and seeks the summary dismissal of the strike out application. It resurrects the initial summary dismissal application itself dismissed by Asplin J on 21 December 2016, but does so in the light of what Koza Altin claims to be a material change of circumstance.

51. The application in the 2021 proceedings (the "service out application") is made by the claimants. It was issued on 22 March 2021 and seeks permission to serve the claim form out of the jurisdiction in Turkey and permission to serve the claim form by alternative means under CPR 6.15. I shall deal with this application first.

The service out application

52. There is no dispute as to the test that an applicant must meet for the grant of permission to serve proceedings out of the jurisdiction. The court must be satisfied that:

    i) The claimants have a good arguable case that the claim falls within one of the jurisdictional gateways listed in paragraph 3 of PD 6B (see CPR 6.33). This means that the claimant must have the better argument on the available material, which must supply a plausible evidential basis for the application of the gateway: *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 at [7].

    ii) There must be a serious issue to be tried on the merits of the claim, which means asking the question whether there is a real as opposed to a fanciful prospect of success: (*Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [71]).

    iii) England must be clearly or distinctly the appropriate forum for the resolution of the dispute.

53. The argument revolved around the first and second parts of the test, because Koza Altin and the individual defendants did not argue that, if they were to be satisfied, England would not be the appropriate forum for the resolution of the dispute. They submitted, however, that the claimants had not established that their claims fell within one of the jurisdictional gateways and had failed to demonstrate that there was a serious issue to be tried. They also said that the new authority claim was an abuse of process and for that reason it should not be permitted to proceed. I shall deal first with the question of whether there is a serious issue to be tried.

Serious issue to be tried

54. At the hearing before Snowden J on 16 August 2016, the judge concluded that there was a serious issue to be tried both in relation to the English company law claim and the old authority claim. In support of his conclusion in relation to the old authority claim, Snowden J said that he was satisfied on the evidence he had seen that there was a serious issue to be tried that the treatment of Mr Ipek in the courts of Turkey leading to the appointment of the trustees of Koza Altin was contrary to English public policy and/or natural justice and/or his human rights.

55. The claimants relied on this conclusion in support of their submission that there is a serious issue to be tried on the new authority claim for the purposes of the application for permission to serve out of the jurisdiction. They point out that neither the trustees nor Koza Altin have ever sought to discharge the injunction granted by Snowden J on the grounds that he was wrong to reach this conclusion. More particularly, they rely on

the fact that Asplin J's order of 21 December 2016, which introduced by consent a regime to hold the ring, was predicated on the assumption that the test had been met.

56. In the end though, I did not understand Mr Siward Atkins QC, who appeared for the claimants, to contend that what occurred in 2016 meant that it is no longer open to Koza Altin and the individual defendants to argue that there is no serious issue to be tried on the new authority claim. The way that he put his argument was that the court could take comfort from what then occurred in reaching a conclusion that this is the case.

57. I think that Mr Atkins is right not to put the point any higher than that. Snowden J's decision was given at a without notice hearing, which Koza Altin and the individual defendants did not attend and at which they were not represented. It was also given before many of the arguments which were made at the hearing before me had been developed and at a time when the Turkish law basis for the authority of the trustees to act on behalf of Koza Altin was different from the legal basis for the current authority of the individual defendants to do so.

58. The position in relation to the hearing before Asplin J is less straightforward. In the 21 December order, Asplin J granted injunctions restricting the calling of general meetings of Koza and the passing of resolutions by Koza Altin in its capacity as a shareholder of Koza. She also accepted undertakings which facilitated the conduct of Koza's business pending trial. Overall the order introduced the regime which I considered in the judgment I delivered in March this year (*Koza Limited and Ipek v Koza Altin Işletmeleri AS* [2021] EWHC 786 (Ch)).

59. It is possible that some of this was relief that the court may not have been willing to grant if there had not been a serious issue to be tried on the old authority claim, but the terms were largely agreed and its significance has to be seen in the context of the jurisdiction challenge to the old authority claim made by Koza Altin and the trustees. It is plain from the recitals to the agreed order that it was intended to do no more than hold the ring in circumstances in which Koza Altin and the trustees reserved their rights to appeal the dismissal of their jurisdiction challenge.

60. In these circumstances, little can be read into the fact that at this stage Koza Altin and the trustees were not advancing a comprehensive case that there was no serious issue to be tried in relation to the 2016 proceedings. An argument to that effect was included in their skeleton argument dealing with why permission to serve out should not be granted as an alternative to the article 24(2) point, and the question was sought to be opened up on appeal in the context of the strike out application, an invitation that was refused by the Court of Appeal. Overall, it seems to me that while the appeal on Koza Altin's and the trustees' jurisdiction challenge was pending, as it was until the Supreme Court gave judgment allowing their appeal, there was a risk that the question of whether there was a serious issue to be tried on the old authority claim would be an unnecessary argument for them to make and might amount to a submission to the jurisdiction in any event. It follows that I must look at the question afresh, based on the material adduced on the application now made.

Serious issue to be tried: the Süer judgment

61. The claimants' case in the new authority claim is that the authority of the trustees who procured Koza Altin to serve the section 303 notice, and the authority of their successors in the form of the individual defendants to procure Koza Altin to act as shareholder of Koza in this jurisdiction, should not be recognised by an English court on public policy grounds. They also contend that Koza Altin cannot take action to enforce the section 303 notice, because it would amount to the indirect enforcement of a Turkish penal law.

62. It was submitted that English public policy considerations are engaged, because the individual defendants' authority derives from a judicial process which was conducted for a corrupt political purpose, was contrary to natural justice and was in breach of article 6 of the ECHR. The claimants also said that the judge who appointed the trustees (Judge Süer) did not act independently or impartially on the basis of the evidence, but pronounced a judgment tainted by what they called the influence of the Erdoğan regime which leads to it being impeachable for fraud. It was also said that the Süer judgment was contrary to Turkish law, was perverse and was not given in good faith. It is also said that the appointment of the trustees was in breach of article 1 of the first protocol to the ECHR, and that the purpose of their appointment was to bring about further breaches of article 1 of the first protocol.

63. The claimants submitted that, if a challenge to the authority of the individual defendants to procure Koza Altin to take steps in England (in its capacity as a shareholder of Koza) requires the individual defendants to rely on the Süer judgment to establish that authority, the court will not accept their authority if the judgment from which it derives was corrupt or otherwise given in breach of principles of natural justice or contrary to article 6. They rely on Dicey, Morris & Collins: the Conflict of Laws (15th edn) at paragraphs [14-002] to [14-006].

64. However, it is important to appreciate the scope of the rule on which the claimants rely. The concepts of enforcement and recognition are concerned with the circumstances in which an English court will not treat a foreign judgment as conclusive as to the issues with which it purports to deal. The focus is therefore on a refusal to enforce or recognise where the judgment would otherwise be used by a claimant or defendant for the purpose of determining a substantive issue in the proceedings.

65. The allegations which challenge the good faith of the Turkish court are obviously very serious. They are of a category which normal principles of comity will require an English court to approach with considerable care. There was, however, evidence that, if corrupt, the Süer judgment would not have been an isolated example. A report prepared by Professor Sir Jeffrey Jowell QC contains a detailed body of evidence to the effect that judicial independence has been substantially weakened in Turkey since 2014, and that this is the case in relation to criminal peace judges in particular.

66. The Jowell report gives credence to a conclusion that, prior to the unsuccessful attempt to overthrow the Erdoğan government which occurred in July 2016, Turkey had suffered a profound deterioration in the rule of law, the independence of the judiciary and respect for free speech and human rights. This is said to have deteriorated further after the events of July 2016. Reports produced by international bodies, non-governmental organisations and commentators and referred to in Professor Jowell's report are heavily critical of the extent to which the actions of the Erdoğan government have caused or contributed to this deterioration. More particularly they are critical of

the breadth of the definition of terrorism in Turkish law and the abuse of its counter-terrorism provisions, as administered by the criminal peace judges, for the purposes of stifling legitimate political dissent and the erosion of core human rights.

