Neutral Citation Number: [2022] EWCA Civ 1284

Case Nos: CA-2021-000042 and 000047

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICEs
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
TROWER J
[2021] EWHC 2131 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LADY JUSTICE SIMLER

- -

Between :

(1) KOZA LTD **(2) HAMDI AKIN IPEK**	**Claimants/ Appellants**
- and –	
KOZA ALTIN IŞLETMELERI AS	**Defendant/ Respondent**

And between:

(1) KOZA LTD **(2) HAMDI AKIN IPEK**	**Claimants/ Appellants**
-and-	
(1) KOZA ALTIN IŞLETMELERI AS **(2) FATIN RŰŞTŰ KARAKAŞ** **(3) ISMAIL GŰLER** **(4) ENIS GŰCLŰ ŞIRIN** **(5) ISMET DEMIR** **(6) PERSONS UNKNOWN**	**Defendants/ Respondents**

- -
- -

Andrew Scott KC and Andrew Trotter (instructed by **Oakstead Solicitors**) for the **Appellants**
Jonathan Crow KC and David Caplan (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing dates : 29 and 30 June 2022
- -

Approved Judgment

Sir Julian Flaux C:

Introduction

1. The claimants appeal with the permission of Newey LJ against the Order of Trower J dated 8 September 2021 (i) dismissing the claimants' application in BL-2021-000516 ("the 2021 proceedings", to which Appeal CA-2022-000047 relates) for permission to serve those proceedings out of the jurisdiction in Turkey and (ii) allowing the defendants' application in HC-2016-002407 ("the 2016 proceedings", to which Appeal CA-2022-000042 relates) to summarily dismiss the claimants' application in those proceedings to strike out the defence and counterclaim.

2. The underlying dispute concerns the control of an English registered company, the first claimant ("Koza"), incorporated in March 2014 to pursue international mining operations. The second claimant, Mr Ipek, is Koza's sole director and the holder of one of its two "A" shares. The only ordinary shareholder is Koza Altin, a Turkish listed company incorporated by Mr Ipek in 2005. Koza Altin is now the sole defendant in the 2016 proceedings and the first defendant in the 2021 proceedings. There were originally five additional individual defendants to the 2016 proceedings ("the trustees") who had been appointed in Turkey as trustees in relation to Koza Altin. Koza Altin is part of a group of companies founded by Mr Ipek's father which until 2015 was managed under the ultimate control of his family. The other defendants in the 2021 proceedings are the four Turkish directors of Koza Altin at the time that those proceedings were commenced and any other persons who may be appointed as directors. The principal issue in both sets of proceedings is whether the authority of those individual defendants to cause Koza Altin to take steps as a shareholder of Koza should be recognised in England.

Factual and procedural background

3. I gratefully adopt and summarise the judge's synopsis of the complicated background to the dispute set out at [5] to [48] of the judgment. The claimants contend that in 2013 President Erdoğan and his party the AKP launched a campaign to purge Turkey of a "parallel state" consisting of the Hizmet organisation of Fethullah Gűlen, an Islamic preacher resident in the United States. At that time some of the Koza group newspapers were reporting on corruption allegations against President Erdoğan and the AKP. On 1 September 2015 the group's Bugűn newspaper published an article critical of the Turkish government claiming that arms were being transferred to Turkey from Islamic State in Syria with the knowledge of Turkish customs. The same day there was a police search of the group's headquarters pursuant to a search warrant issued by a judge known as a criminal peace judge. The allegations which were said to support the warrant were of unlawful transfers of money acquired illegally, including financing by the group of terrorism, an offence with a wide meaning under Turkish law. Mr Ipek and the group contend that the search was part of a campaign by the Turkish government to silence political opponents and expropriate their assets. Their attempt to challenge the warrants on the grounds that the allegations were baseless failed.

4. Soon thereafter, Mr Ipek sought to strengthen his control of Koza which allotted two newly issued £1 "A" shares to him and his brother and amended the articles of association to entrench the rights of the "A" shareholders by conferring under article 26 a class right under which certain resolutions, including to appoint or remove

members of the board, cannot be passed without their consent. Koza also took steps to preserve £60 million introduced by Koza Altin in 2014 as capital contribution for its ordinary shareholding, which was held in the Luxembourg branch of a Turkish bank, Garanti Bank. In proceedings in Luxembourg, Garanti Bank informed the Luxembourg court that the Luxembourg Financial Investigation Bureau had frozen the relevant accounts whilst investigating allegations of financing terrorism. The trustees also issued 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.

5. On 26 October 2015, a criminal peace judge in Ankara, Judge Sűer, appointed a number of individuals including the trustees as directors of group companies including Koza Altin. This was done pursuant to article 133 of the Turkish Criminal Procedure Code ("TCPC") which allows the court to appoint trustees to administer a company with a view to running its business. There have to be strong grounds for suspicion that one or more of a number of scheduled crimes is being committed within the activities of the company and the appointment of trustees must be necessary for revealing the factual truth during a criminal investigation or case. The claimants allege that the judgment of Judge Sűer was corrupt.

6. On 12 November 2015 an appeal against that judgment was determined on the papers by Judge Sahinbey, another criminal peace judge, and dismissed. 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") challenging the appointment of the trustees as a breach of the European Convention on Human Rights ("ECHR"). That application was declared inadmissible on 11 May 2017 for failure to exhaust all domestic remedies. By a judgment delivered on 24 May 2018, the appeal to the Turkish Constitutional Court was dismissed. On 12 December 2018 Mr Ipek filed a further application to the ECtHR which was still pending at the time that the judge's judgment was delivered on 28 July 2021. Since his judgment, the ECtHR has handed down judgment on 21 October 2021 dismissing that application. The defendants sought to put that judgment before this Court in an application to adduce fresh evidence. That application was not opposed and the parties made submissions as to the effect of that judgment with which I will deal hereafter.

7. Soon after the Sűer judgment, the Turkish police entered the group's headquarters and closed down its media operations, although they resumed for a short period under the control of individuals appointed to the relevant companies at the same time as the trustees were appointed in respect of Koza Altin. In fact, the composition of the trustees appointed as directors of Koza Altin changed from time to time, by various orders of the criminal peace court. By the time the 2016 proceedings were commenced, some but not all the trustees were those appointed by the Sűer judgment.

8. In July 2016 there was an attempted coup in Turkey which failed and a state of emergency was declared. The Koza media companies were shut down and their assets transferred to the Turkish treasury. At around the same time, on 19 July 2016, the Luxembourg court ordered Garanti Bank to release the £60 million to Koza. On the same day, Koza Altin, acting through the trustees, served notice under section 303 of the Companies Act 2006 seeking to require Koza to call a general meeting with a view to removing its directors including Mr Ipek and replacing them 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.

9. On 10 August 2016, Koza Altin, acting by the trustees, served a statutory notice under section 305 of the Companies 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 was the catalyst for the 2016 proceedings issued on 17 August 2016 in which the claimants sought declaratory relief that the notices under sections 303 and 305 of the Companies Act were ineffective and an injunction restraining Koza Altin from taking any other steps to remove any director of Koza without "A" shareholder consent. The claimants contended that the resolutions in the section 303 notice cannot properly be moved because if passed they would be ineffective by reason of article 26 of the articles of association. It is convenient to refer to that head of claim, as did the judge, as "the English company law claim". The 2016 proceedings also raised the so-called "old authority claim" under which the claimants sought an injunction to restrain the trustees from holding themselves out as having authority to act for or bind Koza Altin as a shareholder of Koza or permit the doing of anything as a shareholder of Koza in England including the service of the section 303 and 305 notices.

10. On 16 August 2016, the day before the 2016 proceedings were issued, the claimants obtained an ex parte interim injunction from Snowden J (as he then was) restraining the holding of the meeting called for by the section 305 notice. Snowden J also made an order for alternative service permitting the claimants to serve Koza Altin and the trustees by service on their solicitors, Mishcon de Reya, even though the defendants were outside the jurisdiction. He did so on the basis that both limbs of the claim fell within article 24(2) of the Brussels Recast Regulation 1215/2012 which confers exclusive jurisdiction on the courts of a member state where a company has its seat in proceedings concerning the validity of the constitution, the nullity or the dissolution of the company or the validity of the decisions of its organs. The effect of the decision that article 24(2) applied was that service out of the jurisdiction was available under CPR 6.33 without obtaining permission to serve out from the Court under CPR 6.36. The claimants had sought in the alternative to rely upon various of the gateways in paragraph 3.1 of PD6B as justifying permission to serve out, but Snowden J decided that, in the light of his conclusion on article 24(2), he did not need to determine whether the claimants could have obtained the permission of the Court for service out under CPR 6.36.

11. At the return date on 25 August 2016, Snowden J continued the interim injunction he had previously ordered. His order noted that the claimants disputed the authority of Mishcon de Reya to act for Koza Altin. Thereafter, on 7 October 2016 the trustees issued an application contesting the jurisdiction in relation to the 2016 proceedings and Koza Altin issued an application contesting the jurisdiction in relation to the old authority claim, although it served a defence and counterclaim in relation to the English company law claim. By the counterclaim it contended that the resolutions by which article 26 was introduced into the articles of association of Koza were invalid and ineffective as improper attempts to entrench Mr Ipek as controller of Koza. In contesting the jurisdiction, all the defendants challenged the conclusion of Snowden J that article 24(2) gave the English court jurisdiction over the old authority claim. They also contested the alternative basis for jurisdiction that the claimants could bring themselves within one or more of the gateways in paragraph 3(1) of PD6B. They served evidence which sought to challenge that alternative basis for jurisdiction.

12. On 3 November 2016, the claimants issued an application seeking to strike out the acknowledgment of service and defence and counterclaim of Koza Altin on the grounds that the English court should not recognise the authority of the Turkish directors to cause Koza Altin to be represented in the 2016 proceedings. They sought determination of that issue as a preliminary issue with directions towards its trial.

13. The rival applications came before Asplin J (as she then was) for hearing in December 2016. She also heard and determined an application by Koza Altin ("the initial summary dismissal application") for the summary dismissal of the claimants' strike out application on the grounds that it was absurd and abusive for the claimants to serve proceedings on Koza Altin and then contend that it had no right to defend the claim. On the issue of jurisdiction the defendants' position was that the court should deal with both the question of whether article 24(2) applied and with the alternative basis for jurisdiction that the claimants were entitled to permission to serve out. Notwithstanding that, the claimants did not seek permission to serve out to protect themselves in the event that they failed on article 24(2).

14. Asplin J delivered judgment on 21 December 2016 ([2016] EWHC 3358 (Ch)) continuing the injunction granted by Snowden J and dismissing the defendants' challenge to the jurisdiction. She found that Snowden J had been correct that article 24(2) applied, which made any permission application moot, even if one had been being pursued. She dismissed the initial summary dismissal application and stood over the strike out application to be heard with the old authority claim on the grounds that effective case management required the strike out application to be heard at the same time as the old authority claim, so all the underlying issues would be dealt with at the same time.

15. The defendants' appeals against her decision on their jurisdiction challenge were dismissed by the Court of Appeal ([2017] EWCA Civ 1609) but they succeeded in the Supreme Court ([2019] UKSC 40; [2019] 1 WLR 4830). It followed that by Order of the Supreme Court dated 29 July 2019, the 2016 proceedings against the trustees and the old authority claim against Koza Altin were dismissed for want of jurisdiction, which removed the basis upon which Asplin J had stood over the strike out application.

16. Before and after the decision of the Supreme Court there were a number of other applications in the 2016 proceedings, two of which went to the Court of Appeal. As the judge observed at [35] they were not of central relevance to the issues he had to decide, save for having some bearing on the complaint by Koza Altin that the claimants are guilty of warehousing the 2016 proceedings. The claimants did not advance the remaining issues in the 2016 proceedings relating to the English company law claim for a significant period of time. Accordingly, Koza Altin sought to bring matters to a head by issuing a further summary dismissal application on 8 October 2020 and then applying for an unless order to require the claimants to serve amended particulars of claim reflecting the decision of the Supreme Court. The claimants did serve amended particulars on 6 January 2021, simply deleting the old authority claim.

17. In the meantime there had been developments in Turkey. In particular, on 1 September 2016, a statutory decree no. 674 was promulgated which enabled the power of trustees such as those appointed to Koza Altin to be transferred to a state organisation called the Savings Deposit and Insurance Fund ("SDIF"). Effect was given to that decree in relation to Koza Altin by an order of another criminal peace judge on 6 September

2016. On 22 September 2016, the SDIF then appointed a new board of directors for Koza Altin. A further decree in November 2016 then transferred these director appointing powers from the SDIF to its affiliated minister, who was then empowered to delegate the power back to the SDIF, which was done in October 2017. In January 2019, the Ankara 24th High Criminal Court ordered the continuation of the trusteeship.

18. It is common ground, as the judge recorded at [39], that since the SDIF took over the role of trustee, there have been a number of further changes in the identity of the directors of Koza Altin, most recently by a decision of the SDIF dated 5 November 2020 appointing as directors the individuals who are the individual defendants in the 2021 proceedings. The claimants do not contest Koza Altin's case supported by its expert evidence that as a matter of Turkish law, those individuals are the directors of Koza Altin. Nor do they contest that Turkish law treats court decisions as being valid until set aside and none of the decisions relating to the appointments of directors, including the Sűer judgment, has been set aside.

19. On 6 January 2021, the same day as they served amended particulars of claim in the 2016 proceedings, the claimants sent Mishcon de Reya draft particulars of claim in new 2021 proceedings. These were considerably more detailed, but raised the authority issue and sought what was in substance the same relief. Like the judge I will refer to this as "the new authority claim". It includes claims for declarations that the English court does not recognise the authority of the directors to cause Koza Altin to do anything as a shareholder of Koza in this jurisdiction. The claimants do not dispute that Turkish law governs the relationship between Koza Altin and its directors or that the authority of the directors is valid and effective as a matter of Turkish law so as to procure Koza Altin to take the steps it has taken in this jurisdiction. However, the claimants contend that the authority of the SDIF and the individual defendant directors derives from a corrupt Turkish judgment, the Sűer judgment, which should not be recognised in England so that the English court should not recognise the authority of the directors as a matter of public policy.

