Neutral Citation Number: [2019] EWCA Civ 891

Case Nos: A3 2018 0190
A3 2018 1620

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Richard Spearman QC; The Hon Mr Justice Morgan
[2017] EWHC 2889 (Ch); [2018] EWHC 1612 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE PETER JACKSON

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Between:

(1) KOZA LTD	**Claimant/ Appellant**
(2) HAMDI AKIN IPEK	**Claimant**
- and -	
(1) MUSTAFA AKCIL **(2) HAYRULLAH DAGISTAN** **(3) MAHMUT HIKMET KELES** **(4) HAMZA YANIK** **(5) ARIF YALCIN**	**Defendants**
(6) KOZA ALTIN ISTEMELERI AS	**Defendant/ Respondent**

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Lord Falconer of Thoroton, Vernon Flynn QC, Siward Atkins and **Andrew Scott** (instructed by **Gibson Dunn and Crutcher UK LLP**) for the **Appellant**
Jonathan Crow QC and **David Caplan** (instructed by **Mishcon de Reya LLP**) for the **Respondent**

Hearing dates: 9-10 April 2019

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Approved Judgment

Lord Justice Floyd:

1. There are two appeals before the court, both arising out of undertakings given to the court by the appellant, Koza Ltd, that it would not "*dispose of, deal with or diminish the value of any funds belonging to [it] or held to [its] order other than in the ordinary and proper course of its business*". The first, which I will call "the ICSID funding appeal", is from the order of Mr Richard Spearman QC, sitting as a deputy High Court Judge in the Chancery Division, sealed on 21 December 2017. By his order, Mr Spearman declared that Koza Ltd's proposed provision of funding to Ipek Investment Limited ("IIL") to finance fees, disbursements and a possible adverse costs order in an arbitration to be launched by IIL against the Republic of Turkey before the International Centre for the Settlement of Investment Disputes ("ICSID") would not be in the ordinary and proper course of the business of Koza Ltd. The second, which I will call the "extradition expenses appeal", is from the order of Morgan J, sealed on 21 June 2018. By that order, Morgan J declared that proposed payments to solicitors for fees incurred in relation to legal advice, assistance and representation provided to the second defendant and sole director of Koza Ltd, Mr Hamdi Ipek, in connection with the Republic of Turkey's request that Mr Ipek be extradited to Turkey, would not be in the ordinary and proper course of the business of Koza Ltd.

2. The parties are engaged in a hard-fought dispute in the Chancery Division over the control of Koza Ltd. I explained the background to the dispute in my judgment, with which Flaux LJ agreed, in a previous appeal to this court in these proceedings, *Koza Ltd and another v Akcil and others* [2017] EWCA Civ 1609. In brief summary, Mr Ipek is a director of Koza Ltd and a member of the family ("the Ipek family") which owns the corporate group to which Koza Ltd belongs ("the Koza Group"). The Koza Group is a large Turkish-based media and mining conglomerate. Koza Ltd was incorporated in this jurisdiction in March 2014 and capitalised with £60 million provided by the respondent ("Koza Altin") to undertake mining operations outside Turkey, including ventures with other established international mining companies. Koza Altin is another member of the Koza Group and Koza Ltd is its wholly owned subsidiary.

3. The claimants allege in these proceedings that the state authorities in Turkey are engaged in an attempt to take control of the Koza Group from the Ipek family, alleging that the group is involved in criminal activities; the family alleges that the attempt is politically motivated. At all events, following a raid on the headquarters of the group in Ankara in September 2015, the boards of various companies in the group were replaced by state-appointed trustees. The trustees have taken various steps to attempt to recover the £60 million held by Koza Ltd, but have been unsuccessful.

4. In July and August 2016, Koza Altin purportedly served notices under the Companies Act requisitioning a general meeting of Koza Ltd to pass resolutions replacing its directors with the first to third defendants. The meeting was not called, Koza Ltd contending that any meeting that was called could not validly pass the resolutions because of the weighted voting rights of Mr Ipek and his brother. Koza Ltd also challenges the authority of the first to fifth defendants to act on behalf of Koza Altin. On 16 August 2016 the claimants commenced these proceedings, seeking declarations that the Companies Act notices were ineffective and an injunction restraining the defendants from holding any meeting of Koza Ltd pursuant to the notices. On the

same day Snowden J granted an injunction, without notice to the defendants, preventing any meeting of Koza Ltd from taking place for the purpose of passing the resolutions. On the initial return date of the without notice injunction, the injunction was continued on undertakings given by the claimants not to dispose of, deal with or diminish the value of any funds belonging to Koza Ltd, substantially in the form subsequently given to the court in December 2016, to which I shall come.

5. A host of applications came before Asplin J (as she then was) in December 2016. Foremost amongst these was the application by the defendants to challenge the exclusive jurisdiction of the English court to determine the claimants' claim. Asplin J dismissed the defendants' jurisdiction challenge, but it is important to record that the challenge is still on foot, and nothing done by the defendants is to be treated as a submission to the jurisdiction of the English court. An appeal to the Supreme Court from this court's judgment upholding Asplin J on the jurisdiction issue remains pending. That appeal was argued in the Supreme Court in March 2019, but the Supreme Court's judgment is not yet available.