67. It was submitted that one of the consequences of this state of affairs in Turkey has been that the Turkish judicial system did not at any material time, and does not now, operate independently of the government. The Jowell report explains that one of the manifestations of this lack of independence was the abolition in 2014 of the then existing system of criminal peace courts and their replacement by a small pool of criminal peace judges (of which Judge Süer was one). The procedures under which they operate have been the subject of sustained international criticism. They are also appointed directly by the government through the High Council of Judges and Prosecutors, the composition of which has been controlled directly by the Ministry of Justice since it lost its autonomy in 2014. There are examples of occasions on which criminal peace judges have operated in a manner that betrays a significant lack of independence from political interference to such an extent that there are grounds for thinking that their jurisdiction is capable of becoming an instrument of oppression.

68. This does not of itself affect the characteristics of any particular judgment which must be assessed on its own merits against the background circumstances in which it was prepared. It does, however, mean that an English court concerned with enforcing or recognising a judgment of a Turkish criminal peace judge may wish to adopt a critically analytical approach to the reasoning contained in his judgment and the evidence on which it was based. This is a factor to which I must have regard when assessing whether or not there is a serious issue to be tried.

69. Turning to the Süer judgment itself, the political purpose for which it is said that the trustees were appointed was to assist President Erdoğan to expropriate the assets of the Ipek family for unjustified political reasons and thereby to stifle the expression of political dissent and the publication of any form of criticism of President Erdoğan and his government. It is said that this was a flagrant abuse of the Turkish system of criminal justice and that it would be contrary to public policy for the English courts to recognise the appointment.

70. There are a number of specific aspects of the Süer judgment on which the claimants rely in support of their case. They need to be set against the background of evidence I was shown relating to Judge Süer himself which discloses that he was the criminal peace judge responsible for the detention of hundreds of other judges and prosecutors in November 2016 and who has expressed himself in public Twitter posts in a manner which any English court would regard as hopelessly incompatible with the proper conduct of any form of judicial function.

71. The claimants submitted that the Süer judgment gives rise to grounds for believing that Judge Süer either failed to evaluate properly or misunderstood much of the evidence with which he was presented and that he reproduced standard forms of words which had been used by other criminal peace judges in relation to other matters without regard to their application to the case before him. They pointed to evidence that there was no proper assessment of why there were strong grounds for suspecting that any of the crimes listed in article 133 of the TCPC (the legal basis for the appointment of trustees) were being committed within the activities of any of the Koza-Ipek companies. They

also relied on what they said were numerous procedural failings which were explained in some detail by the expert evidence adduced on their behalf.

72. It is also said by the claimants that the Süer judgment does not deal with the reason why it was necessary and proportionate for trustees to be appointed, and there was no evaluation of whether the appointment of supervisory rather than executive trustees would have been a more appropriate course. They contended that the reason for this is obvious. It was not necessary to make the appointments and the reason they were made was in order to achieve the corrupt political purpose. In short, it is said that what occurred is consistent and only consistent with a conclusion that the only reason for the appointments was that they were made to facilitate the expropriation of the Koza-Ipek group from members of the Ipek family in a manner that was contrary to law.

73. In further support of their case, the claimants attacked both the investigator (Professor Çomakli) whose report formed the basis for the trustee appointments made by Judge Süer and the quality of that report as evidence for the appointment. The expert evidence adduced by the claimants refers to a number of aspects of the Çomakli report that they say are inadequate, irrelevant and obviously absurd. There was also evidence that Professor Çomakli was neither qualified nor independent, which the claimants' expert evidence confirmed was contrary to law. He was close to what they called the Erdoğan regime, and was not on the list of experts approved by the court. The view of the claimants' expert is that the extent of these deficiencies meant that the report was unlawful as evidence as a matter of Turkish law. This expert evidence also supports a conclusion that the Çomakli report had been later contradicted in many of its essential parts by a report prepared by the Turkish Financial Crimes Investigation Board in May 2016.

74. Looked at in the round, this evidence provides some support for a case that the Çomakli report was prepared for political purposes as part of the Turkish government's campaign against the Ipek family. If the Çomakli report was itself unlawful, expert evidence adduced by the claimants also supports the conclusion that this is a further reason why the Süer judgment was itself given in a manner that was unlawful (although there was no dispute between the parties that as a matter of Turkish law it stands as an enforceable judgment until set aside).

75. In summary, the claimants submitted that the appointment of the trustees was unnecessary and disproportionate, that they were not appointed for their proper statutory purposes and that there was no due process under Turkish law. Their expert's conclusion, having regard to all these matters was that "I am of the opinion that no judge who abides by the law could render a judgment like the one rendered by PCJ Süer".

76. The decision of Judge Süer was appealed by Mr Ipek to another criminal peace judge (Judge Sahinbey) and then on to the Turkish Constitutional Court. Both appeals were unsuccessful. On the face of it this should have mitigated any deficiencies in the judgment by which the original trustee appointment were made. A functioning system of review and appeal should be capable of validating in the eyes of the English court a decision of a foreign court that might otherwise have been regarded as corrupt (see e.g. *PJSC "Rosgosstrakh" v Starr Syndicate Ltd* [2020] EWHC 1557 (Comm) at [138]).

77. Despite this, the claimants contended that the process of review and appeal was irredeemably flawed. Mr Atkins made submissions on the Sahinbey judgment which he said failed to grapple with the central questions of whether there were grounds for strong suspicion that the Koza group was being used as a front for catalogue (or listed) crimes or why there was any necessity for the appointments to be made. More generally he said that the Jowell report substantiated a concern that it is very unlikely that any criminal peace judge will overturn the decision of another criminal peace judge.

78. As to the decision of the Turkish Constitutional Court, Mr Atkins submitted that there is a credible evidential basis for concluding that the Constitutional Court in the present case did not review the Süer judgment's compliance with article 133 of the TCPC, which was one of the aspects of the decisions appealed from with which the claimants have most cause for complaint. The claimants also relied on aspects of the Jowell report which give support to the additional suggestion that the political pressures to which all members of the judiciary in Turkey are currently subject mean that even the judges of the Constitutional Court cannot be expected to have allowed the appeal given the nature of the matter with which they were required to deal.

79. This is much more difficult case for the claimants to maintain. At first reading it is not obvious why the decision of the Constitutional Court did not operate as an effective review of the decisions of the lower courts. It is detailed and fully reasoned. Furthermore, Professor Jowell's report is as consistent with a conclusion that the government regularly ignores or sidesteps its decisions, as it is with a conclusion that the court itself does not function as an effective means of judicial review and control. The role that the Constitutional Court has played in Mr Ipek's challenge to the trustees' appointment in Turkey means either (as Sir Michael Burton explained in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] CLC 121 at [53]-[54]) that the evidence at trial will have to establish that its decision was arrived at otherwise than in good faith, or that it was not part of its role as a matter of Turkish law to investigate those aspects of the Süer judgment of which the claimants make particular complaint. In my view there is real substance in the submission made by Koza Altin and the individual defendants that the decision of the Constitutional Court in the present case means that the English court is most unlikely to treat the Süer judgment as corrupt for enforcement or recognition purposes.

80. Nonetheless, Mr Atkins submitted that it is at least arguable that the function that the Constitutional Court carried out in relation to the trustees' appointment did not extend to a review of the flaws in the assessment of the evidence that was carried out by both Judge Süer and Judge Sahinbey. He went on to summarise his client's case on this aspect of the dispute in his oral submissions was as follows:

> "To sum-up, we say that there was no effective redress against the Süer judgment. Judge Sahinbey did no better job of assessing the evidence. It was not the remit of the Constitutional Court to do so and they were never going to uphold the appeal anyway. … What we say is that the overwhelming likelihood, we say, is all three of these courts were either acting out of loyalty to the regime or were coerced by it and in either case that judicial independence was compromised contrary to any English concept of substantial justice.".

81. The challenge to the Süer judgment as a ground for contending that the English courts should not recognise the authority of the trustees to procure Koza Altin to take steps in

England as a shareholder of Koza is said to be equally applicable to the individual defendants as their successors. The reason for this is that it is alleged that their purported authority derives solely from the purported authority of the trustees, which can itself be traced back directly to the Süer judgment. This only works as matter of concept because the claimants now also make a further challenge to the subsequent judicial processes, executive decrees and Turkish legislation by which the authority of the trustees was ultimately transferred to the individual defendants by or through the SDIF. It is said that these further steps ought also to be characterised as steps taken by the Erdoğan government towards its unjustified expropriation of the Ipek family's assets.