20. There were two applications before Trower J. In the 2016 proceedings Koza Altin made the further summary dismissal application issued on 8 October 2020. As the judge said at [50], it thus resurrects the original summary dismissal application but does so in the light of what Koza Altin contends is a material change of circumstance. In the 2021 proceedings, the claimants sought, pursuant to an application issued on 22 March 2021, permission to serve the claim form out of the jurisdiction in Turkey and to serve it by alternative means under CPR 6.15.

The judgment below

21. Having set out the factual and procedural background which I have sought to summarise above, the judge dealt first with the claimants' application for permission to serve out. At [52] he set out the test which an applicant must meet for the grant of permission, which was not in dispute:

> "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."

22. As the judge said, the dispute revolved around the first and second parts of the test. It was not in dispute before the judge or before this Court that if the first and second parts of the test could be satisfied, the English court would be the appropriate forum for the resolution of the dispute.

23. The defendants contended that the claimants had not established that the claims fell within any of the jurisdictional gateways and had failed to demonstrate that there was a serious issue to be tried. They also contended that the new authority claim was an abuse of process which should not be allowed to proceed. The judge dealt first with whether there was a serious issue to be tried.

24. He noted at [54] to [57] that the claimants relied upon the fact that Snowden J had concluded that he was satisfied that there was a serious issue to be tried that the treatment of Mr Ipek by the Turkish courts leading to the appointment of the trustees was contrary to English public policy and that the defendants had never sought to discharge the injunction on the basis that he was wrong to reach that conclusion. However, the claimants did not suggest that what happened in 2016 precluded the defendants from arguing that there was no serious issue to be tried on the new authority claim, just that the court could take comfort from what then occurred in reaching the conclusion that there was a serious issue to be tried. The judge considered that the claimants were right not to put the point any higher, since the decision of Snowden J was given at a without notice hearing before the arguments made at the hearing before Trower J were developed and at a time when the Turkish law basis for the authority of trustees to act for Koza Altin was different from the legal basis for the authority of the current directors. Although the judge considered that the position in relation to the hearing before Asplin J was less straightforward, ultimately he concluded at [60] that he should look at the question whether there was a serious issue to be tried afresh based on the material adduced before him. That conclusion was not challenged before this Court.

25. In relation to the Sűer judgment, the judge noted at [62] that the claimants contended that English public policy considerations were engaged because the individual defendants' authority derived from a judicial process conducted for a corrupt political purpose. It was also said that Judge Sűer had not acted independently and impartially on the basis of the evidence but his judgment was tainted by what the claimants described as the influence of the Erdoğan regime, leading to it being impeachable for fraud. It was also said the judgment was contrary to Turkish law, perverse and not given in good faith. The judge went on to record at [63] the claimants' submission that if the challenge to the individual defendants' authority requires them to rely on the Sűer judgment to establish that authority, the English court will not accept their authority if

the judgment from which it derives is corrupt or given in breach of principles of natural justice or in breach of article 6 of the ECHR.

26. The judge went on to refer to the report of Professor Sir Jeffrey Jowell KC ("the Jowell report") on behalf of the claimants referring to the deterioration in the rule of law and the independence of the judiciary in Turkey which the Erdoğan regime has caused or to which it has contributed. He noted at [67] the claimants' submission that one of the consequences of this state of affairs was that the Turkish judicial system did not at any material time operate independently of the government. One of the manifestations of that lack of independence was said by the Jowell report to be the abolition in 2014 of the then system of criminal peace courts and their replacement by a small pool of criminal peace judges (including Judge Sűer) whose procedures had been the subject of sustained international criticism. They are appointed directly by the government.

27. At [68] the judge noted that this did 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, but the English court concerned with recognising or enforcing such a judgment might wish to adopt a critically analytical approach to the reasoning in the judgment and the evidence on which it was based.

28. The judge recorded at [69] that the claimants contended in relation to the Sűer judgment that the trustees were appointed to assist President Erdoğan to expropriate the assets of the Ipek family in order to stifle political dissent, which was a flagrant abuse of the Turkish system of criminal justice so that it would be contrary to English public policy to recognise the appointment. The judge went on to describe specific aspects of the judgment on which the claimants relied, first that Judge Sűer had been the criminal peace judge responsible for the detention of hundreds of other judges and prosecutors in November 2016 and who had expressed himself in public on Twitter in a manner which an English court would regard as hopelessly incompatible with the conduct of any sort of judicial function.

29. The judge then set out the serious criticisms made by the claimants of the failure of Judge Sűer to evaluate the evidence properly or make a proper assessment as to why there were strong grounds for suspecting that any of the crimes listed in article 133 of the TCPC had been committed. The upshot was that what had occurred was only consistent with the conclusion that the reason for the appointment of the trustees was to facilitate the expropriation of the Koza-Ipek group. The claimants were also highly critical of the investigator whose reports formed the basis for the trustee appointments. He summarised the submission at [75] as being that the appointment of the trustees was unnecessary and disproportionate, not for the proper statutory purposes and that there was no due process under Turkish law.

30. At [76] the judge noted that the judgment of Judge Sűer had been appealed to another criminal peace judge and then to the Turkish Constitutional Court and that both appeals were unsuccessful. He said that this should have mitigated any deficiencies in the judgment by which the original trustee appointment was made. Nonetheless the claimants contended that the process of review and appeal was irredeemably flawed, criticising the Sahinbey judgment as failing to grapple with the central question as to whether there were strong grounds for suspicion that the Koza group was being used as a front for crimes.

31. The judge recorded at [78] the claimants' submission that there was a credible evidential basis for concluding that the Turkish Constitutional Court did not review the Sűer judgment's compliance with article 133 of the TCPC and the suggestion derived from the Jowell report that the current political pressures on all members of the judiciary in Turkey meant that even the judges of the Turkish Constitutional Court could not be expected to have allowed the appeal given the nature of the matter with which they were dealing. At [79] the judge said this was a much more difficult case for the claimants to maintain. It was not obvious why the decision of the Turkish Constitutional Court did not operate as an effective review of the decisions of the lower courts. It was detailed and fully reasoned. The judge considered there was real substance in the submission made by Koza Altin that the decision of the Turkish Constitutional Court meant that the English court was most unlikely to treat the Sűer judgment as corrupt for recognition or enforcement purposes. However he went on to note at [82] that it was accepted on behalf of the defendants that the issues as to deficiencies in the functioning of the Turkish courts, whilst hotly contested, could not be resolved on an interlocutory basis.

32. The judge went on to consider the submissions made by Mr Jonathan Crow KC (QC as he then was) on behalf of Koza Altin. Mr Crow stressed two points. First, that the evidence was that the authority of the existing directors as a matter of Turkish law does not derive from the Sűer judgment but from the administrative decision-making of the SDIF introduced by legislation subsequent to the state of emergency and a later confirmation of the trusteeship by another criminal court, the integrity of whose decision is not subject to a specific challenge. The second point was that the basic principle of private international law was that because Koza Altin is a Turkish company, Turkish law governs the constitution of its board of directors and whether they have been validly appointed, a proposition with which Mr Siward Atkins KC (QC as he then was) on behalf of the claimants did not disagree. Mr Crow submitted that it followed that the English court was not being asked to rule on a point of Turkish law, but to determine that it should not recognise what has happened as a matter of Turkish law, notwithstanding that Turkish law governs the relevant substantive issue of authority.

33. The judge noted at [90] that Mr Crow's oral submissions focused on the argument that the new authority claim is misconceived because there is no real issue as to who the directors of Koza Altin actually are. This was not a case in which the English court was 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 and recognition generally describes a situation where a litigant founds a defence on a foreign judgment. The judge noted at [91] Mr Crow's submission that the substance of the dispute in England was the nature and extent of the rights that Koza Altin has as a shareholder of Koza. Nothing which happened in Turkey and no judgment given by a Turkish court affects the answer to that question.

34. At [93] the judge accepted that submission, concluding that the fact that Koza Altin was being encouraged to exercise shareholder rights by persons appointed pursuant to a flawed Turkish law process was neither here nor there so far as English law was concerned, because English law was not enforcing the flawed Turkish process but simply enforcing the English law right. He went on to say at [94] that the disputed rights in the English company law claim are not founded on any Turkish judgment or

administrative decision, but pre-existed any allegedly flawed decisions and were not affected by them. He made the point that, at root, Mr Ipek's complaint was that he did not like the fact that it is the individual defendants who are in the position to determine what steps Koza Altin should take to vindicate its rights as a shareholder of Koza. The judge concluded that the fact that the individual defendants' ability to do so could be traced back to a flawed Turkish judgment is logically irrelevant so far as the English court is concerned to the question how the dispute should be resolved.

35. The judge then analysed at [95] to [103] the decision of the House of Lords in *Williams & Humbert Ltd v W&H Trademarks Jersey Ltd* [1986] AC 368 (*Williams & Humbert*), upon which the defendants relied. He noted that the case concerned misfeasance proceedings brought by English and nationalised Spanish companies formerly owned by the defendants and other members of the Mateos family but now controlled by appointees of the government of Spain. The defendants contended the plaintiffs were not entitled to relief because the proceedings represented an attempt to enforce a foreign penal law or rights which otherwise ought not to be enforced by the court on public policy grounds.

36. At [97] the judge cited from the leading speech of Lord Templeman explaining why the defendants' case was misconceived on the basis that 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, namely the claims by those companies against the defendants. At [98] the judge said that the context was slightly different from the present case, since here the rule of private international law said to be offended is enforcement of a corrupt foreign judgment rather than enforcement of a foreign penal law, but the judge considered that the underlying principle was essentially the same.

37. At [99] the judge said that, if the defendants did not need to rely upon the Sűer judgment to exercise Koza Altin's rights as a shareholder of Koza, the Sűer judgment did not need to be recognised to determine a substantive issue in the proceedings. He said that in his view they did not because those rights as shareholder exist wholly independently of the judgment. So far as the status of the individual defendants as directors is concerned, all the various judgments and decrees in Turkey have all taken effect and the appointments are valid in Turkish law unless and until set aside, which had not occurred. The judge considered the position as very similar to that in *Williams & Humbert*.

38. He then cited two passages from Lord Templeman's speech:

> "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)

39. He went on to say at [101] that there may be circumstances in which the English court would take a different view, citing *Oppenheimer v Cattermole* [1976] AC 249 (which concerned the Nazi race discrimination laws depriving Jewish citizens of their nationality) but said, citing a passage from *Briggs: Private International Law*, that these cases were probably explicable on the basis that the foreign law is so disgraceful as not to be regarded as a law at all. The judge agreed with Mr Crow's submission that there was nothing remotely like that in the present case. He also agreed with Mr Crow's submission that this was not a case where the English court should be prepared to 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 a remedy. To the extent that he has a claim arising out of breaches of natural justice or his ECHR rights in relation to the Sűer judgment, he was exercising a form of redress in his applications to the ECtHR.

40. At [103] the judge concluded that, whilst the application of the principle was not straightforward, he had reached the view that *Williams & Humbert* provided a principled answer, at least by analogy and that it would be wrong in principle to grant the permission to serve out sought.

41. The judge then dealt with various separate arguments advanced by the claimants on which he found in favour of the defendants but since these arguments were not pursued on appeal, it is not necessary to address them here. The judge's conclusion at [114] was that there was no serious issue to be tried on the new authority claim.

42. Although that made it unnecessary to deal with jurisdictional gateways, the judge dealt with that question briefly. He concluded that the claim for injunctive relief fell within paragraph 3.1(2) of PD6B: "a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction". He accepted that what was sought to be restrained was such acts of the individual defendants as amounted to a holding out in England that they were authorised to cause Koza Altin to exercise its rights in England to act as shareholder of an English company. On the basis that the claim for injunctive relief fell within that gateway it was accepted by the defendants that the other claims would fall within gateways (3) and (4A).

43. The judge then dealt with the defendants' allegations of abuse of process, although they too did not arise. He set out the applicable principles, as to which there was no dispute, at [131] and [132]. He noted at [133] Mr Crow's argument that the service out application and the new authority claim were a plain abuse, on the basis that all the jurisdiction arguments in relation to the authority issue, including any application for permission to serve out, could and should have been dealt with at the same time. The claimants had originally applied for permission to serve the 2016 proceedings out of the jurisdiction but then changed their approach in the light of Snowden J's conclusion on article 24(2). They had deliberately not advanced the application for permission to

serve out before Asplin J when they could have done so, nor was it pursued on appeal, restricting their arguments to the article 24(2) point. Mr Crow submitted that it was too late now for them to take the point.

44. The judge set out at [135] to [139] the claimants' submissions. They said that, after the decision of Snowden J, they had made it clear that they were proceeding with the article 24(2) point first and only then, if necessary, would they turn to the application to serve out. Mishcon de Reya wrote saying that it would be an abuse of process if all jurisdiction points were not dealt with as a whole, but that was not a position the claimants were prepared to accept. At the hearing before Asplin J the defendants said that they were ready to deal with the question of jurisdiction as a whole but the claimants submitted that the question of permission to serve out did not arise because they were not making an application. Counsel then acting for the defendants, Mr Stephen Auld KC (QC as he then was) told Asplin J that his clients understood that the permission application was not being pursued but he had not gone on to say that it should be decided in the alternative in any event. This was not contradicted by the claimants, but they did not confirm that they would not seek permission to serve out at a later stage if necessary.