82. Although Mr Jonathan Crow QC, who appeared for Koza Altin and the individual defendants, said that the allegations in relation to deficiencies in the functioning of organs of the Turkish state were hotly contested and would be difficult to establish given the large number of individuals and entities now involved, he accepted that many of them could not be resolved on an interlocutory basis. His oral submissions did not therefore concentrate on the question of whether or not there is serious issue as to the integrity of the Süer judgment, as reviewed by the Sahinbey judgment and on appeal by the Turkish Constitutional Court.

83. That was an understandable position for him to adopt, because the core of his case is that Koza Altin and the individual defendants are not seeking to enforce the Süer judgment in England. The individual defendants are relying on their Turkish law authority in procuring Koza Altin to defend proceedings (and to make a counterclaim) in England so as to vindicate its undisputed rights as a shareholder of Koza. That is a quite different question and means that, if the Süer judgment has relevance at all, it is in a quite different context from the one in which an *in personam* foreign judgment is sought to be enforced by proceedings in this jurisdiction or recognised for the purposes of pleading a defence.

84. As to that, Mr Atkins said that even leaving aside questions of enforcement, there are many cases at common law in which an English court has refused to recognise a foreign judgment going to status on the grounds that it would be contrary to public policy to do so. There is at least a serious issue to be tried as to how far recognition goes. In other words he said that, if a corrupt foreign judgment is part of the process by which persons such as the trustees, and now the individual defendants, were appointed and came to have the status of being able to act for Koza Altin, that status is itself impeachable in an English court.

85. He submitted that the same result is achieved by a proper application of section 6 of the Human Rights Act 1998 (the "HRA"), because it is unlawful for a public authority (which includes a court) to act in a way that is incompatible with a Convention right. In the present case the Convention right that has been infringed is the right to a fair trial under Article 6, and more particularly the right to a determination of a person's civil rights and obligations by an independent and impartial tribunal established by law. He said that recognition of the status of the trustees and the individual defendants to act on behalf of Koza Altin in exercising its shareholder rights in England is at least arguably an act that would be incompatible with the right to a fair trial. The reason is that the recognition of that authority would perpetuate the breach by proceeding on the footing that the Süer judgment had been obtained other than in breach of Article 6.

86. Although Mr Atkins did not cite any cases which confirmed that this was the right approach, he submitted that both Briggs: Civil Jurisdiction and Judgments (7th edn) at paragraph [34.33] and Dicey, Morris & Collins: the Conflict of Laws (15th edn) at paragraph [14-170] proceed on the basis that the court's duties under Article 6 work in much the same way as recognition under the common law. I did not understand Mr Crow to disagree with the submission that the common law and the HRA adopt the same approach in this area.

87. By way of preliminary submissions to answering this case, Mr Crow stressed two points. The first was the evidence that the authority of the existing directors as a matter of Turkish law does not derive from the Süer judgment. It derives from the administrative decision-making of the SDIF itself introduced by legislation subsequent to the introduction of the state of emergency and a later confirmation of the trusteeship by another criminal court the integrity of whose decision is not subject to any specific challenge. These events all took place after the commencement of the 2016 proceedings. It follows that, while the appointments with which the old authority claim was concerned all derived from the Süer judgment, the appointment of the individual defendants did not do so save in the most remote sense. In short, it is clear that there have been a number of stages subsequent to the Süer judgment, both by the intervention of legislation and by judicial decision-making, at which the validity of the appointment of Koza Altin's directors from time to time was further confirmed as a matter of Turkish law.

88. The second was the basic principle of private international law that, because Koza Altin is a Turkish company, Turkish law governs the constitution of its board of directors and whether or not they have been validly appointed, a proposition with which Mr Atkins did not disagree. Turkish law recognises the status of the individual defendants to act on behalf Koza Altin, including by procuring it to exercise its rights as a shareholder of Koza. The evidence is clear that judicial and administrative decisions in Turkey are valid, effective and binding until set aside, which has not happened with the decisions that have led to the appointment of the individual defendants in the present case. It follows that the English court is not being asked to rule on a point of Turkish law. It is being asked to determine that it should not recognise what has happened as a matter of Turkish law, notwithstanding the fact that Turkish law governs the substantive issue with which the 2016 proceedings and the 2021 proceedings are both concerned.

89. In its skeleton argument, Koza Altin and the individual defendants advanced four reasons why the claimants' arguments are misconceived and the new authority claim does not give rise to a serious issue to be tried:

    i) Koza itself is not a proper claimant and has no relevant rights that are engaged.

    ii) The new authority claim is misconceived in circumstances in which there is no real issue as to who the directors of Koza Altin actually are.

    iii) There is no basis for the new authority claim to have been brought against the individual defendants.

    iv) The injunction sought would require the individual defendants to act in breach of their obligations under Turkish law, which means that granting it would be contrary to principle.

90. In his oral submissions, Mr Crow concentrated on the second reason. He said that this is not a case, whether in the context of the 2021 proceedings or strike out application, in which the English court is being asked to recognise, let alone enforce, a foreign judgment. Enforcement involves a situation in which a litigant founds its claim on a judgment given in another jurisdiction, while recognition generally describes the situation in which a litigant founds a defence on a foreign judgment. In both instances, reliance is placed on the foreign judgment for determination of one or more of the substantive issues in the case.

91. Against that background, Mr Crow submitted that the substantive issues in the dispute are all matters governed by English law which have nothing to do with the question of what has happened in Turkey. The substance of the dispute is the nature and extent of the rights that Koza Altin has as a shareholder of Koza. It does not matter whether that question arises in the context of the claim by Koza Altin to vindicate those rights or a claim by Koza or Mr Ipek to prevent Koza Altin from doing so. Nothing that occurred in Turkey, no issue governed by Turkish law and no judgment given by a Turkish court affects the answer to that question. The new authority claim (like the old authority claim before it) is simply a prequel to that point of substance. This can be seen from the fact that it is only in the context of litigation to enforce Koza Altin's shareholder rights that the claimants could have any possible interest in questioning the authority of the individual defendants to cause Koza Altin to participate. It is not a freestanding question in its own right and there is no other context in which the point can arise.

92. Where a defendant is faced with proceedings brought in the name of a claimant without authority he may have an interest in having that question resolved, which can be vindicated by applying to have the proceedings struck out as an abuse (*John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, *Airways Ltd v Bowen* [1985] BCLC 355 and *Zoya Ltd v Ahmed* [2017] Ch 127). I think it is arguable that a company faced with a shareholder seeking to exercise shareholder rights enforceable by action in England is in a similar position and has a legitimate interest sufficient to challenge the authority of those procuring the shareholder to exercise those rights. It should not matter whether the issue arises in the context of proceedings in which the shareholder is claimant or defendant (cf *Yonge v Toynbee* [1910] 1 KB 215). That is the case, even though the underlying dispute may be one between two warring shareholders, such that it would be wrong for the company itself to bear the costs of determining that issue.

93. However, Mr Crow submitted, in my view correctly, that this does not affect the fact that the real rights with which this litigation is concerned are rights that Koza Altin has under English law as a shareholder of Koza. The fact that Koza Altin is being encouraged or procured to exercise those rights by persons appointed pursuant to a flawed Turkish law process is neither here nor there so far as English law is concerned. The reason for this is that English law will not in those circumstances be enforcing the flawed Turkish process. It will simply be enforcing the English law right.

94. The disputed rights in the English company law claim are not founded on any Turkish law judgment or administrative decision. They pre-existed all of the decisions that the claimants say are flawed and were not affected by them. Koza Altin's rights as a shareholder in Koza are whatever English law provides that they should be. That will include such rights as Koza Altin is held to have on determination of the English company law issue. At root, the complaint of Mr Ipek is that he does not like the fact that it is the individual defendants who are in the position to determine the steps that

Koza Altin should take to vindicate its rights as a shareholder of Koza. But the fact that their ability to do so can be traced back to a flawed Turkish judgment is logically irrelevant, so far as the English court is concerned, to the question of how the dispute should be resolved.

95. In *Williams and Humbert Ltd v W&H Trademarks Jersey Ltd* [1986] AC 368 the court was concerned with misfeasance proceedings brought by English and nationalised Spanish companies (Rumasa and William and Humbert), which had previously belonged to the defendants and other members of the Mateos family but were now controlled by appointees of the government of Spain. The defendants contended that the plaintiffs were not entitled to relief by reason of the fact that the proceedings represented an attempt to enforce a foreign law which was penal or which otherwise ought not to be enforced by the court on public policy grounds. The applicable foreign law expropriated the shares in a foreign company by legislation.

96. Mr Crow pointed out that *Williams and Humbert* was on one view a stronger case than the present case, because the act complained of was the enforced expropriation of assets in the form of shares in a company, rather than an enforced change of control by the appointment of trustees. In both cases, however, the point has been taken by a party seeking to resist the enforcement in England of English law rights on the grounds that a foreign change of control law is subject to challenge on public policy grounds.

97. The leading speech in *Williams and Humbert* was given by Lord Templeman who first explained that the compulsory acquisition of property rights in foreign jurisdictions was not of itself abhorrent and expressed doubts that the Spanish law with which the court was concerned was itself penal. But he then went on to explain why as a matter of principle the defendants' case was misconceived. The plaintiffs were not seeking to enforce the Spanish law, because there was nothing left to enforce, but were seeking to enforce an English private law right (i.e. the claims by those companies against the defendants). At p.428G to 429A he said as follows:

> "… in any event the plaintiffs in the trade marks action and the plaintiffs in the banks' action are not seeking to enforce the Spanish law. In the trade marks action the plaintiffs, Williams and Humbert and in the banks' action Rumasa, Jerez and Norte are seeking to enforce English private law which can be invoked, subject to exceptions not here, by a plaintiff of any nationality against any defendant within the jurisdiction and against any property within the jurisdiction. Nourse J., ante, p. 3850-E, succinctly observed that the object of the Spanish law of 29 June 1983:
>
> > "was to acquire direct ownership and control of Rumasa and the two banks and indirect ownership and control of Williams and Humbert. That object has been duly achieved by perfection of the state's title in Spain. Accordingly, on a simple but compelling view of the matter there is nothing left to enforce."
>
> I agree."

98. This is a slightly different context from the one which arises in the present case, because the rule of private international law said to be offended is enforcement or recognition of a corrupt foreign judgment rather than enforcement of a foreign penal law. But in my view the underlying principle is essentially the same. When it is said by the claimants that the English court should not recognise the Süer judgment, what they rely

on are the rules that a party cannot rely on the general rule (as to which see Dicey, Morris & Collins: the Conflict of Laws (15th edn) at [14R-001]) that a foreign judgment is conclusive for the purpose of determining an issue in the action: i.e. the rules which mean that a judgment is impeachable for fraud [14R-137], contrary to public policy [14R-152] or contrary to natural justice [14R-162].

99. If Koza Altin and the individual defendants do not need to rely on the Süer judgment to exercise Koza Altin's rights as a shareholder of Koza, the Süer judgment is not one which needs to be recognised for a substantive issue in the proceedings. In my view they do not, because Koza Altin's rights as a shareholder of Koza exist wholly independently of the judgment. So far as the status of the individual defendants as directors of Koza Altin are concerned, the judgments (including the Süer judgment, the subsequent judgments of a number of other criminal peace judges, the Ankara High Criminal Court and the Constitutional Court) and the decrees relating to the role of the SDIF have all taken effect in Turkey. The appointments are all valid in Turkish law unless and until set aside, which has not yet occurred. That is very similar to the position in *Williams and Humbert*.

100. In *Williams & Humbert*, Lord Templeman went on to say:

> "If the principles of English domestic law and international law are applied and if the plaintiffs succeed in establishing liability against any of the appellants in tort, misfeasance or breach of fiduciary duty then an English court will grant the appropriate relief. If the Mateos family had remained in charge of the Rumasa group perhaps no action would have been brought by any of the companies comprised in the Rumasa group against the appellants. But that consideration is irrelevant to the actions which have now been brought." (at p.430C-E)
>
> and
>
> "These authorities illustrate the principle that an English court will recognise the compulsory acquisition law of a foreign state and will recognise the change of title to property which has come under the control of the foreign state and will recognise the consequences of that change of title. The English court will decline to consider the merits of compulsory acquisition." (at p.431C-D)

101. There may be circumstances in which the English court would take a different view (see for example *Oppenheimer v Cattermole* [1976] AC 249), but these cases are probably explicable (as to which see Briggs, Private international Law in English Courts (2014) at [9-132]) on the basis that the foreign law is so disgraceful as not to be regarded as a law at all. This case was referred to by Mr Atkins as an example of what he called English private international law's armoury of principles to allow an English court to disregard objectionable foreign law, even if that law and things done under it remain valid in the foreign jurisdiction. But I agree with Mr Crow's submission that there is nothing remotely like that in the present case. *Oppenheimer* was concerned with Nazi race discrimination laws, depriving Jews of their nationality. The offending act in the present case is a deprivation of director control, not a shareholding expropriation, and the law provides for claims to compensation in the event of trustee mismanagement.

102. In any event, I agree with Mr Crow's submission that this is not a case in which the English court would or should be prepared to develop and extend the existing principled approach to recognition of foreign trustee appointments which may interfere with the enjoyment of foreign property rights on the grounds that Mr Ipek would otherwise be left without remedy. To the extent that Mr Ipek has a claim arising out of breaches of natural justice or his ECHR rights in relation to the way in which the original Süer judgment was given, or indeed any of the later legal steps, he has and is exercising a form of redress in the applications he has made to the ECtHR.

103. The claimants said that the application of this principle was a difficult question which was unsuited to determination other than at trial. I agree that it is not straightforward, but I have reached the view that *Williams and Humbert* provides a principled answer (anyway by way of analogy) in circumstances in which, as Mr Atkins accepted, there is no authority which gives clear support for the way that he puts his case. Having reached this conclusion, I think that it would be wrong in principle to grant the permission to serve out of the jurisdiction sought by the claimants, quite apart from the fact that it would give rise to the kinds of concern which troubled Lord Templeman in *Williams and Humbert* (see at p.436C-D):

> "If the appellants' pleadings and particulars had not been struck out, the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the plaintiffs and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the Spanish authorities which appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity."

Indirect enforcement of a foreign penal law

104. The claimants also advance a quite separate case. They contend that, even if they were to lose the authority issue and the court were to conclude that the individual defendants are properly entitled to represent Koza Altin in this jurisdiction, the service of the section 303 and the section 305 statutory notices amount to the indirect enforcement of a foreign penal law. This is the law pursuant to which the seizure order was made in criminal proceedings for the seizure of Koza Altin's share capital.

105. The evidence relied on in support of this argument is that the seizure order was made by a criminal peace judge pursuant to the provisions of articles 123 and 127 of the TCPC. These are penal provisions, which were being utilised in the context of a criminal complaint relating to Koza Altin's capitalisation of Koza with the £60 million originally transferred from Koza Altin to Koza in March 2014. This is the same amount that was the subject matter of the Luxembourg proceedings.

106. It is then said that it is to be inferred that the purpose and effect of the replacement of Koza's directors pursuant to the exercise by Koza Altin of its shareholder rights would be to appoint a board which would deal with Koza's assets in accordance with the seizure order, or to allow them to be seized and dealt with in accordance with the seizure order. It is said that this would constitute the indirect enforcement of articles 123 and

127 of the TCPC, which should not be permitted by the English court for that reason. It is said that the inference is supported by evidence (which is disputed) that the trustees were involved in procuring the seizure order. The claimants rely on evidence that the trustees had been in touch with the prosecutor and that some of the information put before the criminal peace judge appears to have emanated from Koza Altin.

107. The way that Mr Atkins summarised his argument on this part of his case was that the principle engaged was clear. The English court will not directly or indirectly enforce a foreign penal law (see the discussion in *United States of America v Inkley* [1989] QB 255). The question is whether or not there would be indirect enforcement in the present case depending on whether the situation is closer to the circumstances of *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1KB 140, where the purpose of the English proceedings was to hand the property to the Spanish republic in enforcement of the penal law, or *Williams and Humbert*, where the purpose of the English proceedings was to enforce a prior private law right in circumstances in which the foreign penal law was already spent.