45. At [139] the judge said that in these circumstances he considered that Mr Atkins was correct that at the hearing before Asplin J it was the defendants who decided not to pursue that part of their jurisdiction application which dealt with permission to serve out. Accordingly the question was not dealt with by Asplin J. The judge referred at [141] to Mr Crow's argument that the article 24(2) challenge had taken nearly three years to final disposition and been very expensive and if the claimants obtained permission to serve the new authority claim out of the jurisdiction, that whole exercise would prove to have been a waste of time. The judge also noted that Mr Crow argued that the abusive nature of the steps the claimants were attempting to take was demonstrated by the fact that they took 17 months to reformulate the claim in the 2016 proceedings after the decision of the Supreme Court, which established that they had been warehousing the proceedings.

46. The judge then recorded Mr Atkins' arguments in response. He argued that in the light of Snowden J's decision on article 24(2) it was not possible to pursue the alternative application for permission to serve out as the effect of his decision was that the 2016 proceedings were not "proceedings to which rule 6.32 or 6.33 does not apply" within the meaning of CPR 6.36. The judge accepted that, in one sense, there was substance in this submission, but did not accept that that in itself meant that the claimants were not in a position to seek permission to serve out as an alternative to their primary case that article 24(2) applied. The court at the *inter partes* hearing could have heard argument on the point and dealt with it on a contingent and anticipatory basis.

47. At [149] to [150] the judge dealt with Mr Atkins' submission that in the Supreme Court, Lord Sales at [44] of his judgment had endorsed the proposition that following the determination that article 24(2) did not apply, it would be open to the claimants to seek permission to serve out. The judge considered this was not a good point as Lord Sales was not addressing the question whether it was in fact open to the claimants to start again with an application for permission. However the judge said at [151] that the appeal process did highlight a difficulty with Mr Crow's argument. The judge considered that, even if the claimants had maintained their alternative application for permission, in all probability Asplin J would have declined to deal with it in the light

of her conclusion on article 24(2) in which case the matter could not have been before the Court of Appeal. The reason the judge considered it likely Asplin J would not have dealt with a permission application was that the argument and evidence on permission to serve out would have added substantially to the weight of the hearing.

48. At [153] the judge said that whilst there would doubtless be many cases where it would be obvious that the alternatives could most efficiently be run together, he was not persuaded this case was one of them. He concluded this is a case in which the streamlined system of jurisdiction provided by the Brussels Recast regime would have been partially undermined if the court concluded that a permission application should have been argued. Further at [154] he concluded that since the claimants had never made any secret of the course they intended to adopt, the defendants could always have invited the court to give a formal ruling on the permission point if they wished to maintain the position that it should be argued before Asplin J. Accordingly the judge concluded it would not have been proportionate or cost effective for the court to be asked to deal with permission to serve out at the same time as the article 24(2) application and, even if asked, the probability was the court would have declined the request.

49. The judge recorded at [157] that Mr Crow submitted that the delay between the Supreme Court decision and January 2021 gave rise to abusive warehousing. The judge cited at [158] the test set out by Arnold LJ in *Asturion Fondation v Alibrahim* [2020] 1 WLR 1627. At [159] the judge said that he was very doubtful that the claimants had been pursuing the litigation with all due expedition but he was not persuaded that Mr Ipek's conduct was abusive in the sense contemplated by Arnold LJ nor that it added materially to Mr Crow's overall argument. There was no reason to believe that the costs had been unduly increased by the course taken. Accordingly, he considered that the application for permission to serve out should not be refused on the additional ground that it amounts to an abuse of process.

50. Finally the judge dealt with the defendants' further summary dismissal application, which, as he said at [160], raises very similar issues to the question of serious issue to be tried. He was prepared to consider the substance of the application, notwithstanding the claimants' argument that there had been no material change of circumstance since Asplin J dismissed the initial summary dismissal application, an argument which he rejected. The judge went on to conclude at [170] that the claimants' strike out application raised the same question as he had determined against them. Since Turkish law governs the issue of authority and, in the light of the fact that there is no serious issue to be tried that those instructing Mishcon de Reya are not authorised under Turkish law to do so, the strike out application was bound to fail.

The Grounds of Appeal and Respondents' Notice.

51. The claimants pursue five grounds of appeal:

    (1) That the judge erred in reasoning that the constitution of the board of Koza Altin is governed by Turkish law and that the Sűer judgment is valid until set aside so that no question of recognition of that judgment arises. Neither the law applied by the foreign judgment nor its validity in the foreign jurisdiction has any bearing on whether the judgment should be recognised in proceedings in England. He should

have found those matters were irrelevant and that the question of recognition of the Sűer judgment did arise.

(2) The judge erred in reasoning that the "substantive issue" in the case was the disputed rights of Koza Altin as a shareholder of Koza and the trustees did not need to rely on the Sűer judgment to exercise those right so that the judgment did not need to be recognised. He should have found that the authority issue was the only "substantive issue" in the 2021 proceedings and the strike out application, alternatively if the rights of Koza Altin are the "substantive issue" in the litigation in some more general sense, the judge was wrong to find that the principles on recognition of judgments were confined to such "substantive issue". He should have found that the trustees did need to rely upon the Sűer judgment to establish their authority to bring or defend a claim in the name of Koza Altin based on its shareholder rights and accordingly they require it to be recognised by the English court.

(3) The judge erred in applying the decision in *Williams & Humbert* and finding that it precluded the claimants from disputing the trustees' authority to act in the name of Koza Altin. In doing so, he conflated (i) the rule against enforcing a foreign penal law with (ii) the principles on recognition of foreign judgments. He should have found that the case has no application to the authority issue because it concerns the prohibition on enforcing a foreign penal law and has nothing to do with the Court's power to decline to recognise foreign judgments on public policy or other grounds.

(4) The judge erred in applying the rule in *Oppenheimer v Cattermole*. He should have found (i) that the principle in that case concerns the stricter test for disregarding a foreign legislative or executive act and so says nothing about whether the Sűer judgment should be recognised and (ii) the nature and degree of injustice involved in the Sűer judgment and subsequent legislative and executive acts in this case could not in any event be resolved on an interlocutory basis, as the parties had accepted.

(5) The judge erred in suggesting that it was necessary for the claimants to sustain challenges to certain measures subsequent to the Sűer judgment. He should have found (i) on the uncontested Turkish law evidence, the subsequent measures operated only to transfer the authority of the original trustees and did not provide a fresh source of authority, such that it is sufficient for the claimants on the authority issue to impugn the Sűer judgment; or (ii) that that question of Turkish law could not be resolved on an interlocutory basis.

52. The claimants contend that by reason of all or any of the errors at (1) to (5), the judge erred in finding there was no serious issue to be tried on the authority issue. He should have found there was a serious issue to be tried, granted permission to serve the 2021 proceedings out of the jurisdiction and refused to dismiss the strike out application.

53. By their Respondents' Notice the defendants seek to uphold the judge's orders on additional grounds:

(1) There was no serious issue to be tried in relation to either the new authority claim or the strike out application in the light of the Turkish Constitutional Court's dismissal of the appeal against the Sűer judgment. The judge held at [79] that the decision of the Turkish Constitutional Court meant that the court was "most

unlikely to treat the Sűer judgment as corrupt for enforcement or recognition purposes". He should have gone further and held that its decision, which there was no or no sufficient reason to impeach, provided a complete answer to the new authority claim and the strike out application.

(1A) There has been a material development since the judgment in that the decision of the ECtHR of 21 October 2021 dismissed the complaint of Mr Ipek about the Sűer judgment and the relief he sought against Turkey. That too provides a complete answer to the new authority claim and the strike out application.

(2) The judge should have concluded that there was no serious issue to be tried in relation to either the new authority claim or the strike out application because the authority of the existing directors of Koza Altin does not derive from the Sűer judgment, but from legislatively-sanctioned administrative decision-making of the SDIF and a later confirmation of their authority by a separate court decision, the integrity of which is not subject to any specific challenge.

(3) The judge should have concluded that the service out application fell to be dismissed on the additional ground that there was no good arguable case that it fell within any jurisdictional gateway. The gateway in para 3.1(2) of PD6B on which the claimants relied is not applicable because the individual defendants are resident in Turkey and all relevant acts in procuring Koza Altin (a Turkish company) to do anything take place in Turkey. There was no evidence that they had done or would ever do anything in this jurisdiction. The judge was wrong to conclude, *obiter*, that the claimants had a good arguable case that this gateway was satisfied.

(4) The judge should have concluded that the service out application fell to be dismissed on the additional ground that it constituted an abuse of process. The judge's reasons for reaching the conclusion that it was not are all unsound. It was for the claimants, not the defendants, to advance the application for permission to serve out and the defendants could not force them to do so. The judge's conclusion that the court might not have dealt with the application in 2016 even if the claimants had advanced it is entirely speculative and diverts focus away from the relevant question which is whether the claimants should have advanced the application in 2016, rather than 2021. The reference to the streamlined approach under the Brussels Recast regime is wrong in principle. Questions of jurisdiction should be dealt with in one go insofar as possible, otherwise one risks the scenario here where an attempt is being made in 2021 to have a second bite of the jurisdictional cherry and set the previous battle to naught.

The parties' submissions

54. I will summarise the submissions of the parties. In doing so, I will, where appropriate, set out citations from authorities on which they particularly relied so that it will not be necessary to cite them again in the Discussion section of this judgment.

55. The core argument of Mr Andrew Scott KC for the claimants on the appeal was that the judge had been wrongly persuaded by the defendants to treat the authority issue as raising a choice of law question, concluding that because Turkish law governs the constitution of Koza Altin as a Turkish company and the individual defendants had authority to represent Koza Altin as a matter of Turkish law, the complaints made by

the claimants about the Sűer judgment were legally irrelevant. The correct analysis was that where a director's authority to act for a foreign company derives from a foreign court judgment, the English court has to determine whether to recognise that judgment and will not do so where the foreign judgment is contrary to English public policy which the Sűer judgment was.

56. Mr Scott made three contextual observations about the judge's conclusion. First, that the judge's task was not to try the authority issue but to apply the test for service out of the jurisdiction. It is not appropriate in an interlocutory procedure such as this to determine controversial questions of law in a developing area such as arose in this case. Mr Scott cited the statement of the principle enunciated by Lord Collins giving the judgment of the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Limited* [2011] UKPC 7; [2012] 1 WLR 1804 (*"Altimo Holdings"*) at [83] to [86], in particular at [84]:

> "It was no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration"".

57. Second, that the authority issue is a narrow and novel one. It is narrow because in most cases, representatives of a foreign company will be appointed by private processes involving the directors or shareholders, not as here by the judgment of a foreign court. It is novel because there is no English or Commonwealth authority specifically addressing how the English court should approach such appointments. The third contextual point is that, faced with this narrow and novel issue, the judge sought to answer it as a matter of principle. The judge had considered that the decision of the House of Lords in *Williams & Humbert* applied by analogy, but Mr Scott submitted that that case is completely irrelevant. It was concerned with the deferential approach adopted by English courts under the foreign act of state doctrine to foreign legislation or executive acts. However, that doctrine has no application to foreign judgments which attract a different principle. This is clear from a series of authorities culminating in the recent decision of the Supreme Court in *Deutsche Bank AG London Branch v Receivers; Central Bank of Venezuela v Governor and Company of the Bank of England* [2021] UKSC 57; [2022] 2 WLR 167 (to which I will refer as "the *BCV* case").

58. At [157] to [159] Lord Lloyd-Jones JSC stated the relevant principle:

> "157. Although judicial rulings of a foreign state are manifestations of state sovereignty, it is now clear that they do not themselves attract the operation of any rule of foreign act of state applicable in this jurisdiction and, as a result, are not entitled to the deference which may be shown to legislative and executive acts of a foreign state. So much was established by Lord Collins delivering the judgment of the Judicial Committee of the Privy Council in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, para 101:
>
> > "The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking

> in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas & Oil Co v Hammer (No 3)* …, is the basis of Lord Diplock's dictum in *The Abidin Daver* … and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it."

158. Rix LJ was able to build on this foundation when delivering the judgment of the Court of Appeal in *Yukos Capital (No 2)* [2014] QB 458, which held justiciable the issue whether judicial acts had been part of a "campaign waged by the Russian state for political reasons against the Yukos group and its former CEO" (paras 29(ii), 90). This difference of approach does not reflect any hierarchical inferiority of judicial acts but rather reflects a shared understanding of how courts should behave under the rule of law. As Lord Mance put it in *Belhaj v Straw* [2017] AC 964, para 73(ii):

> "If one believes in justice, it is on the basis that all courts will or should subscribe to and exhibit similar standards of independence, objectivity and due process to those with which English courts identify."

159. As a result, courts in this jurisdiction are more willing to investigate whether a foreign court is acting in a way that meets the standards expected of a court and whether there has occurred or is likely to occur a failure of substantial justice. For this reason, foreign judgments fall to be assessed under different rules from those applicable to legislative and executive acts and are simply less impervious to review. The matter is admirably expressed by Rix LJ in *Yukos* [2014] QB 458, para 87:

> "So the position is, to put the matter broadly, that whereas in a proper case comity would seem to *require* (at any rate as a principle of restraint rather than abstention) that the validity or lawfulness of the legislative or executive acts of a foreign friendly state acting within its territory should not be the subject of adjudication in our courts, comity only *cautions* that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence. If then the question is asked - Well, why should acts of a foreign judiciary be treated differently from other acts of state, and what is the basis of that difference? - the answer, in our judgment, is that judicial acts are not acts of state for the purposes of the act of state doctrine. The doctrine in its classic statements has never referred to judicial acts of state, it has referred to legislative or executive (or governmental or official) acts of a foreign sovereign. … It is not hard to

> understand why there should be a distinction. Sovereigns act on their own plane: they are responsible to their own peoples, but internationally they are responsible only in accordance with international law and internationally recognised norms. Courts, however, are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law. In other words the judicial acts of a foreign state are judged by judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine, even if the dictates of comity still have an important role to play. As Lindley MR said in *Pemberton v Hughes* [1899] 1 Ch 781, 790: 'If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, *unless they offend against English views of substantial justice*'." (Emphasis added)
>
> In the result, the Court of Appeal therefore agreed with the holding of Hamblen J at first instance, [2011] EWHC 1461 (Comm); [2012] 1 All ER (Comm) 479, para 201, that "there is no rule against passing judgment on the judiciary of a foreign country"."