108. Koza Altin's answer to this argument is similar to the one I have already explained. Although the English court will not enforce a foreign penal or revenue law, that principle has no effect on a person's ability to enforce his private law rights so as to enable him to meet his own liabilities, for example, to pay tax for penalties which would be unenforceable at the suit of a foreign state. In the present case, all that is happening is that Koza Altin is seeking to exercise its own rights as a shareholder in Koza. There is no principle of English law that the court can prevent Koza Altin from exercising those private law rights under English company law simply because the court is concerned that, as a result of the exercise of those rights, Koza Altin might cause its subsidiary to make a distribution which will then be used to satisfy the seizure order.

109. I agree with Koza Altin on this point. There is no evidence that any new board of directors of Koza would do anything other than comply with their duties as such when determining how the assets of Koza ought to be used or distributed. In my view, the case that they will simply hand over the money in accordance with the seizure order is speculative and is based on an inference to be derived from a disputed involvement which the trustees (who are a different body from those now responsible for the management of Koza Altin's affairs) may have had in the original obtaining of the seizure order. This is a very thin basis for a conclusion that they may choose to procure Koza to comply with the seizure order when its enforcement in England has on the claimants' own case been unsuccessful despite many attempts to do so. In short, it seems highly improbable that they will simply allow the seizure order to be enforced rather than taking appropriate steps to make such distributions to Koza Altin (in its capacity as Koza's shareholder) as may be required in accordance with ordinary principals of English company law.

110. More fundamentally I think that the underlying principle on which the claimants rely is misstated. It is certainly correct that English law prevents the indirect enforcement of a foreign penal or revenue law, and there is authority to the effect that such indirect enforcement can take the form of a claim in England by a claimant in liquidation, whose sole creditor is a foreign revenue authority (*QRS 1 ApS v Frandsen* [1999] 1 WLR 2169). This is because, in those circumstances, the liquidator is the nominee of the foreign state and seeks a remedy which is designed to give the foreign penal or revenue law extra-territorial effect.

111. However, the underlying reason for the principle is that a claim will not be enforced where it amounts to an extension of the sovereign authority of another state (Dicey, Morris & Collins: the Conflict of Laws (15th edn) at paragraph 5-020). It is readily applicable where the relief that is sought leads to the foreign revenue or penal obligations being discharged in whole or in part, either directly or indirectly through a nominee or other privy or agent. It seems to me that, unless the steps sought to be impugned have that quality or effect, the principle is not engaged.

112. There is also a further reason why I think that the principle relied on by the claimants is not engaged. The exercise of shareholder rights by Koza Altin does not involve the invocation of the jurisdiction of the English courts. The court is only involved because the claimants have applied to restrain the exercise of those rights. As Briggs J explained in *Carey Group Plc v AIB Group (UK) Plc* [2012] Ch 304 at paragraphs [57] to [62], the argument made by the claimants is misconceived:

> "In my judgment a person resident or carrying on business in this jurisdiction is at liberty to comply voluntarily with a request or demand of a foreign government agency, based upon foreign public law, without fear of restraint by the English courts, provided only that he thereby commits no wrong actionable under English law. Thus for example, a person with tax liabilities in the USA may, although resident in England, perfectly properly pay his US tax, and the Inland Revenue Service of the USA may perfectly properly demand payment of that tax. The only effect of the non-enforcement principle is that (in the absence of any relevant treaty or convention) the IRS will not be able to bring English proceedings to enforce payment."

113. In my view, it would be to extend the principle substantially beyond its proper limits if the English court were to prevent a shareholder from exercising its 2006 Act rights, simply because there is evidence that the effect will be that a seizure order made pursuant to a foreign penal law will then be satisfied. As Mr Crow pointed out, this would have wide ramifications in any case in which the foreign parent of an English subsidiary sought to exercise its rights as a shareholder to procure a distribution from which it proposed to discharge its tax liabilities. For the reasons explained by Lord Templeman in *Williams and Humbert Ltd v W&H Trademarks Jersey Ltd* [1986] AC 368, 428-429, this would fly in the face of basic principles of the separate corporate identities of parent and subsidiary and in my view is not the law. The mere fact that the effect of an order made by an English court is that a foreign revenue or penal liability might come to be paid or discharged is not sufficient to establish that the order amounts to the indirect enforcement of the revenue or penal law which underpins the liability.

Conclusion on serious issue to be tried

114. It follows that I am satisfied that there is no serious issue to be tried in respect of either of the ways that the claimants put their case in the new authority claim. It is clear and indeed undisputed that Turkish law governs the issue of the authority of the individual defendants to act for Koza Altin and there is no dispute that as a matter of Turkish law they have authority to do so. The argument that deficiencies in the Süer judgment and indeed other aspects of the judicial, administrative and legislative processes mean that

the Turkish law authority should not be recognised in England is in my view misconceived.

115. Although not necessary in the light of that conclusion, I should say something about one other part of the relief sought. The final head of relief sought in the 2021 proceedings is a declaration that the persons to be recognised by the English courts as having authority to cause Koza Altin to act as a shareholder of Koza in this jurisdiction are Mr Ipek and five of his associates, who were the board members of Koza Altin immediately prior to the Süer judgment. It is said by Koza Altin that any such declaration would be unprecedented, something that the court has no jurisdiction to make, unprincipled and liable to lead to chaotic consequences. Mr Crow submitted that it is not even clear whether the individuals concerned are willing, able or even eligible as a matter of Turkish law to be designated as such. It is also impossible to see how the parallel board members would be in a position to perform their legal obligations as directors of a Turkish public company nor how it could be feasible for a company contracting internationally to operate coherently if there were two boards of directors, one recognised in some jurisdictions and one recognised in others.

116. Mr Crow also submitted that anything that the parallel board of Koza Altin purported to do on behalf of Koza Altin would not be binding, anyway outside England, and the effect would be that Koza Altin would be unable to do anything as a shareholder of Koza at all. This would amount to a serious deprivation of its property rights. He submitted that these considerations provide a further strong indication that the entire approach taken by the claimants in the new authority claim is misconceived.

117. I agree. While it is true that the mere fact that different laws vest different individuals with authority to act on behalf of a corporation, either generally or in relation to particular assets, is not of itself objectionable, the court should consider carefully whether there is something wrong with the underlying answer if it is driven to granting a remedy which has this effect.

118. Something similar happens in cases in which a single legal entity is subject to the appointment of a principal liquidator in one jurisdiction and an ancillary liquidator in another, but normally only when a company has ceased trading and is insolvent, which is not the case with Koza Altin. Likewise, it is not unprecedented for a receiver to be appointed over a company's assets in one jurisdiction which has the effect of removing control of those assets from the directors who otherwise continue to carry out their duties elsewhere under the law of its incorporation. In all of these cases, however, it will give rise to practical problems of real significance (as alluded to Lord Templeman in *Williams and Humbert* at p.430A-C), and is not for that reason relief which the court will grant lightly.

119. Nonetheless, I accept that all things being equal, this should not be determinative of the claim. If it were otherwise appropriate to refuse to recognise the individual defendants' authority in England, the court may be driven to grant some form of relief to protect Koza Altin's interests in England. As the court can always appoint a receiver if it is just and convenient to do so, the fact that the claimants seek the remarkable and unusual relief of a declaration recognising the former board, does not seem to me to be determinative of whether or not the new authority claim raises a serious issue to be tried.

Jurisdictional gateways

120. As I have decided that there is no serious issue to be tried, the question of gateway does not arise. I will, however, express my views in case this matter goes further.

121. The substantive jurisdictional gateway on which the claimants rely is identified in paragraph 3.1(2) of CPR PD 6B: "a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction". So far as the declaratory relief is concerned, they rely on the gateway identified in paragraph 3.1(4A) (a further claim arising out of the same or closely connected facts). They also rely on the gateway identified in paragraph 3.1(3) (necessary or proper party). There is no independent challenge by Koza Altin and the individual defendants to gateways (3) and (4A). It is accepted that they stand or fall with the answer to gateway (2).

122. The acts that Koza seeks to injunct are the taking of any further action on the section 303 and 305 notices which would require the instruction of solicitors and the commencement and pursuit of proceedings in England and holding themselves out as having authority to act for Koza Altin as a shareholder of Koza in this jurisdiction. The way the claim is pleaded in the proposed amended particulars of claim is:

> "an injunction to restrain (i) the SDIF Appointees (including the Second to Fifth Defendants) or Koza Altin from taking any further action upon the s 303 Notice or the s 305 Notice, or any further notices under ss 303 or 305 of the Act, and (ii) the SDIF Appointees from holding themselves out as having any authority to act for Koza Altin as a shareholder of Koza Ltd and from otherwise causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Ltd in this jurisdiction."

123. The question for the court is whether there is a good arguable case on the jurisdictional elements necessary for the claim to come within the gateway, i.e. that the claim is "one which would found an injunction ordering the defendant to do, or to refrain from doing, an act within the jurisdiction". The merits of the claim itself are not relevant once the threshold of serious issue to be tried has been passed: *Fujifilm Kyowa Kirin Biologics Co Ltd v Abbvie Biotechnology Ltd* [2017] RPC 7 at [87], [88] and [91].

124. Mr Crow's answer so far as the individual defendants are concerned is that they themselves do not do anything in this jurisdiction. They are resident in Turkey and if they do anything to procure Koza Altin (as a Turkish company) to do things as a shareholder of Koza in this jurisdiction, they do it in Turkey. Koza Altin may have to act in this jurisdiction for example by instructing solicitors and issuing proceedings to enforce the statutory notices, or otherwise holding itself out as a shareholder of Koza, but the individual defendants do not.

125. Mr Crow also relied on *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2017] 1 WLR 810 as an answer so far as the injunctions against both Koza Altin and the individual defendants were concerned. In *AB Bank*, Teare J held that a mandatory order requiring the defendant to do something (in that case to provide information verified by a responsible officer) but which was capable of being complied with outside the jurisdiction, did not fall within the gateway. As Teare J put it at paragraph [17] of his

judgment, the injunction did not require any action within the jurisdiction. Mr Crow said that nothing that Koza Altin or the individual defendants needed to do to exercise Koza Altins's rights as a shareholder of Koza needed to be done in England. It could all be done elsewhere. He said that the same principle applied in the present case, if the prohibitory injunction sought by the claimants would restrain the doing of an act (such as the further acting on the section 303 notice), capable of being committed outside the jurisdiction. He said that, by analogy with *AB Bank*, the gateway would not in those circumstances be open.

126. I do not accept these submissions. There is a difference between an injunction requiring an act to be done which can be done either in England or overseas (the position in *AB Bank*) and an injunction restraining the doing of an act in this jurisdiction, which is all that is sought in the present case. The former does not fall within the wording of CPR PD 6B para 3.1(2), but the latter does. All that is sought to be restrained by the injunction is such acts of the individual defendants as amount to a holding out in England that they are authorised to cause Koza Altin to exercise its rights in England to act as a shareholder of an English company. If there were to be a legal basis for the injunction it would be the lack of authority to act in England on behalf of Koza Altin, because the judgment which founds the authority ought not to be recognised.

127. I also agree with the submissions made by Mr Atkins in relation to the position of the individual defendants. First, he said that if the holding out as authorised to act for Koza Altin or the causing or procuring of the doing of acts by Koza Altin as a shareholder of Koza are all acts that take place in England, it does not matter that the individual defendants themselves are always in Turkey and make their decisions in Turkey. He drew an analogy with what happened in *Tozier v Hawkins* (1885) 15 QBD 650, where the court held that the equivalent gateway applied where an act of transmission outside the jurisdiction caused the publication of a libel in England.

128. Secondly, he said that the argument made by Koza Altin and the individual defendants assumes that the authority issue would be decided in their favour. If the authority issue were to proceed and then to be decided in favour of the claimants, which is the only context in which any injunctions will be granted, any acts done at the suit of the individual defendants in England in the name of Koza Altin in its capacity as a shareholder of Koza would not be recognised as acts of Koza Altin. They would therefore be the acts of the individual defendants because, so far as English law is concerned, they would not on this hypothesis be treated as the acts of the legal entity whom the individual defendants purport to represent.

129. The real point seems to me to be that the injunction restraining acts only in England might not be granted as a matter of discretion if the acts sought to be restrained could be equally effective if committed elsewhere. This was not explored in any detail in the submissions, but on any view the claimants have a good arguable case on the point. The acts sought to be restrained relate to the governance and of an English company and the exercise by Koza Altin of its rights as a shareholder of an English company.

Abuse of process

130. The argument on abuse of process does not arise either, but it was dealt with in some detail and I should give my views in any event.

131. There was no real issue between the parties on the applicable principles. In an earlier decision of the Court of Appeal in the 2016 proceedings (*Koza Limited v Koza Altin Işletmeleri AS* [2021] 1 WLR 170 at [30] to [40]), Popplewell LJ reviewed the law of abuse of process as explained in *Henderson v Henderson* 3 Hare 100, 114-115, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536C and *Johnson v Gore Wood & Co* [2002] 2 AC 1, 30H-31F.

132. The following propositions can be derived from these authorities and subsequent cases in which the principles have been applied:

i) The court's power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated: e.g. *Michael Wilson & Partners Ltd v Sinclair (Emmott, Part 20 defendant)* [2017] 1 WLR 2646 at [48], per Simon LJ.

ii) The test of whether an application is an abuse is what Mr Crow called context-specific. It will depend on all the circumstances of the case looked at as a whole. As Lord Bingham said in a well-known passage from his judgment in *Johnson v Gore Wood* [2002] 2 AC 1, 31:

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

iii) The principles apply to interlocutory applications as much as they do to final hearings. The question of whether or not there has been a change of circumstance will often be a significant factor. As Popplewell LJ said at para [42]:

> "Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing."

iv) Although the principles are the same for interlocutory applications as they are for final hearings, the considerations may be different in the sense and to the extent explained by Popplewell LJ in a later passage from his judgment in the 2016 proceedings at [2021] 1 WLR 170 (at in paragraph [42]:

> "… because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings."

133. Mr Crow submitted that the service out application and what he called the resurrection of the authority claim were a plain abuse. He said that Koza Altin and its directors are now being vexed twice in relation to the same matter and that the court's resources will have been wasted if the service out application and the new authority claim are allowed to proceed. He said that all of the jurisdiction arguments in relation to the authority issue, including any application for permission to serve out, both could and should have been dealt with at the same time.

134. In support of this submission Mr Crow relied on the fact that the claimants originally applied for permission to serve the 2016 proceedings (including the old authority claim) out of the jurisdiction as one of the principal heads of relief and adduced evidence in support. He said that they then changed their approach in light of the conclusion that Snowden J reached on article 24(2). They deliberately did not advance the application for permission as an alternative at the hearings before Asplin J when they could have done so, nor was it pursued in the Court of Appeal or the Supreme Court. Instead, they restricted their arguments to the article 24(2) point on which they eventually lost. This meant, he submitted, that it was now too late for them to take the point.

135. The claimants submitted to the contrary. They said that, once Snowden J's ruling had been given at the without notice stage, their consistent position had been that the right way to proceed was to deal with the article 24(2) point first and only then if necessary turn to permission to serve out. This was made clear at a directions hearing before Rose J held on 10 November 2016, when Mr Richard Morgan QC representing the claimants confirmed that he was nailing his colours to the article 24(2) mast and there was therefore no need for his clients to establish a good arguable case or that England was the convenient forum. He then went on and said the following about the relationship between article 24(2) and any possible application for permission to serve out, albeit in the context of a debate about the possible joinder of additional defendants:

> "So if [article 24(2)] does not found good jurisdiction, then my clients will have to consider whether they want to, or indeed need to, bring the SDIF and their appointees and, if so, the jurisdictional basis for that, and we will need to get permission to serve out. But let us at least find out whether the court is right in thinking that it has exclusive jurisdiction as of right under the Regulation. Because only once that has been determined can we begin to address whether we need to seek another route by which service can be effected."

136. Morgan Lewis then acting for the claimants confirmed immediately after that hearing that the permission application was no longer before the court. Mishcon said in terms that it would be an abuse of process if all jurisdiction points were not dealt with as a whole. That was not a position that the claimants were prepared to accept.