59. Mr Scott relied upon three lines of authority which establish that, where a person's status derives from a foreign judgment, the English court applies its rules on recognition of foreign judgments and does not simply look at the question as a choice of law one: judgments in rem, determinations of marital status and appointments of receivers and other office holders.

60. The leading authority on recognition of judgments in rem is the decision of the House of Lords in *Castrique v Imrie* (1870) LR 4 HL 414. That concerned an English ship sold under a judgment of the French court whilst in port in France to settle a debt for necessaries. Pursuant to the court order the ship was sold to the defendants. The plaintiff sued in England to recover the ship on the basis that he had a prior title under English law under a mortgage of the ship granted by the original owner before the French court gave judgment. The plaintiff had appeared before the French court to make an objection, but the French court erroneously concluded that he did not have valid title under English law.

61. The House of Lords asked the judges the question whether the plaintiff was entitled to recover the ship from the defendants. The majority opinion was given by Blackburn J. He concluded that the plaintiff was not so entitled, on the basis that the defendants acquired good title under the French judgment, which was entitled to recognition in

England. Mr Scott submitted that Blackburn J treated the issue as turning on recognition of the French judgment not on the question of choice of law which was an important distinction because approached as a choice of law question, the law of France, the situs of the ship, would have applied English law to determine the plaintiff's title and, under English law properly applied, his title was paramount. The plaintiff argued that the French judgment should be disregarded because it involved a misapprehension of English law. Blackburn J considered that fraud would render the French judgment void but this error was not within that exception, so despite the error as to English law, the French judgment was recognised (see 432-434). The House of Lords endorsed Blackburn J's approach: see Lord Hatherley LC at 445-6, Lord Chelmsford at 446-8 and Lord Colonsay at 448.

62. Mr Scott also cited the decision of the Privy Council in *Altimo Holdings.* As he put it, that case involved a dispute between two rival Russian camps concerning the ownership of a Kyrgyz company, BITEL. One camp was the KRG companies who originally held the shares in BITEL, but there was then a coup in Kyrgyzstan and the owners of the KRG companies who were associated with the previous regime left the country. Thereafter, Fellows, a company in the rival camp obtained an order from the Kyrgyz court to register it as shareholder of BITEL in place of the KRG companies. The shares were then transferred by executive order to other companies. The contention of the KRG companies was that the Kyrgyz courts were corrupt and the orders were obtained by fraud, also that the transfers of the shares were in breach of an arbitration agreement and of injunctions granted by the English and BVI courts.

63. The KRG companies were sued in the Isle of Man in a claim to enforce a debt under another Kyrgyz judgment. They defended and counterclaimed on the basis that the judgment should not be recognised because it was obtained by fraud. They also applied for permission to serve out of the jurisdiction a counterclaim for unjust enrichment against Fellows and other recipients of the BITEL shares. They contended that the Kyrgyz court orders under which the transfers of shares had taken place were not entitled to recognition on grounds of English public policy. The defendants to that counterclaim submitted that permission to serve out should be refused because it was bound to fail on the merits, inter alia on the grounds that the defendants were entitled to the shares under the Kyrgyz court orders which were in rem and so could not be impugned in England. The Manx court granted permission to serve out and the defendants' appeal to the Privy Council was dismissed.

64. Mr Scott noted in passing that the Privy Council had rejected any suggestion that the English court could not adjudicate upon allegations of endemic corruption in the foreign justice system. Lord Collins JSC set out the authorities at [97] to [100] and stated the principle to be derived from them at [101]:

> "The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas and Oil v Hammer (No 3)* [1982] AC 888, is the basis of Lord Diplock's dictum in *The Abidan Daver* [1984] AC 398 and the decisions which

> follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it."

65. Mr Scott relied upon the approach of the Privy Council to the Kyrgyz judgments transferring the BITEL shares. At [109], Lord Collins stated the principle:

> "The principle in *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 is that, in the context of recognition and enforcement of foreign judgments at common law, a foreign judgment may be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been produced, or even was produced and rejected, in the foreign court."

66. He then rejected the defendants' argument that that principle was not applicable to judgments in rem, as in that case, because they have proprietary effect, stating at [121] that it was arguable that the exception to the *Abouloff* principle for judgments in rem does not apply in cases of misappropriation and that, in any event, it was arguable that the Kyrgyz judgments should not be recognised on public policy grounds. Mr Scott submitted that Lord Collins was thus holding that it was arguable that the constitution of the shareholders of BITEL was not to be determined by Kyrgyz law, since if that had been the case the short answer would have been that the shareholders were Fellows and those deriving title from them. It was arguable from the English (or strictly, Manx) court's perspective that the true shareholders were the KRG companies because the Kyrgyz judgments that were said to have divested them of their shares were not entitled to recognition in the Manx court.

67. The second line of cases on which Mr Scott relied concerns foreign determinations of marital status. He submitted that, where a party claims a particular marital status under a foreign judgment, the issue does not turn on the choice of law for the validity of the marriage but on whether the foreign judgment is entitled to recognition under English law principles, which is borne out by the leading case, the decision of the House of Lords in the Scottish case of *Van Lorang v Administrator of Austrian Property* [1927] AC 641. The case concerned moveable property in Scotland for which there were competing claims. The Administrator was an office holder under a statutory scheme set up to administer the property of Austrian nationals in the United Kingdom. He would be entitled to the property if the appellant, who was a British subject domiciled in Scotland, was an Austrian national.

68. His case was that she had acquired Austrian nationality by an alleged marriage to an Austrian national. The alleged marriage was celebrated in Paris and the couple lived together in Germany, where they were domiciled. The couple had obtained a decree from a German court declaring the marriage a nullity and the question was whether that judgment should be held binding by the Scottish courts. The Lord Ordinary at first instance held that the German judgment was binding. His decision was reversed in the Court of Session but restored by the House of Lords, which confirmed that the German judgment was entitled to recognition and thus altered the appellant's status.

69. Viscount Haldane, applying what was said by Sir Nathaniel Lindley MR in *Pemberton v Hughes* [1899] 1 Ch 781, held at 659:

> "Our Courts, as he says, never inquire whether a competent foreign Court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed."

Viscount Dunedin, also applying *Pemberton v Hughes*, said at [663]:

> "In order for a foreign decree to be immune from disturbance by an English Court - and in my opinion Scottish may with perfect justice be substituted for English - it must be pronounced between persons subject to the foreign jurisdiction, and deal with a matter with which the Court is competent to deal, and it must not offend against English ideas of substantial justice."

70. This principle has been applied in a series of cases since, in which English courts have held that although a foreign decree of annulment or nullity is a judgment in rem, it is open to the court not to recognise such a decree where it was obtained by fraud or collusion or was contrary to public policy. Mr Scott cited by way of example the decision of the Court of Appeal in *Gray v Formosa* [1963] P 259.

71. The third line of cases on which Mr Scott relies concerns office holders appointed by a foreign court, in relation to which he relied upon passages from *Lightman & Moss on the Law of Administrators and Receivers of Companies* 6th edition. At 30-032 the authors say that, although the position of office holders appointed by a foreign court has not been authoritatively settled, in contrast with out of court appointments (where the office holder can exercise his or her powers in England if authorised by the law of the country where the company is incorporated), in cases of appointment by a foreign court, the English court must satisfy itself that the foreign court was jurisdictionally competent to make the appointment according to the relevant principles of English private international law. Mr Scott referred to *Schemmer v Property Resources Ltd* [1975] Ch 273, where the English court declined to recognise the appointment of a receiver in the United States under the Securities Exchange Act 1934, on the basis that that was a penal law unenforceable in the English courts.

72. Mr Scott submitted that exactly the same approach would apply if the appointment were made pursuant to a foreign judgment which was procured by fraud or corrupt or otherwise contravened English public policy. In support of that submission he relied upon the decision of Snowden J in *Kireeva v Bedzhamov* [2021] EWHC 2281 (Ch) which concerned whether to recognise at common law the appointment of a trustee in bankruptcy under the judgment of a Russian court. At [113], the judge began this part of his analysis with what Mr Scott said was a very important insight:

> "Most of the common law authorities and commentaries to which I was referred do not deal with recognition in quite the same way as the CBIR [Cross-Border Insolvency Regulation], which focusses on recognition of the foreign representative or office-holder. Instead, they treat recognition as a question of recognition by the English court of the foreign court order commencing bankruptcy proceedings."

73. The judge went on to conclude that the bankrupt debtor had submitted to the jurisdiction of the Russian court so that its judgment was in principle entitled to recognition. He then dealt with the bars to recognition of a foreign judgment: fraud, breach of the principles of natural justice and public policy, concluding that the Russian court order was entitled to recognition. That decision to recognise the bankruptcy order was reversed on appeal ([2022] EWCA Civ 35) on the grounds that the judge had been wrong to recognise it given the bankrupt's arguable allegations that it was procured by fraud, which required a trial. Mr Scott submitted that what matters for present purposes is that both Snowden J and this Court applied a recognition, not a choice of law, analysis.

74. Mr Scott also sought to derive support for his core argument from the law on the foreign act of state doctrine and its limits. He relied to a considerable extent on the *BCV* case. The issue there, as in the present case, was who was authorised to represent a foreign corporate body, the BCV, in relation to its assets in England. The first main issue was the recognition issue, whether the English court should recognise as President of Venezuela, Mr Maduro or Mr Guaidó. That turned on the "one voice" principle under our constitution and was not relevant for present purposes. The other main issue which is relevant here is the act of state issue, how far the English court could investigate the validity of appointments to the board of the BCV under legislative and executive acts in Venezuela. The Supreme Court had to consider whether a distinction was to be drawn between such legislative and executive acts in Venezuela and judicial acts in Venezuela, because part of the Maduro board's case was that Mr Guaidó's acts of appointment had been held null and void by the highest Constitutional Court in Venezuela, the STJ.

75. The Supreme Court concluded on the recognition issue, applying the "one voice" principle that, since 4 February 2019, our Government had recognised Mr Guaidó as President and not Mr Maduro (see [110] of the judgment of Lord Lloyd-Jones JSC). Lord Lloyd-Jones then went on to deal with the act of state issue, identifying at [113] four possible rules which were to be treated as aspects of the doctrine, derived from the judgment of Lord Neuberger PSC in *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964. Mr Scott referred in particular to the first two:

> "(1) The first rule ("Rule 1") is that the courts of this country will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state ([2017] AC 964, para 121).
>
> (2) The second rule ("Rule 2") is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state (at para 122)."

76. Mr Scott then referred to the limitations on the foreign act of state doctrine identified by Lord Lloyd-Jones at [136]:

> "The various manifestations of foreign act of state in English law are undoubtedly subject to limitations and exceptions. These were considered in detail by Rix LJ in *Yukos Capital (No 2)*

> [2014] QB 458, paras 68-115 and may be summarised as follows:
>
> …
>
> (2) "[T]he doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights" (*Oppenheimer v Cattermole* [1976] AC 249, 277-278, per Lord Cross of Chelsea; *Kuwait Airways (Nos 4 and 5)* [2002] 2 AC 883 and *Yukos Capital (No 2)*, paras 69–72).
>
> (3) Judicial acts will not be regarded as acts of state for the purposes of the act of state doctrine (*Altimo Holdings …* and *Yukos Capital (No 2)*, paras 73–91)."

77. Mr Scott relied on Exception (2) in relation to his fall-back position that, to the extent that the defendants were right that the appointment of the directors was pursuant to subsequent legislative and executive acts in Turkey rather than the Sűer judgment, those acts were open to challenge on public policy grounds. However his primary case remained that the appointments were made pursuant to or derived from the Sűer judgment, so that Exception (3) applies.

78. Mr Scott then referred to the section of the judgment headed "The judgments of the STJ" from [153] onwards where Lord Lloyd-Jones makes the point that, whilst it might be thought that, once Mr Guaidó was recognised as President as he was in England, Rule 2 of the act of state doctrine would prevent the English court from investigating the validity of his appointments to the BCV as they were sovereign acts of state, this was to overlook the STJ judgments which had declared Mr Guaidó's appointments null and void as a matter of Venezuelan law.

79. Lord Lloyd-Jones set out the grounds of distinction in treatment by the English courts of the executive and legislative acts of a foreign state on the one hand and its judicial rulings on the other in the passage at [157] to [159] which I have already quoted at [58] above. He summarised the position at [161]:

> "There is therefore no rule requiring an unquestioning acceptance by courts in the United Kingdom of the validity or legality of a foreign judgment. Rather, the status of a foreign judgment is left to be determined in accordance with domestic rules on the recognition and enforcement of foreign judgments."

80. As Mr Scott pointed out, in applying those principles to the STJ judgments, Lord Lloyd-Jones noted at [170] that the extent to which those judgments were entitled to recognition by courts in this jurisdiction was outside the scope of the preliminary issues before the Supreme Court. The issue would therefore have to be remitted for further consideration by the Commercial Court, subject to one important caveat:

> "One matter, however, is clear. Courts in this jurisdiction will refuse to recognise or give effect to foreign judgments such as

> those of the STJ if to do so would conflict with domestic public policy. On this appeal we have not been taken to the judgments in question and the Commercial Court will have to address this issue among others when the matter is remitted to it. It is important to note at this point, however, that the public policy of the forum will necessarily include the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state. As a result, if and to the extent that the reasoning of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities depends on the view that he is not the President of Venezuela, those judicial decisions cannot be recognised or given effect by courts in this jurisdiction because to do so would conflict with the view of the United Kingdom executive."