137. By the time of the hearing before Asplin J, the position of the parties was reflected in their skeleton arguments. Koza Altin and the trustees said that they were ready to deal with the question of jurisdiction as a whole. The claimants submitted that the point simply did not arise because no application for permission was being made and so the detailed evidence that had been submitted by Koza Altin and the trustees, which only went to the grounds for permission, did not need to be considered.

138. In the light of this difference in approach, Mr Stephen Auld QC, then acting for Koza Altin and the trustees, told Asplin J that his clients understood that the permission application was not being pursued, but did not go on and say that it should be decided in the alternative in any event. This was not contradicted by or on behalf of the claimants, but nor did they confirm that they would not seek permission at a later stage if necessary.

139. In these circumstances, I think that Mr Atkins is correct to submit that it was Koza Altin and the trustees who decided at the hearing not to pursue that part of their 7 October jurisdiction application which dealt with permission to serve out. The claimants had been consistent throughout that they regarded this alternative potential ground for inviting the court to accept jurisdiction as unsuitable for determination at this stage. In these circumstances the question of whether permission could or would have been granted if article 24(2) did not apply was not dealt with by Asplin J.

140. In the Court of Appeal, Floyd LJ recorded in his judgment (*Koza Limited and another v Akçil and others* [2017] EWCA Civ 1609 at [39]) that:

> "The claimants were not pursuing any alternative application for permission to serve the proceedings out of the jurisdiction, for example on the basis that the former trustees were necessary and proper parties to the English company law claim. Their contention was that they did not need such permission because the whole claim fell within article 24(2)."

It seems to me that this is entirely neutral on the question of whether or not the claimants might seek permission in due course if they were to be unsuccessful on their article 24(2) argument.

141. Mr Crow pointed out that the argument on the article 24(2) jurisdiction challenge took nearly 3 years from inception to final disposition and was very expensive as well as time consuming. He said that if the claimants obtain permission to serve the new authority claim out of the jurisdiction that whole exercise will prove to have been a waste of time.

142. He also said that the abusive nature of the steps that the claimants were attempting to take was illustrated by the fact that it took them 17 months to reformulate the 2016 proceedings in the light of the decision of the Supreme Court, which clearly established that Mr Ipek had been warehousing the proceedings. By this he meant that, the claimants had been deliberately stalling the proceedings in circumstances in which they

had the benefit of interim injunctive relief. It was incumbent on them to progress matters expeditiously (*Asturion Fondation v Alibrahim* (CA) [2020] 1 WLR 1627) and that was a factor I was bound to take into account when considering whether the conduct of the claimants overall amounted to an abuse.

143. Mr Atkins advanced a number of arguments in response. The first was that it was not possible for the alternative application for permission to serve out to be pursued once Snowden J had determined the article 24(2) point. In the judgment he delivered at the end of the 16 August hearing Snowden J said as follows:

> "Accordingly, it seems to me that this is a case in which jurisdiction exists and service out of the jurisdiction without permission is available to the claimants under article 24(2) and CPR Part 6.33(2)(b). For that reason I do not go on to consider what would have been the situation had I been required to consider the grounds for service out of the jurisdiction in CPR Parts 6.36 and 6.37 and Practice Direction 6B."

144. Mr Atkins argued that the consequence of Snowden J's conclusion was that the 2016 proceedings were not "proceedings to which rule 6.32 or 6.33 does not apply" within the meaning of CPR rule 6.36. The reason for this was that Snowden J's article 24(2) determination that permission to serve out was not required meant (as Snowden J himself said) that they were proceedings to which rule 6.33 did apply. It therefore followed that the claimants had no entitlement to seek relief in the form of permission to serve out under CPR rule 6.36.

145. In one sense there is substance in the submission. Snowden J had expressed himself satisfied that jurisdiction existed under article 24(2) and had made an order for alternative service on Mishcon in England which would not have been available if that had not been the case. Although his order was made without notice, that determination would stand until set aside and to that extent the 2016 proceedings had been found to be proceedings to which rule 6.33 did apply and were therefore outside the purview of CPR 6.36.

146. However, I do not accept that this in itself meant that the claimants were not in a position to seek permission to serve out of the jurisdiction by way of alternative to their primary case that jurisdiction had been established under article 24(2). It cannot be right that, while it is accepted that at the without notice stage before Snowden J in August, it was both possible and appropriate for the claimants to advance their claim for permission as an alternative to a determination under article 24(2), the same was not also an available course for them to take when the matter was heard on notice by Asplin J in December.

147. I can see no reason why the court at the *inter partes* hearing could not simply turn to deal with the permission application if and insofar as it determined the article 24(2) issue against the claimants. It would have received the application and heard the argument on a conditional and anticipatory basis, expressing its conclusion either once it had ruled against them on article 24(2) or, if it had ruled in their favour, to guard against the possibility that the matter might go further.

148. Nor do I think that there is anything in Mr Atkins' argument that the court could not grant permission because the claim form had already been served. If it were later to be

determined that Snowden J had been wrong to decide that article 24(2) applied, the service without permission would not have been valid. If permission were then to be granted, I see no difficulty in the subsequent service based on that permission being the time of service for all purposes.

149. Mr Atkins also submitted that, in his judgment in the Supreme Court (*Koza Limited and another v Akçil and others* [2019] 1 WLR 4830, [2019] UKSC 40 at [44]), Lord Sales had endorsed the proposition that, following the decision determining that article 24(2) did not apply, it would be open to the claimants to seek permission. The passage he relied on was as follows:

> "44. Before leaving this part of the case, however, it should be pointed out that there is an important consequence which flows from the fact that Turkey is not a member state of the EU. It means that the courts in Turkey do not enjoy exclusive jurisdiction in respect of the authority claim by virtue of the Recast Regulation. Therefore, even though the authority claim does not fall within the exclusive jurisdiction provision in article 24(2) as regards the courts in England, that does not prevent those courts 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 governing service of proceedings on persons outside the jurisdiction. It is not necessary to examine this possibility further, because in the present case it is solely on the basis of article 24(2) that the English courts have assumed jurisdiction over Koza Altin and the trustees in these proceedings in relation to the authority claim."

150. In my judgment, Mr Atkins' submission was not a good one. Lord Sales was not addressing the question of whether it was in fact open to the claimants to start again with an application for permission. He was simply drawing attention to the legal consequence of the fact that Turkey is not a member of the EU. I agree with Mr Crow's submission that the question of whether or not it would be legitimate for the claimants to seek to persuade the court to assume jurisdiction on some other basis (such as permission to serve out) was not before the Supreme Court.

151. However, the appeal process does highlight one of the difficulties with Mr Crow's arguments more generally. It seems to me that, even if the claimants had maintained an alternative application for permission to serve out before Asplin J, the probabilities are that she would have declined to deal with it in light of the view she took on the article 24(2) point. If that had been the case, the matter could not have been before the Court of Appeal, because there would have been no decision against which an appeal could have been advanced unless the claimants sought to appeal Asplin J's decision to refuse to deal with the point which, because it would have been a case management decision, would almost certainly have failed.

152. The reason I consider it likely that Asplin J would have taken the same course as Snowden J is that the nature of an application for permission to serve out the jurisdiction is very different from the more discrete legal question of whether or not the claim falls within one of the heads of exclusive jurisdiction under article 24. Even though applications for permission should not be permitted to descend into mini-trials, I think that there is substance in Mr Atkins' submission that the argument and the evidence in relation to the service out application would have added substantially to the weight of the hearing. That may have been justifiable expenditure if there had been a high degree

of assurance that the point might need to be decided. However, the permission point would not have needed to be decided if the article 24(2) point continued to be determined in favour of the claimants. In the event, the point was determined against them in the Supreme Court, but the decisions of the courts until that stage went the other way, so it is difficult to see why the parties should have considered that this eventuality was anything more than a possibility.

153. While each case will depend on its own facts, and there will doubtless be many cases in which it is obvious that the two alternatives can most efficiently be run together, I am not persuaded that this is one of them. In my view this is a case in which the purpose of what Mr Atkins called the streamlined system of jurisdiction provided by the Brussels Recast Regime would be anyway partially undermined if the court were to reach a conclusion that a permission application should have been argued, not just could have been argued, as an alternative to the main article 24(2) point.