81. Mr Scott said that he would seek to argue if this case goes to trial, that exactly the same analysis should apply if this Court concludes that the Sűer judgment is contrary to English public policy. Having reached that conclusion it would be incoherent for the Court to go on to give effect to legislative and executive acts in Turkey that were premised on the Sűer judgment being valid.

82. Accordingly, Mr Scott submitted in relation to his first ground of appeal, that, applying the lines of authority on which he relied, the judge had been wrong to treat the authority issue as a choice of law question determined by Turkish law rather than a question dependent on whether or not the Sűer judgment was entitled to recognition. The principle which he should have applied was that, where a party asserts in England a right or status derived from a foreign judgment, it must be shown that that judgment is entitled to recognition in line with domestic principles, otherwise that judgment can have no legal effect in this jurisdiction.

83. In relation to the second ground of appeal, Mr Scott submitted that the judge erroneously concluded that the substantive issue in the case was the disputed rights of Koza Altin as shareholder of Koza for which there was no need for the trustees to rely upon the Sűer judgment. An example of that flawed analysis was at [90] to [94] of the judgment, which I have summarised at [33] and [34] above. Mr Scott submitted that this analysis wrongly assumed the authority issue in favour of the defendants. If the claimants were right on the authority issue, what the defendants were doing has nothing to do with Koza Altin's rights, but is the usurpation of those rights by individuals who do not have authority to represent that company. He submitted that before any debate about Koza Altin's rights, there was a prior issue as to whether the defendants were authorised to exercise those rights in this jurisdiction or not.

84. The third ground of appeal was that the judge erred in applying *Williams & Humbert* on which I have summarised the judge's analysis at [35] to [38] above. Mr Scott submitted that that case dealt with two points, neither of which was of any relevance to the claimants' core case on this appeal. The first point was whether the claims there, private law director misfeasance claims, engaged the well-established rule against enforcing foreign penal laws. The House of Lords held they did not because even if the Spanish law was penal, there was nothing left to enforce as the shares in the relevant companies had been transferred under the Spanish legislation. The second point was

whether it would be contrary to English public policy to recognise that Spanish legislation and the House of Lords held it would not. Mr Scott referred to the passages in the speech of Lord Templeman, where having set out the Russian revolution cases, he stated the principle at 431C-E:

> "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. In their pleadings the appellants seek to attack the motives of the Spanish legislators, to allege oppression on the part of the Spanish government and to question the good faith of the Spanish administration in connection with the enactment, terms and implementation of the law of the 29 June 1983. No English judge could properly entertain such an attack launched on a friendly state which will shortly become a fellow member of the European Economic Community."

85. As Mr Scott said this is an example of the deferential approach of the English court to foreign legislative acts under Rule 1 of the foreign act of state doctrine. The English court will recognise the foreign legislation unless it is contrary to English public policy. However, he submitted that this has nothing whatsoever to do with the principles relating to the recognition of foreign judgments, which as the *BCV* case demonstrates are different from the principles applicable under the foreign act of state doctrine.

86. The fourth ground of appeal relates to the judge's conclusion, on the claimants' alternative case, that the claimants cannot rely upon the public policy exception to the foreign act of state doctrine. The judge dealt with this at [101], summarised at [39] above. Mr Scott submitted that this reasoning was unsustainable for three reasons. First, as he had already submitted, the foreign act of state doctrine has no application to foreign judgments, so there is no need for the claimants to invoke an exception to the doctrine to challenge the Sűer judgment. Their challenge to that judgment depends on well-established common law rules attacking foreign judgments as corrupt or contrary to substantial justice and the judge recognised that the claimants had a triable case that the judgment was corrupt and unjust.

87. Second, in so far as the claimants do need to go further than challenging the Sűer judgment and challenge the Turkish legislative and executive acts which do engage the foreign act of state doctrine, Mr Scott submitted that the reasoning at [101] does not recognise the true scope of the public policy exception to the foreign act of state doctrine. Both the decision of the Court of Appeal in *Yukos Capital (No 2)* and the decision of the Supreme Court in the *BCV* case, which post-dates the judge's judgment, make it clear that the exception applies where the relevant foreign act of state either breaches clearly established rules of international law or contravenes English public policy principles or gravely interferes with human rights. *Oppenheimer* does not exhaust the scope of the exception but illustrates it and the judge misunderstood that, thinking the claimants had to show this was an *Oppenheimer* case. He accepted that the claimants had to show that the breaches were pretty grave but submitted that they did so, by reference to the allegations in the re-amended particulars of claim, including the

allegation that the rule of law has generally broken down in Turkey. He submitted that there were serious issues to be tried.

88. Third, it was not appropriate for the court to attempt to resolve these issues on a summary basis, whether the claimants' case on the application was right or not. Mr Scott referred to the fact that the trustees had controlled the company for seven years since the Sűer judgment, preventing the Ipek family from exercising their shareholder rights. The judge had suggested they could seek compensation for trustee mismanagement but that was illusory where the rule of law had broken down and the courts were acting corruptly in the service of the regime to further a campaign of oppression against Mr Ipek and his family. If the claimants were right on the facts, there was no remedy for them in Turkey and it had been unrealistic to think these points could be summarily determined.

89. Mr Scott then developed submissions on the defendants' arguments in Grounds 1, 1A and 2 of the Respondents' Notice seeking to maintain the trustees' authority by reference to developments after the Sűer judgment. In relation to the defendants' argument that the decision of the Turkish Constitutional Court was in effect a "knock-out blow", he said this had not even been argued in the court below and was not foreshadowed in the evidence of the trustees, although he did not seek to argue that it was not open to Mr Crow to argue the point before this Court. Mr Scott submitted that the defendants' argument (based on two Commercial Court decisions) that, where the impugned foreign judgment had been upheld on appeal, it was necessary to establish deliberate misconduct as opposed to just error on the part of the appellate court as well, was wrong as a matter of law. He submitted that what had to be shown to refuse recognition depends on all the circumstances of the case.

90. He sought to draw a distinction between the two Commercial Court cases and the present case. In *Maximov v OJSC Novolipetsky* [2017] EWHC 1911 (Comm); [2017] CLC 121, Sir Michael Burton held after a trial in a case where it was in dispute whether any of the impugned judgments were corrupt, that none of them was. Mr Scott submitted that, in contrast with that case, it was conceded by the defendants that the issue of whether the Sűer judgment was corrupt and whether that alleged corruption was not cured by the horizontal appeal to Judge Sahinbey could not be determined summarily. Furthermore, both *Maximov* and the decision of Moulder J in *PJSC "Rosgosstrakh" v Starr Syndicate Ltd* [2020] EWHC 1557 (Comm) involved conventional appeal processes where the appeal courts addressed whether or not the decision on the merits was right or wrong. In contrast in the present case, there is a conventional appeals process in Turkey but it is not applicable to decisions of peace court judges. Instead there is a special procedure to have the case reviewed by another peace court judge, as happened here. The Turkish Constitutional Court sits outside the conventional appellate structure and its jurisdiction is limited to constitutional points. Therefore it did not consider the merits as to whether the trustees should have been appointed. Mr Scott accepted in argument in answer to Newey LJ that the Turkish Constitutional Court does have jurisdiction to consider human rights issues and that some of the claimants' complaints were about human rights issues but he submitted that the complaint about the corruption of Judge Sűer was not necessarily so.

91. Mr Scott argued that in any event there was a serious issue to be tried as to whether the decision of the Turkish Constitutional Court can be impugned. He submitted that it was accepted that there were serious issues to be tried on the factual case on four

propositions: (i) that the rule of law and the protection of human rights has generally broken down in Turkey; (ii) that Mr Ipek, his family and the Koza-Ipek group have been the target of a politically motivated campaign of oppression by the Turkish state; (iii) in furtherance of that campaign, a peace court judge issued the corrupt Sűer judgment; (iv) the corruption was not cured by the horizontal appeal to Judge Sahinbey.

92. Mr Scott also submitted that the Jowell report supported a number of propositions concerning the geopolitical situation in Turkey and specifically the rule of law and the independence of the judiciary. He submitted that these gave rise to a serious issue to be tried. He accepted that these allegations were not pleaded, but undertook to amend the pleadings if the Court allowed the case to go to trial.

93. Mr Scott made a number of specific criticisms of the judgment of the Turkish Constitutional Court in the present case. He focused on two in his oral submissions. First, the Court's dismissal of the complaint that peace court judges are not independent or impartial as "clearly without ground" at [113] of its judgment is impossible to reconcile with the contrary evidence in the Jowell report and difficult to reconcile with the defendants' position before this Court that they accept that whether the Sűer judgment was corrupt could not be determined summarily. Second, at [111]-[112] the Turkish Constitutional Court concluded that the horizontal appeal was sufficient to meet any injustice because before Judge Sahinbey, Mr Ipek had the opportunity to challenge the expert report relied upon by the government before Judge Sűer. Again this was contrary to the evidence in the Jowell report and to the defendants' stance before this Court.

94. Mr Scott next addressed the defendants' case in relation to the decision of the ECtHR dated 21 October 2021. He submitted that the decision was effectively of a committee of the ECtHR as it sat as a court of three judges rather than seven. He also pointed out that the ECtHR was not part of the Turkish legal system and so neither offered an appeal against the Sűer judgment nor did it have the power to set that judgment aside. The defendants argue that it would now be hopeless for the claimants to seek to impeach the Sűer judgment given that the application to the ECtHR failed, but the claimants disagreed for several reasons. First the application was brought against Turkey with Mr Ipek alleging that the Turkish processes infringed the presumption of innocence and his right to property and to freedom of expression contrary to the ECHR. The ECtHR was not concerned with questions of English public policy or recognition of foreign judgments under English private international law and was not asked to find whether the Sűer judgment was corrupt. The ECtHR judgment did not give rise to *res judicata* or any form of estoppel and any statements of fact which were really assumptions by the ECtHR as to the facts would be inadmissible before the English court under the rule in *Hollington v Hewthorn*.

95. Second, Mr Scott submitted that the ECtHR decision does not shed any light on the serious issues to be tried in this case about the propriety of the Sűer judgment. Its conclusions have nothing to do with the issues before the English court as to the corruption of the Sűer judgment. Thus the ECtHR dismissed Mr Ipek's complaint about the presumption of innocence because it found that the Turkish authorities did not hold him out as guilty of offences but merely the subject of investigation. In relation to the complaint about interference with his property, Mr Ipek put his case before the ECtHR on the basis of breaches of article 6 and A1P1 of the ECHR but the ECtHR assessed

the case only under A1P1 so did not consider whether the proceedings before the various Turkish courts complied with article 6.

96. The ECtHR found that the measures taken in Turkey were proportionate, but its reasons for doing so were unsustainable in the context of the claimants' factual case in the present proceedings. Thus, it found that the measures were ordered by an independent judicial authority and that was Judge Sűer whom the defendants concede was arguably corrupt. Mr Scott submitted that what appears to have happened is that the ECtHR assumed, on the basis of what the Turkish Constitutional Court had said, that the processes in Turkey were impartial and independent, but that was challenged by the claimants in these proceedings. Mr Scott also asked the Court to bear in mind that this committee decision may not be the end of the matter before the ECtHR since Mr Ipek has applied for the matter to be reconsidered by the full Court.

97. In relation to both the decision of the Turkish Constitutional Court and that of the ECtHR, Mr Scott submitted that even if this Court thought the defendants' arguments raised "killer points" the appropriate and fair course would be to remit the case to the Chancery Division for those matters to be tried with all the others.

98. As for Respondents' Notice Ground 2, that the authority of the trustees does not depend upon the Sűer judgment but what the defendants describe as legislatively sanctioned decision making of the SDIF which cannot be challenged because of the foreign act of state doctrine, Mr Scott submitted this was unsustainable for two reasons. First, all the Turkish legislative and administrative decisions provide for the transfer to the SDIF or persons appointed by it of powers that derive from and only from the Sűer judgment. This was a transfer of power not a fresh source of power and thus the claimants do not need to attack the decrees or administrative decisions. If the Sűer judgment is corrupt and cannot be recognised, there is no room left to recognise the Turkish law and administrative acts built upon it.

99. The second reason was one he had already addressed, that if the claimants do need to challenge the Turkish legislative and executive measures they can do so on the basis that the public policy exception to the foreign act of state doctrine arguably applies and that issue cannot properly be decided on a summary basis.

100. On behalf of the defendants, Mr Jonathan Crow KC submitted that Mr Scott's whole argument on the main authority issue about the judge having wrongly treated the issue as one of choice of law rather than recognition of a foreign judgment begs the question whether the English court is being asked to recognise anything that has happened in Turkey at all. He noted that the judge had referred in [92] to the line of well-known cases from *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 concerned with whether those who caused proceedings to be issued on behalf of a company were in fact directors or had lawful authority under the constitution of the company to do so. However, Mr Crow submitted that the judge rightly recognised that the present case was not in that category, because the claimants are not challenging the authority of the individuals who are the directors of Koza Altin under Turkish law. There was no challenge that under Turkish law they are the directors.

101. In answer to points made by the Court in the course of argument that the main issue was not about Koza Altin's rights but about whether, notwithstanding that the individual defendants are directors as a matter of Turkish law, the English court should

not recognise their status or authority because they were appointed pursuant to the Sűer judgment, which was corrupt, Mr Crow sought to argue that the claimants were not challenging the authority of the directors under the applicable law, Turkish law, since they had such authority under that law. Mr Scott was inviting the English court to ignore that. Mr Crow submitted that this was not a question of recognition of a foreign judgment as that question only arises if someone in proceedings here is seeking to rely on a foreign judgment in relation to a dispute which needs to be determined here. However, in this case, there was no dispute as to who the directors are. He submitted that, in effect, Mr Scott was seeking to raise, in the abstract, a debate about whether a foreign judgment should be recognised.