154. I also think that, in light of the fact that the claimants had never made any secret of the approach that they proposed to adopt (see what Mr Morgan told Rose J), it was always open to Koza Altin and the trustees to invite the court to give a formal ruling on the permission point if they wished to maintain their position that it should have been advanced at the hearing before Asplin J. They had made clear in their 7 October jurisdiction challenge that, if necessary, they would contend in the alternative that permission should not be granted, so that was a point it was always open to them to make.

155. It follows that, in the present case, it would not have been a proportionate or cost-effective response for the court to be asked to deal with the service out application at the same time as the application in relation to article 24(2). Even if the court had been asked, I think that the probabilities are that it would have declined the request, a decision that it would have been difficult if not impossible to appeal. In my judgment, these considerations count against the argument made by Koza Altin and the trustees that the current application for permission to serve out is an abuse of process.

156. However, these conclusions do not fully dispose of the abuse point because Mr Crow also submitted that questions of abuse require the court to look at everything in the round. In the present case this includes the delay that occurred between the decision of the Supreme Court and January 2021 (when the 2021 proceedings were reissued and the 2016 proceedings were reactivated by service of an amended pleading). He said that this was what gave rise to the abusive warehousing point I have already mentioned.

157. So far as the test of abusive warehousing is concerned the way that Arnold LJ put the point in *Asturion* was as follows:

> "… 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."

158. I was not taken in any detail to what was going on during this period of delay, although Mr Atkins reminded me that there was a significant sideshow in relation to the funding

of the ICSID arbitration. He also said that, in any event, there were some listing difficulties in relation to the CMC.

159. I am very doubtful that the claimants have been pursuing the litigation with all due expedition and I am conscious that the operation of the interim regime imposed by Asplin J's interim regime in December 2016 has given Mr Ipek a great incentive to drag his feet. Nonetheless I am not persuaded that Mr Ipek's conduct to date is abusive in the sense contemplated by Arnold LJ, nor am I persuaded that it adds materially to the overall argument advanced by Mr Crow. There is no particular reason to believe that the costs have been unduly increased by the course that has been taken. In my judgment the application for permission to serve out should not be refused on the additional ground that it, or the raising of the authority issue in the form of the new authority claim pleaded in the 2021 proceedings, amounts to an abuse of process.

The further summary dismissal application

160. The purpose of the further summary dismissal application is to dispose of the strike out application on a summary basis. It therefore raises very similar issues to the question of serious issue to be tried on the application for permission to serve the 2021 proceedings out of the jurisdiction. It is also an application that was made in 2016 in effectively the same form (the initial summary dismissal application).

161. On one view the fact that the further summary dismissal application is a straightforward repeat of the initial summary dismissal application that was dismissed by Asplin J in December 2016 means that it is an abuse and should not be permitted to proceed. However, Koza Altin submitted that this is no objection to resurrecting the point, because there has been a significant change in circumstance in the underlying proceedings since that order was made. The Supreme Court has declared and ordered that the English courts have no jurisdiction in respect of the old authority claim. It therefore follows, so Koza Altin submitted, that the reasoning which underpinned the decision of Asplin J to stand over the strike out application to be determined at trial with the old authority claim as a matter of good case management, and without considering the merits of the initial summary dismissal application, no longer applies.

162. The claimants argued that there has been no sufficient change of circumstance, but I do not agree. In my view the circumstances have changed such that the principle based on *Henderson v Henderson* (1843) 3 Hare 100 is not engaged. In my view, the procedural context in which the points were raised and considered by both Asplin J and the Court of Appeal have fundamentally changed in the light of the decision of the Supreme Court. In short, and for the reasons given by Mr Crow, I do not think that what then occurred is of itself a reason not to consider the further summary dismissal application on its merits.

163. The conclusion that Asplin J's dismissal of the initial summary dismissal application does not of itself bar a further summary dismissal application is also consistent with the fact that her approach to the strike out application was heavily influenced by the fact that the 2016 proceedings included the old authority claim. As she said in paragraph [66] of her judgment, the question of whether the trustees had authority to direct the management of Koza Altin (including by serving the statutory notice) was inherent in

the claims then made in the 2016 proceedings. That is no longer the case. The 2016 proceedings in respect of which the strike out application has been issued only now raises the English company law issues. It does not raise the authority issue as a substantive matter.

164. Turning to the substance, there are three grounds referred to in the evidence adduced on behalf of Koza Altin and the individual defendants to support their case that the further summary dismissal application should be granted and the strike out application should be dismissed:

i) The first is that it is absurd and abusive to serve proceedings on the defendant and then contend that it has no right to defend the claim.

ii) The second is that, while the claimants accept that while the authority of those giving instructions to Mishcon on behalf of Koza Altin is valid in Turkey, their argument that Mishcon is not entitled or able to take instructions from them in English proceedings is incoherent and contrary to basic principles of private international law.

iii) The third is that the claimants obtained permission to serve the proceedings on Koza Altin via Mishcon and have continued to deal with them thereafter as representatives of Koza Altin.

165. At first blush, Koza Altin's first point is consistent with what Asplin J said at paragraph [67] of her judgment ([2016] EWHC 3358 (Ch)):

> "As I have already mentioned, Koza Altin is a defendant and as such was brought before the court by the Claimants. It seems to me that it would be a nonsense if, having done so, the Claimant could contend that the Acknowledgement of Service and Defence could be struck out as an abuse of process arising from the very lack of authority which is relied upon in the claim itself."

166. However, the Court of Appeal ([2017] EWCA Civ 1609) on appeal from Asplin J took a slightly different view. As Floyd LJ said at paragraph [64]:

> "I think, however, that in the circumstances where only the company law issue was in play, and the claimants were exposed to the counterclaim, they remained entitled to question the authority of those representing Koza Altin. It was not, on this view, a nonsense to seek to strike out at least the counterclaim and to seek directions for the trial of that question. In the event, with both issues in play, the strike out application lost any conceivable utility, and so the judge could simply have made no order on the strike out application, or dismissed it. However, it does not follow that she was wrong to take the course which she did, namely to stand it over to the trial with costs in the authority issue, and also to make the claimants pay the costs of the directions application. … Koza Altin's case is that it followed as a matter of logic that the strike out application should have been dismissed with costs. It does not. The judge's decision was, in the circumstances which arose after judgment, a case management decision with which it would be wrong for this court to interfere."

167. It follows that, in circumstances in which only the company law issue is now in play in the 2016 proceedings, and the claimants are exposed to the counterclaim, they remained entitled to question the authority of those representing Koza Altin if there was any arguable basis for them to do so. The conventional manner in which to bring such an application where the claimant's name is used without authority is by applying to strike out the proceedings, which must be done as soon as practicable for case management reasons: e.g. *Airways Ltd v Bowen* [1985] BCLC 355. It is not a question (as Koza Altin submits) of it having no right to defend the proceedings. In my view, and because proceeding without authority is an abuse which once raised must be resolved, it is simply the procedural means by which the question of authority is to be determined.

168. There is a similar answer to the third point raised by Koza Altin. It is clear that the correspondence has been conducted throughout without prejudice to the fact that the authority issue was in play. This was the conclusion reached by Asplin 6 in December (see *Koza Limited and Ipek v Akçil and others* [2016] EWHC 3358 (Ch) at paragraph [67]) and on this point I see no reason to differ from the conclusion that she reached.

169. However, while I do not accept that the procedural history of what has occurred would have had the effect of preventing the claimants from running an argument that Koza Altin's Turkish directors do not have authority to cause it to defend the 2016 proceedings, the second argument advanced by Koza Altin and the individual defendants has now been determined in their favour by my decision on serious issue to be tried in the service out application.

170. It seems to me that the reasons I gave for deciding that point against the claimants are equally applicable to the merits of the strike out application. The defence of the 2016 proceedings is a clear example of the context in which the issue of the authority of the Turkish trustees or directors to represent Koza Altin in the vindication of its rights as a shareholder of Koza has arisen. In my view the answer to the question which the strike out application raises is simply that Turkish law governs the issue of authority and that, in light of the fact that there is no serious issue to be tried that those instructing Mishcon are not authorised under Turkish law to do so, the strike out application is bound to fail.

171. On that ground alone, I take the view that there is no serious issue to be tried on the strike out application and it should be dismissed.