102. Mr Crow submitted that enforcement or recognition of a foreign judgment means giving legal effect in this jurisdiction to the substance of that judgment for the purpose of disposing of a point at issue in the proceedings. Given that there is no contested issue in these proceedings as to whether the individual defendants are the directors of Koza Altin, no question of needing to recognise the Sűer judgment arises. The Court is not being asked to make a ruling on Turkish law, the law of the place of incorporation of Koza Altin, but to decide whether to recognise the authority which the defendants do have. Because the claimants are not seeking to challenge the existence of that authority under Turkish law, the Court is not being asked to give effect to the Sűer judgment or to "recognise" that judgment, as that word is used in this area of the law. The claimants' argument was circular and legally incoherent.

103. In relation to the three strands of authority on which Mr Scott relied, Mr Crow submitted that whilst they illustrated how the court conducts the exercise of deciding whether or not to recognise a foreign judgment, they provided no direct assistance at all in answering the anterior question which was whether, properly analysed, the question of recognition arose at all. For example, he submitted that in *Castrique v Imrie*, the issue for the English court was a property right in a ship, but to determine that issue the court had to decide whether or not to recognise the French judgment dealing with that property right.

104. In answer to a question from Simler LJ, Mr Crow accepted that if there had been a challenge to the Sűer judgment's appointment of the trustees that would be a status question and thus if there was a challenge before the English courts as to whether or not the trustees were authorised to be directors, the English court would have to engage with the question whether or not to recognise the Sűer judgment, but he submitted that that was not this case. The English court was not being asked to recognise the Sűer judgment because that judgment was only relevant to identify who the directors of Koza Altin are and that was not in dispute.

105. Mr Crow submitted that the correct approach was that set out in *Williams & Humbert*. He drew attention to what Nourse J said at first instance at [1986] AC 385D-G about the fact that the plaintiffs were not seeking to enforce the Spanish laws which had already achieved their object of acquiring the ownership of the companies. The same point that there was no question of the plaintiffs seeking to enforce the decrees in England was made by Fox LJ in the Court of Appeal at 396E-G and by Lord Templeman in the House of Lords at 428G and 430D. Mr Crow submitted that in principle, the position was the same here: everything that needed to happen under Turkish law, the law of the place of incorporation, had happened. The individual defendants had been appointed directors of Koza Altin. What was happening was that

in its section 303 and 305 notices, Koza Altin was seeking to exercise rights as a shareholder in Koza under English law, not dependent on anything which had happened in Turkey. The notices were served by Koza Altin, the company, acting through the people who were unquestionably its directors.

106. Mr Crow submitted that the *BCV* case was of no assistance to the claimants, since it did not address the question whether an issue of recognition arose at all. In that case there was a conflict between the "one voice" principle under which our Government and thus the English courts recognised Mr Guaidó as President of Venezuela and what was said by the STJ. There was no equivalent conflict here.

107. He went on to submit that if this Court was against him and determined that it did have to recognise something from Turkey, that something was not the Sűer judgment at all but legislation and administrative decision making of the SDIF. Contrary to Mr Scott's contention, this point and the related point relying on the Turkish Constitutional Court were run by the defendants below. The SDIF point was expressly referred to by the judge at [87] of his judgment and both points were dealt with at some length in the defendants' skeleton argument below.

108. Mr Crow accepted that decree no. 674 was predicated upon there having been a previous decision by a judge that trustees should be appointed under article 133 of the TCPC, which factually was what had occurred in this case. However, he submitted that the legal validity of the powers vested in the SDIF was not predicated on the correctness of the Sűer judgment, simply on the fact that it had occurred. The legal basis for the appointment of the SDIF as trustee was the legislative decree, not the Sűer judgment. He submitted that it was highly significant that the trusteeship had been continued by a decision of the Ankara 24th High Criminal Court dated 9 January 2019. The judge referred to this in [38] of his judgment. That decision provided for the continuation of the "trusteeship duty" by the SDIF. Accordingly, it is simply a matter of record that the Sűer judgment is not now the source of the trusteeship under which the directors were appointed.

109. It followed that the Court was not being asked to recognise a judicial decision in Turkey at all, but appointments made by the SDIF, which are executive acts. Mr Crow relied upon what was said by Lord Lloyd-Jones JSC in the *BCV* case at [135] about the reasons why the English courts will not adjudicate upon the lawfulness or validity under its own law of the executive act of a foreign state:

> "It appears therefore that a substantial body of authority, not all of which is obiter, lends powerful support for the existence of a rule that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state. The rule also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. While the same rationale underpins state immunity, the rule is distinct from state immunity and is not required by international law. It is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. The rule does not turn on a

> conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law of the state in question. On the contrary it is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings. In the words of Lord Cottenham, it applies "whether it be according to law or not according to law". I can, therefore, see no good reason to distinguish in this regard between legislative acts, in respect of which such a rule is clearly established (see paras 171-179 below), and executive acts. The fact that executive acts may lack any legal basis does not prevent the application of the rule. In my view, we should now acknowledge the existence of such a rule."

110. Mr Crow submitted that since the current directors of Koza Altin were appointed by the executive acts of the SDIF, it did not matter whether or not the Sűer judgment was corrupt, because otherwise this Court would be interfering with the executive acts of the SDIF which it could not do unless the case was within one of the exceptions recognised in *Yukos Capital (No 2)* summarised by Lord Lloyd-Jones in [136] which I cited at [76] above. What has happened in Turkey since the Sűer judgment does not depend for its validity under Turkish law upon that judgment. Independent legislation has been passed and independent judicial decisions made.

111. Mr Crow noted that Mr Scott had made what he described as a valiant effort to suggest that the *BCV* case had somehow introduced a more relaxed test as regards the exceptions where the English court would refuse to recognise a foreign executive or legislative act, but that was simply not the case. Of the cases referred to by Lord Lloyd-Jones in [135(2)], *Oppenheimer* concerned the Nazi laws depriving Jewish citizens of their nationality and as Lord Cross of Chelsea said [1976] AC 249 at 278C: "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all", an analysis which the judge had adopted at [101]. Similarly, in *Kuwait Airways* the Iraqi laws expropriating the Kuwaiti aircraft were likened to the Nazi laws, and described as a gross violation of established rules of international law and as an act of international piracy. Mr Crow submitted that the judge had been quite correct to say at [101] that there was nothing remotely like that in the present case.

112. In any event, Mr Crow argued that the decision of the Turkish Constitutional Court provided a complete answer to any objections to the Sűer judgment. He submitted that there was nothing in Mr Scott's point that the Turkish Constitutional Court was not a court of appeal which was examining all the evidence and law de novo. He submitted that, where an English court was being asked not to recognise a foreign judgment on the grounds that it was contrary to English public policy, the fact that it has been subject to bona fide scrutiny at appellate level was an answer without this Court conducting a microscopic examination of what points were taken and what criteria were applied by the Turkish Constitutional Court. Even if that were not so, the judgment of the Turkish

Constitutional Court in fact involved a detailed consideration of the questions of fact and of law that were the foundation of the Sűer judgment.

113. At the outset of the judgment of the Turkish Constitutional Court, the Court states the subject of the application: "The application is related to the claim that the right to a fair trial and property rights as well as freedom of speech and media have been violated due to decisions of raid, seizure and trustee appointment during prosecution for the crimes of management in a terrorist group, financing terrorism, embezzlement and propaganda for a terrorist organisation." Mr Crow submitted that that, in a nutshell, was the complaint that was being made in the present proceedings, as the basis on which the Sűer judgment should not be recognised and that was exactly what the Turkish Constitutional Court was grappling with.

114. The Turkish Constitutional Court then set out at Section III "The Incident and the Facts" over some eight pages of the judgment and identified at Section IV the relevant law setting out various articles of the TCPC including article 133. The Court also set out provisions of the ECHR and reviewed the approach taken by the ECtHR to the complaints. Section V is headed "Review and Reasoning" and extends to thirteen pages of reasons. At the outset of this Section, at [63] the Court said:

> "The applicant initially expressed that the conditions of [article 133] relating to the appointment of a trustee had not occurred in this case. According to the applicant, in order for a trustee to be appointed to a company, there must be a crime being conducted, not a crime conducted already. Also the applicant asserted that there was no strong criminal suspicion which is needed to exist according to the law in this case. Besides the appointment of a trustee was not registered and announced. The applicant for these reasons, complained that injunction cannot be foreseen and was applied against the rule of legal clarity."

Thus contrary to Mr Scott's suggestion that the Turkish Constitutional Court did not review the justification for the appointment of trustees under article 133, that is precisely what it did.

115. The Turkish Constitutional Court then made an assessment which, as Mr Crow said, was the same process as the Strasbourg court employs of determining admissibility, then the question whether property rights are engaged, whether there was an interference with those rights and, if so, whether it pursued a legitimate objective, whether the law was applied and there was a legal basis for what happened and, finally, the question of proportionality. At [113] the Turkish Constitutional Court identified a specific issue the applicant had raised, that the criminal judges of peace courts had been set up in defiance of the principle of natural justice and were neither independent nor impartial. The Turkish Constitutional Court had reviewed such allegations in relation to a number of decisions of criminal peace judges and found the allegations without any basis.

116. As Mr Crow put it, he was not asking this Court to agree with everything that the Turkish Constitutional Court said. That was not the question for us, but rather whether this review by the Turkish Constitutional Court provides a sufficient answer to the criticisms of the Sűer judgment for this Court to say that it will recognise the Sűer

judgment, on the assumption that contrary to his primary case, such recognition is required. The question was not, as Mr Scott suggested, whether the Turkish Constitutional Court is part of the normal appellate structure or whether it was concerned not with facts and law but only fundamental breaches of human rights. That was an erroneous line of argument, because the question in this Court is not whether the Turkish Constitutional Court provides a full de novo review of all the evidence and law, but whether, as it was put in *Maximov*, the judgment of the Turkish Constitutional Court is so perverse that no bona fide court could have reached it. He submitted that it was simply not possible to reach that conclusion in relation to the judgment of the Turkish Constitutional Court. Nor was any such allegation made by the claimants in the re-amended particulars of claim, which simply noted the decision of the Turkish Constitutional Court as part of the chronology of what had occurred in Turkey.

117. Furthermore, Mr Crow said in any event that the complaint that there had been a comprehensive breach of human rights in Turkey was precisely the argument that had been ventilated before the Turkish Constitutional Court and rejected by it. He asked rhetorically why in those circumstances the English court should devote weeks of court time with expert evidence about the geo-political situation and the rule of law in Turkey when faced with judgments going up to the Turkish Constitutional Court, dealing with those issues, from the jurisdiction of a friendly foreign state.

118. Mr Crow submitted that whilst the Jowell report makes a large number of criticisms of different aspects of the administration of justice in Turkey, as the judge correctly pointed out at [79], the Jowell report is as consistent with a finding that the Turkish Constitutional Court is independent, precisely because it does find against the government sometimes and the government simply chooses not to comply with its rulings. Furthermore, that the Turkish Constitutional Court is capable of providing effective remedies for alleged breaches of human rights has repeatedly been recognised by the ECtHR, for example in *Mercan v Turkey* (2016) at [25] and [30]. There, as in previous cases, the ECtHR dismissed the application for failure to exhaust domestic remedies, which as Mr Crow said, it would not have done if it thought that the Turkish Constitutional Court could not provide adequate remedies.

119. Mr Crow then submitted that even if this Court were against him on everything else so far, the decision of the ECtHR of 21 October 2021 in the present case provides a complete answer to the claimants' complaints. Although the court had sat as a committee of three rather than a chamber of seven, apparently to get through the backlog of cases, the decision of the committee had to be unanimous, and such a decision on the merits was binding. Contrary to Mr Scott's submission, there was no jurisdiction for the ECtHR to reopen the decision to declare the application inadmissible.

120. Mr Crow took issue with Mr Scott's suggestion that the ECtHR was not asked to find whether the Sűer judgment was corrupt. He pointed out that we did not know precisely what Mr Ipek's complaint was because he had not put it in evidence, but suggested that what was said in [74] of the judgment entitled this Court to infer that he had sought to contend that the Sűer judgment was politically influenced:

> "The applicant complained that his group was placed under the administration of a curator by decision of a [criminal peace judge]. He alleges that [criminal peace judges] do not constitute

> judicial authorities in accordance with the requirements of Article 6 of the Convention and that they are not independent and impartial."

121. The ECtHR observed at [81] that such a measure of trusteeship was a preventive measure temporarily restricting the use of property by its owner and at [82] that such measure was provided for in article 133 of the TCPC and pursued the legitimate aim of preventing the commission of new offences. At [84] the ECtHR said:

> "This measure was ordered by an independent judicial authority on the basis of technical reports. On this point, the Court recalls that it has already ruled on complaints similar to those of the applicant concerning the independence of [criminal peace judges] and has declared them inadmissible (see *Baş* cited above [269] to [281]). There is nothing in the present case to depart from that conclusion."

In other words, as Mr Crow pointed out, Mr Ipek did complain about the impartiality of Judge Sűer but the ECtHR rejected that complaint because nothing he put in front of the court caused it to depart from its earlier rulings.

122. Mr Crow submitted that Mr Scott's complaint that the ECtHR only dealt with A1P1, not article 6 is purely formal. If there was a deprivation of property that was not in accordance with the law because article 6 was violated, it would have been caught up by the court's ruling. The ECtHR had gone through the complaints in much the same way as the Turkish Constitutional Court did, concluding that there was a legal basis for the measure, it was pursuing a legitimate objective and it was doing so proportionately. Having gone through the complaints from [74] to [97] of its judgment, it concluded at [97] that the complaints under A1P1 were manifestly ill-founded.

123. Whilst Mr Scott was correct that the ECtHR was not an appellate court, Mr Crow submitted that the question for this Court was whether the fact that that court has concluded as it has in relation to alleged fundamental breaches of human rights is sufficient to satisfy this Court that the Sűer judgment should be recognised. The answer to that question does not turn on a minute examination of the scope of the jurisdiction of the ECtHR but involves comparing the allegations of fundamental breaches of human rights made in the re-amended particulars of claim with what is essentially the same territory canvassed before the ECtHR.

124. As for the other points made by Mr Scott in relation to the decision of the ECtHR, Mr Crow submitted that the submission that rulings of that court on the facts are inadmissible in evidence before an English court was a particularly courageous submission given that section 2 of the Human Rights Act 1998 requires English courts to take into account rulings of the ECtHR. He cited the most recent decision on the section, the decision of the Supreme Court in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2022] 2 WLR 133. In particular he referred to [99] of the judgment to demonstrate that the domestic court cannot come to a different view from the Strasbourg court:

> "Other cases which I have cited also indicate that the alignment between Convention rights at the domestic and international

> levels described in *Ullah* was not as narrow in scope as was suggested in *Re G*. For example, in *N v Secretary of State for the Home Department*, para 25, Lord Nicholls stated as a general proposition, in relation to the courts' role under the Human Rights Act: "It is not for us to search for a solution to [the appellant's] problem which is not to be found in the Strasbourg case law". In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*, para 25, Lord Bingham stated unequivocally: "A party unable to mount a successful claim in Strasbourg can never mount a successful claim under sections 6 and 7 of the 1998 Act". In the same case, Lord Nicholls stated at para 34 that "the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg"."

125. To the extent that the claimants sought to argue that they were going to adduce different evidence before the English court from that adduced before the ECtHR, then, Mr Crow submitted, one was in the territory of abuse of process, with the claimants having had a go before the Turkish Constitutional Court, then before the ECtHR, then seeking a third bite of the cherry here. By inviting this Court to decide that he has an arguable case that the Sűer judgment was corrupt, Mr Scott would be inviting this Court to go behind what the ECtHR had decided. Furthermore, in relation to the ECtHR's decision, Mr Scott could gain no assistance from any concession by the defendants that the issue as to whether the Sűer judgment was corrupt could not be determined summarily. The ECtHR decision was not an interlocutory decision, but a ruling on the evidence before it and, in any event, any concession was made before that decision, so that the defendants should not be held to it.

126. Mr Crow then addressed his Respondents' Notice points about jurisdictional gateways and abuse of process. On the challenge to the judge's conclusion that the claim for an injunction against the individual defendants fell within para 3.1(2) of PD6B, he submitted that there was no relevant conduct within the jurisdiction to be restrained. Although the case was pleaded by the claimants as one where what was sought to be restrained by an injunction was acts by the individual defendants within the jurisdiction, on analysis the individual defendants, who were all in Turkey, had not carried out any acts here. Their acts as directors of Koza Altin, a Turkish company, were all carried out in Turkey.

127. The judge relied upon the decision of the Divisional Court in *Tozier v Hawkins* (1885) 15 QBD 650 on an earlier version of the relevant gateway. However, as Mr Crow pointed out, in that case it was effectively conceded during the course of argument that the acts sought to be restrained, there the publication of a libel, had been committed in England. The case was decided on another point, that the court had jurisdiction to grant such an injunction against a defendant resident outside the jurisdiction. Accordingly, as Mr Crow submitted, the case is of little, if any, assistance here.

128. Mr Scott dealt with the gateway issue shortly in his reply submissions. He submitted that it turned on attribution. If the claimants were correct on the authority issue then the acts done by the directors will be their own acts not the acts of Koza Altin, the company. The delivery of the section 303 and 305 notices and the attempt to call the meeting were all acts which took place in England and the injunction sought is to restrain the directors

from acting on the matters which they would be doing in England, so that the gateway in paragraph 3.1(2) of PD6B was clearly satisfied.

129. In relation to abuse of process, Mr Crow submitted that it was an abuse for the claimants to have only pursued exclusive jurisdiction under article 24(2) and not pursued an alternative application for permission to serve out at the same time. By only pursuing the former application, the claimants deprived the court of the opportunity to case manage the case appropriately. He said that paradoxically, the claimants had made an application on both grounds and put evidence in relation to permission to serve out before the court but then unilaterally decided not to ask the court to rule on it so that the astonishing position was now reached where the proceedings were issued six years ago, there have been four trips to the Court of Appeal and one to the Supreme Court, but we are still arguing about permission to serve out.

130. Mr Crow relied upon the letter his solicitors wrote to the claimants' solicitors in November 2016 in the run-up to the hearing before Asplin J which made the point forcefully that all issues of jurisdiction should be dealt with as a whole and that seeking to have those issues dealt with piecemeal was an abuse of process, although he accepted that saying that it was an abuse of process did not make it one.

131. He submitted that the judge's analysis that, because Mr Auld on behalf of the defendants had told Asplin J that his clients understood the permission application was not being pursued, but not then gone on to say the court should decide the issue in the alternative in any event, it was the defendants who decided not to pursue that part of their own application, was just wrong. The onus could not be on a defendant to force the claimant to move an application that the claimant chooses not to move. In their skeleton argument before Asplin J, the defendants had said that they were ready to deal at the hearing with the question of jurisdiction as a whole and invited the court to do so, although Mr Crow accepted the issue was not pursued orally at the hearing.

132. Mr Crow then submitted that the delay in moving forward the 2016 proceedings was a relevant factor in considering whether there had been abuse. That delay was all the more grievous because Mr Ipek was sitting on interim relief granted in December 2016 which gave him de facto control over Koza through his golden share. It was incumbent on him to move the proceedings forward and not warehouse them.

133. He submitted that the gravity of Mr Ipek's conduct was aggravated by the fact that the English court had found on an interlocutory basis that it was highly likely that the share purchase agreement he was relying on in an ICSID arbitration was a forgery and that he was in breach of fiduciary duty as a director of Koza. In relation to those points, which Mr Scott rightly characterised as jury points, Mr Scott submitted that there had been no trial on either of those issues and no findings on them. They were serious issues which could only be resolved at trial.

134. Mr Scott dealt with abuse of process in his reply submissions. He made the point that one is looking at this on the hypothesis that the claimants have shown a serious issue to be tried on issues of corruption, public policy and foreign act of state which passes through the jurisdictional gateways and for which England is the appropriate forum. It would require the clearest possible facts to support a conclusion of abuse in that context, which the defendants did not get anywhere near.

135. He reminded this Court of what was said in an earlier appeal in this case about the function of this Court in relation to appeals from decisions on abuse of process. In *Koza Ltd v Koza Altin* [2020] EWCA Civ 1018, [2021] 1 WLR 170 at [34] Popplewell LJ cited the judgment of Simon LJ in *Michael Wilson & Partners v Sinclair* [2017] 1 WLR 2646 where at [48] that judge set out the principles, including (6):

> "An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Laing v Taylor Walton* case, para 13."

136. At [35] Popplewell LJ noted that the same point was made by Thomas LJ in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748 at [16]:

> "an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion which was impermissible or not open to him."

137. On the basis of these applicable legal principles, Mr Scott submitted that Mr Crow's submissions completely ignored the question whether he could show whether the judge had erred in that way. Whilst Mr Crow disagreed with the weight or emphasis put by the judge on certain matters, that was not good enough. He had to show that the judge had taken account of matters he ought not to have taken into account or had failed to take into account matters he should have taken into account. Mr Crow had not sought to allege any of that, so the abuse case on appeal was simply not open to him.

138. To the extent that it was necessary to deal with the points made, Mr Scott submitted that the judge had been right in concluding that it would have been open to the defendants before Asplin J to follow through the threats they had made in correspondence by inviting the judge to declare that the case was not suitable for permission to serve out of the jurisdiction, but they had chosen not to do so. That was a relevant consideration for the judge to take into account in assessing whether there had been an abuse.

Discussion

139. Notwithstanding the careful analysis of the judge and the ingenious submissions of Mr Crow on the main authority issue, I consider that the judge's approach to that issue was incorrect. I consider that Mr Scott is correct that the authority issue should not be resolved by a choice of law or applicable law analysis such as found favour with the judge, concluding that because the directors were appointed by the Turkish court and Turkish law regards them as validly appointed, that is the end of the matter. That approach has the effect of assuming the authority issue in favour of the defendants. The

issue is not about the exercise of Koza Altin's rights, as the judge seems to have thought, but about whether, despite the position under Turkish law, the process by which the directors were appointed, by the Sűer judgment, was a corrupt one, so that their appointment should not be recognised by the English court, which should conclude for the purposes of proceedings in England that the defendants do not have authority to act for Koza Altin.

140. The recognition approach for which the claimants contend ensures that the English court has a control mechanism in place in relation to the authority issue. Were the choice of law approach the correct one, then in the extreme example which Newey LJ put to Mr Crow in the course of argument, if the company was incorporated in an endemically corrupt jurisdiction, where the judges, without having to apply the law, simply appointed a board of directors, the hands of the English court would be tied. That seems entirely counter-intuitive and, in my judgment, should not and does not represent English law.

141. The judge concluded that, because under Turkish law, the directors were validly appointed, their authority could not be questioned before the English courts by applying principles derived from *Williams & Humbert* by analogy. However, that is where the judge fell into error, because *Williams & Humbert* is irrelevant to the issues in the present case. There were essentially two issues in that case. The first concerned the approach of the English court to the legislative acts of a foreign state. Applying what was in effect the foreign act of state doctrine, albeit before its development in later case law, culminating in the *BCV* case, the courts held that they would not go behind or question the validity of foreign laws. Lord Templeman recognised that there might well be an exception if the foreign law were contrary to public policy, if, as he said at 427G: "English law abhorred the compulsory acquisition legislation of every other country" or if the foreign law offended human rights, as in *Oppenheimer* to which Lord Templeman referred at 434C-E.

142. The second issue concerned the scope of what is sometimes called "the revenue rule", that English courts will not enforce, directly or indirectly, the penal laws of a foreign country. This issue is dealt with most fully in the speech of Lord Mackay of Clashfern at 437-441. The House of Lords held that, even if the Spanish compulsory acquisition law was penal, the plaintiffs were not seeking to enforce it directly or indirectly because the property had already been transferred to them pursuant to the compulsory acquisition law.

143. Neither of these issues arises here, at least so far as the Sűer judgment is concerned, as the issue is whether that judgment should be recognised if it was corrupt as the claimants allege. The question of whether a foreign judgment should be recognised by the English court does not attract the foreign act of state doctrine but a different principle, as is clear from the passage at [157] to [159] of the judgment of Lord Lloyd-Jones in the *BCV* case set out at [58] above. As he said at [159]:

> "…courts in this jurisdiction are more willing to investigate whether a foreign court is acting in a way that meets the standards expected of a court and whether there has occurred or is likely to occur a failure of substantial justice. For this reason, foreign judgments fall to be assessed under different rules from

> those applicable to legislative and executive acts and are simply less impervious to review."

144. I consider that, in principle, if the claimants had what would otherwise be an arguable case that the individual defendant directors were appointed pursuant to a corrupt foreign judgment so that there had been a failure of substantial justice, there would be a serious issue to be tried as to whether or not the English court should recognise their authority to act on behalf of Koza Altin, notwithstanding that under Turkish law, the law of the place of incorporation of the company, they have such authority. The correct analogy is not with *Williams & Humbert*, which does not concern foreign judgments or their recognition, but with the three categories of case relied on by Mr Scott which do concern foreign judgments and their recognition, judgments in rem, cases of marital status and foreign office holders appointed pursuant to the judgment of a foreign court. Those cases establish that where a person's status derives from a foreign judgment, the English court applies its rules on recognition of foreign judgments to determine whether that status should be recognised and does not simply accept without more the position under the relevant foreign law. The authority issue is likewise one as to the status of the defendants as directors of Koza Altin, as Mr Crow effectively accepted during the course of argument (see [104] above).

145. The decision of the Privy Council in *Altimo Holdings* (considered at [62] to [66] above) is of particular relevance. The defendants to the counterclaim sought to argue that they were the shareholders pursuant to the Kyrgyz court orders which were judgments in rem which could not be impugned before the English courts. That contention was rejected by the Privy Council, which held that it was arguable for the purposes of permission to serve out that the Kyrgyz judgments should not be recognised by the English court on grounds of public policy. I agree with Mr Scott's submission that this amounted to holding that the constitution of the shareholders of BITEL was not to be determined simply by applying Kyrgyz law and that it was arguable from the perspective of the Manx court that the true shareholders in BITEL were the KRG companies because the Kyrgyz judgments which had divested them of their shareholdings were not entitled to recognition before the Manx courts. I consider that the same analysis should apply to the Turkish directors in the present case as applied to the Kyrgyz shareholders there. If they were appointed pursuant to the Sűer judgment and if that judgment were arguably corrupt, then the judge should have determined that there was a serious issue to be tried as to whether the authority of the individual defendants to act as directors of Koza Altin should be recognised by the English court.

146. However, for reasons other than the analogy with *Williams & Humbert* which the judge adopted, I do not consider that there is such a serious issue to be tried, both because the authority of the individual defendants to act as directors is not even arguably derived from the Sűer judgment and, even if it were, there is no serious issue to be tried that the Sűer judgment was corrupt in the light of the decisions of the Turkish Constitutional Court and/or the ECtHR. I will take those points in turn.

147. Whilst the original trustees were appointed as directors pursuant to the Sűer judgment, as set out at [7] above the identity of the directors changed from time to time pursuant to further orders of the criminal peace court, so that some but not all of the trustees appointed by the Sűer judgment were directors when the 2016 proceedings were commenced in August 2016 and thus became defendants to those proceedings. However, in September 2016, legislative decree no 674 was promulgated under which

the powers of trustees such as those appointed to Koza Altin were transferred to the SDIF, part of the executive, and the SDIF then appointed a new board of directors to Koza Altin. The SDIF has made a number of subsequent changes to the identity of the directors, most recently by a decision dated 5 November 2020 (referred to at [18] above), by which the individuals who were the directors at the time the 2021 proceedings were commenced were appointed. It is the authority of those directors which the claimants seek to put in issue.

148. Contrary to Mr Scott's submissions, in my judgment neither decree 674 making the SDIF trustee nor the subsequent executive acts of the SDIF appointing directors to Koza Altin from time to time, up to and including the appointment of the individual defendants in November 2020, can be said to be derived from the Sűer judgment or premised on the Sűer judgment being valid. I agree with Mr Crow that the decree is simply predicated on the fact that chronologically the Sűer judgment and other judgments like it had occurred, not on the validity of that judgment. The legal basis for the appointment of the SDIF as trustee was that legislative decree, not the Sűer judgment.

149. Furthermore, I agree with Mr Crow that it is significant that the trusteeship of the SDIF was continued by a decision of the Ankara 24th High Criminal Court of 9 January 2019, which provided for the continuation of the "trusteeship duty" by the SDIF. There has been no specific challenge by the claimants to that judgment or any suggestion that it was corrupt. I also agree with Mr Crow that it is a matter of record that the Sűer judgment is not now the source of the trusteeship under which the directors were appointed. The source of the trusteeship of the SDIF is the legislative decree 674 confirmed by the January 2019 judgment and the individual defendants were appointed by the executive act of the SDIF.

150. It follows that it is Turkish legislative and executive acts from which the current directors derive their authority to act as directors of Koza Altin, not the Sűer judgment. In those circumstances, Rules (1) and (2) of the foreign act of state doctrine as set out in [113] of Lord Lloyd-Jones' judgment in the *BCV* case (quoted at [75] above) apply and the English court will recognise and will not question the effect of those foreign legislative and executive acts unless the claimants can establish that one of the exceptions summarised at [136] of the judgment in the *BCV* case applies. The relevant exception is that the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law or are contrary to English principles of public policy or constitute a grave infringement of human rights. Lord Lloyd-Jones then cites *Oppenheimer*, *Kuwait Airways (Nos 4 and 5)* and [69]-[72] of *Yukos Capital (No 2)*.

151. As set out at [87] above, Mr Scott sought to argue that cases like *Oppenheimer* may not exhaust the exception but are an example of it, but to the extent that this was a suggestion that the exception is of potentially wider scope, that is misconceived. Both *Oppenheimer* and *Kuwait Airways* demonstrate that something very flagrant must have occurred before the exception is engaged: in the case of *Oppenheimer* a so-called law constituting so grave an infringement of human rights as not to be a law at all, in the case of *Kuwait Airways* a gross violation of international law amounting to piracy. Rix LJ pointed out in *Yukos Capital (No 2)* the exception is a narrow one as Lord Hope recognised in *Kuwait Airways* and, in *Yukos Capital (No 2)*, this Court refused to extend it to expropriation without compensation. Nothing in [153] to [156] of the judgment of

Lord Neuberger PSC in *Belhaj v Straw* (to which Mr Scott referred us in his reply submissions) casts doubt on the narrowness of the exception.

152. Even allowing for the fact that this appeal is from an order made on an interlocutory application, not after a trial, I consider that the judge was quite right to conclude at [101] of the judgment that the complaints made by the claimants about the position in Turkey are nothing remotely like the extreme and egregious cases where the exception would apply. The judge was thus correct in concluding (which he did at [103], albeit in the context of saying that the exception did not apply to preclude the application of the principle in *Williams & Humbert*) that the claimants could not show a serious issue to be tried that the exception applied.

153. Even if, contrary to the analysis I have just expounded, the authority of the current directors is derived from the Sűer judgment, I consider that the effect of the judgments of the Turkish Constitutional Court and/or of the ECtHR of 21 October 2021 is that the claimants cannot establish that there is a serious issue to be tried that the Sűer judgment was corrupt and should not be recognised by this Court.

154. The judgment of the Turkish Constitutional Court is some 30 pages of well-reasoned analysis. As Mr Crow said (recorded at [112] above), at the outset of the judgment it states in a nutshell what the complaint was and is, that the applicant's rights to a fair trial and property rights had been violated by, inter alia, the appointment of the trustees pursuant to the Sűer judgment. Contrary to what Mr Scott suggested, the Turkish Constitutional Court did review the justification for the appointment of trustees under article 133 of the TCPC, as set out at [114] above. It engaged in an assessment which, as Mr Crow said, closely followed the approach of the ECtHR, albeit with different nomenclature. It considered at [113] the specific issue the applicant had raised that criminal peace courts were courts set up in defiance of natural justice and were neither independent nor impartial. It noted that it had considered such allegations in relation to previous decisions of criminal peace judges and found them without foundation. That reference to its previous analyses was precisely the same approach which the ECtHR adopted in its decision in due course.

155. There is nothing in the judgment of the Turkish Constitutional Court, which I have considered carefully, to suggest that it did not deal with the issues raised by the applicant or that its approach to those issues was anything other than impartial. As I note at [92] above, Mr Scott relied upon a number of criticisms of the Turkish legal and judicial system contained in the Jowell report, but none of these is a specific criticism of this decision of this Turkish Constitutional Court. As the judge correctly said at [79]: "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."

156. I agree with Mr Crow that there is nothing in the claimants' point that the Turkish Constitutional Court is not part of a normal appellate structure or did not provide a full de novo review of all the evidence and law (although on my reading it conducted a pretty thorough analysis of the issues raised). When an impugned foreign judgment has been subject to review by a higher court which has rejected the criticisms made, then unless the decision of the higher court can itself be impugned as not having been made in good faith, it is entitled to be recognised by the English court and its conclusions are entitled to be respected. The judge correctly stated the applicable principle at [79]

derived from *Maximov* at [53]-[54]. Mr Scott sought to distinguish *Maximov* because it was a decision reached after a full trial, but the principle is of general application, as stated by Sir Michael Burton at [15]:

> "The fact that a foreign court decision is manifestly wrong or is perverse is not sufficient (see for example *Dicey, Morris and Collins, The Conflict of Laws* (15th edn) at 14-163, *OJSC Bank of Moscow v Chernyakov* [2016] EWHC 2583 (Comm) and *Erste Group Bank AG (London) v JSC VMZ Red October* [2013] EWHC 2926 (Comm)). The decision must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it."

157. When the issue as to whether the judgments in question, including the reviewing judgment, can be impugned arises at the interlocutory stage of an application for permission to serve out, the issue is whether the applicant who seeks to impugn the judgments can show a serious issue to be tried. The judge was clearly doubtful whether the claimants could do so in this case, stating at the end of [79]:

> "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."

158. However, the judge did not decide this issue against the claimants. His reason for not doing so is apparent from [82] and [83] of his judgment:

> "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 a 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…"

159. In his submissions to this Court, Mr Crow accepted that, whilst in his oral submissions before the judge he had not specifically dealt with whether there was a serious issue to be tried in relation to the integrity of the decision of the Turkish Constitutional Court, he had always made it clear to the judge that he was not abandoning anything that was in his written submissions. I note that in his skeleton argument before the judge at [117(1)] he referred to the decision of the Turkish Constitutional Court and to the

decision of the ECtHR of 11 May 2017 referred to at [6] above declaring Mr Ipek's application as inadmissible for failure to exhaust domestic remedies. As Mr Crow had said at [109] that was an important point because, at the very time when Mr Ipek's appeal to the Turkish Constitutional Court was pending, the ECtHR was of the view that the Turkish Constitutional Court was capable of providing redress for ECHR violations, as the ECtHR had previously decided in *Uzun v Turkey* (2013) and *Mercan v Turkey* (2016). At [118] of his skeleton argument, Mr Crow went on to say this (in a passage repeated in essentially the same terms in the skeleton argument for this appeal at [37(b)]):

> "Nowhere in the claimants' (extensive) evidence is there any attack on the *bona fides* of the Turkish Constitutional Court. Quite the reverse-the suggestion is that one of the problems in the Turkish legal system is that the decisions of the Constitutional Court are not properly implemented when they go against the judgment:[passages from the Jowell report are then cited.] Nor is there any specific attack on the Constitutional Court's decision of 24 May 2018 dismissing Mr Ipek's appeal against the appointment of trustees. Nor are there even any pleas on these matters. In the circumstances, any "non-recognition" of judgments case could not get off the ground".

160. Accordingly, in my judgment, there is no proper basis for any suggestion that the defendants had somehow conceded before the judge that the claimants had an arguable case which should go to trial that the decision of the Turkish Constitutional Court lacked integrity or was somehow itself corrupt. There is, in any event, no serious issue to be tried as to the integrity of that decision. As the judge correctly said at [76]: "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." In my judgment, the decision of the Turkish Constitutional Court did so in relation to the Sűer judgment and, in consequence, there is no serious issue to be tried as to whether the Sűer judgment should be recognised in England.

161. In any event, it seems to me that the matter is put beyond doubt by the judgment of the ECtHR of 21 October 2021. There is nothing in the point that it is a judgment of a three judge rather than a seven judge court. It is unanimous in deciding that Mr Ipek's application is inadmissible and it is a final decision. Although Mr Scott disputed Mr Crow's submission that there was no right of review or appeal, the basis of the renewed application by Mr Ipek to which he referred us seems distinctly unpromising and, in my judgment, we should proceed on the basis that the ECtHR has decided twice now that Mr Ipek's applications to it are inadmissible.

162. I agree with Mr Crow's submission that this Court should infer that Mr Ipek was asking the ECtHR to determine whether or not the Sűer judgment was corrupt. Mr Ipek has chosen not to disclose his application to the ECtHR, but this Court can safely infer that this was one of the issues raised not only from the passages in the ECtHR judgment which I have set out at [120] and [121] above, but from the close analysis of the history of the case in the ECtHR judgment. The ECtHR expressly rejected the complaint about the criminal peace court.

163. At section 3 of "A: The circumstances of the case", the ECtHR set out in detail from [43] to [64] the decision of the Turkish Constitutional Court without any criticism as to its independence or impartiality. On the contrary, later in the judgment at [96] the ECtHR observed that the applicant could at any time request the judicial authority (evidently a reference to the criminal peace court) to lift the measure appointing the trustees and, if necessary, refer the matter back to the Turkish Constitutional Court, particularly if the duration of the measure should become excessive. It would hardly have done this and thus concluded that the applicant would have an effective domestic remedy if it had doubts as to the independence and impartiality of the Turkish Constitutional Court.

164. The ECtHR concluded at [97] that the complaints under A1P1 were manifestly ill-founded. I agree with Mr Crow that the complaint by Mr Scott that the ECtHR did not deal with Mr Ipek's article 6 rights is no more than formal. As Mr Crow said, if there had been a deprivation of his property not in accordance with the law because article 6 was breached, it would have been caught up in the ECtHR's comprehensive ruling. In any event, it is clear from the passage at [74] of the ECtHR judgment quoted at [120] above that the Court did deal with an allegation of breach of article 6 in relation to the allegation that the criminal peace courts are not independent and impartial and rejected that allegation.

165. Mr Scott is no doubt right that, as a matter of strict analysis, the judgment of the ECtHR does not give rise to *res judicata* and that its findings of fact may not be admissible as such, but what the passage from *Elan-Cane* quoted at [124] above does demonstrate is that, to the extent that the claims made by Mr Ipek in these proceedings involve allegations of breaches of the ECHR, those claims cannot succeed in the light of the dismissal of his complaint by the Strasbourg court.

166. However, that gives rise to the wider question whether in circumstances where both the Turkish Constitutional Court and the ECtHR have dismissed the claimants' allegations about the criminal peace court as without foundation, it can still be said that there is a serious issue to be tried before the English court as to whether the Sűer judgment was corrupt. In my judgment, the clear answer to that question is in the negative.

167. Accordingly, albeit for different reasons to those of the judge, I consider that there is no serious issue to be tried as to the authority of the directors of Koza Altin and the judge was right to reach that conclusion and to refuse permission to serve out of the jurisdiction. On that basis, the appeal must be dismissed.

168. In those circumstances, it is not strictly necessary to deal with the points in the Respondents' Notice about the jurisdictional gateway and abuse of process and I can deal with those points shortly.

169. I consider that the judge was right to conclude that the claimants would have had a sufficiently arguable case within paragraph 3.1(2) of PD6B for the reason Mr Scott gave. The acts in relation to the sections 303 and 305 notices and the attempt to call a meeting all took place in England and, if the claimants had demonstrated a serious issue to be tried on the authority issue, it would have been arguable that, because the directors did not have authority to act for Koza Altin, any such acts were attributable to them.

170. On abuse of process, the applicable test in relation to an appeal from a judge's order in such a case is correctly stated by Popplewell LJ in [34] and [35] of his judgment in the earlier appeal in this case (quoted at [135] and [136] above). This Court will not interfere unless the judge has failed to take into account something he should have taken into account or taken into account something he ought not to have taken into account. Nothing which satisfies that test has been demonstrated here. The closest Mr Crow got to it was his complaint about the judge taking into account the fact that the defendants had not pursued before Asplin J their threat in correspondence to invite the court to deal with the application for permission to serve out at the same time as the article 24(2) application. However, in my judgment that was a matter the judge was clearly entitled to take into account in determining in the light of all the circumstances of the case whether there had been an abuse of process.

171. In any event, even if the claimants had pursued their application for permission to serve out at the same time, once the court determined that it had exclusive jurisdiction under article 24(2), any such alternative application could only have been on a contingent basis. The court could not have granted permission to serve out given that CPR 6.33 applied. On that basis and given the amount of material produced on permission to serve out and the amount of court time it would probably have occupied, I consider it extremely unlikely that Asplin J would have been prepared to hear the application.

172. All the other allegations relating to abuse were satisfactorily dealt with by the judge, so there is nothing in this point. However, overall for the reasons I have given, the appeal must be dismissed.

Lady Justice Simler

173. I agree.

Lord Justice Newey

174. I also agree.