6. Asplin J continued the injunction concerning the holding of company meetings and the passing of resolutions. The first schedule to Asplin J's order contained the following undertaking:

> "2. …
>
> (1) [Koza Ltd, defined in the order as "the Company"] will not dispose of, deal with or diminish the value of any funds belonging to the Company or held to the Company's order other than in the ordinary and proper course of its business.
>
> …"

7. Paragraph 2 of the first schedule went on to provide for the giving of advance notice of any payment of more than £25,000 or any transaction which would create a liability of over £25,000, "*apart from any payment of or incurring of liability in respect of legal fees in connection with this litigation*". Paragraph 3 of the first schedule is also of importance:

> "3. These undertakings shall not prohibit the Company from spending a reasonable sum on legal advice and representation, provided that the funds spent on liabilities incurred in this connection properly relate to legal advice and representation for the Company's benefit."

The ICSID funding appeal

8. By an application notice dated 20 June 2017, Koza Ltd applied for orders relating to four classes of expenditure. The only class of expenditure which remains relevant is expenditure of up to £1.5 million over an 18 month period, and £1.5 million to be held on account against an adverse costs order, to enable an Investment Treaty arbitration to be pursued by IIL ("the ICSID expenditure"). The application was argued on the twin bases (i) that the ICSID expenditure fell within the scope of the undertaking, or,

if not, (ii) that the undertaking should be varied so as to permit the ICSID expenditure. Koza Ltd no longer seeks a variation.

9. IIL is a company incorporated in England and Wales and is said by Koza Ltd to have become the ultimate holding company of the whole of the Koza Group pursuant to a share purchase agreement dated 7 June 2015 ("the SPA"). The SPA is said to have been made between (1) the Ipek family, as sellers of their shares in Koza-Ipek Holding A.S. ("Koza Holding") the ultimate holding company of the Koza Group as at 7 June 2015, (2) IIL as purchaser of those shares in consideration for issuing shares to the Ipek family in IIL, and (3) Koza Holding. The SPA recites that Koza Holding had agreed to obtain a board resolution to register IIL as the new owner of the shares in Koza Holding. The purported effect of the transaction was to place IIL, an English company, into the corporate hierarchy below the Ipek family and above Koza Holding, by exchanging the family's shares in Koza Holding for shares in IIL, and registering IIL as the owner of the shares in Koza Holding

10. On 6 March 2017, IIL issued a notice to the Government of Turkey under the terms of the Bilateral Investment Treaty between the Governments of the United Kingdom and Turkey ("the BIT"). On 5 April 2017, IIL requested Koza Ltd to assist it with funding for the arbitration and Koza Ltd agreed. Koza Ltd explained that the takeover of Koza Altin and the other companies in the Koza Group had cut off Koza Ltd's sources of funding for larger scale mining projects. The ICSID proceedings would be of great importance to Koza Ltd in establishing (a) that Koza Ltd and the Koza Group have been the subject of a politically motivated takeover and (b) that the allegations of criminality made against the Koza Group are baseless and politically motivated. The ICSID arbitration had the potential to add significantly to the ability of Koza Ltd to regain its sources of funding from the Koza Group and to engage constructively with current and potential investors in the company. Koza Ltd also contended that the arbitration would prevent the enforcement of a seizure order granted by the Turkish courts of funds belonging to Koza Ltd and held in the client account of its then solicitors, Morgan Lewis. It was on this basis that Koza Ltd contended before the judge that the ICSID expenditure would be in the ordinary and proper course of Koza Ltd's business.

11. The respondent argued that the ICSID expenditure was prohibited by the undertaking on the grounds (a) that any payment made on the basis of the SPA was not a proper use of Koza Ltd's funds because it was "a sham and backdated, created in order to engineer a position in which IIL can attempt to bring an ICSID arbitration" ("the authenticity issue"); (b) that the proposed arbitration was wholly or substantially concerned with furthering the interests of the Ipek family and would not be of commercial benefit to Koza Ltd; (c) that there were serious issues about the jurisdiction of the ICSID to hear the dispute ("the jurisdiction issue"); and (d) that the evidence did not establish that Koza Ltd was the only source of funds available to IIL ("the alternative funding issue").

The judgment of Mr Spearman QC

12. Mr Spearman reviewed the points made by the respondent on the authenticity of the SPA between [75] and [86] of his judgment. At [88] and [89] he concluded that, although the explanations given by Koza Ltd to the points made by the respondent

were unsatisfactory, "this application is not the occasion to try those issues." At [90] he said:

> "In these circumstances, I consider that, on the materials at present available to the court, the authenticity of the SPA is open to very serious doubt. If Koza Limited was a freezing injunction defendant, the healthy scepticism which is typically justified with regard to assertions made by such a defendant that are not firmly supported by seemingly reliable evidence might present a fatal obstacle to an application to use frozen funds for a purpose which depends on the authenticity of the SPA. However, Koza Limited is not a freezing injunction defendant, and I therefore consider that it would not be appropriate to follow this precise approach in the present case. At the same time, it would be wrong to ignore the doubts that exist concerning the SPA."

13. Mr Spearman accepted, at [97], that it was, at the lowest, seriously arguable that a successful outcome of the ICSID arbitration for IIL would be of substantial commercial benefit to Koza Ltd, not least by allowing it to obtain further funding from the Koza Group. This was a separate benefit from any benefit Mr Ipek or his family would obtain from the ICSID arbitration.

14. At [101], the deputy judge held that, if the expenditure on the ICSID arbitration fell outside what was permitted by the undertaking (but not otherwise), it was relevant to consider alternative sources of funding. He accepted that IIL had no funds, but considered the evidence as to Mr Ipek's own assets to be "exiguous". He pointed as well to the absence of any evidence at all as to the availability of other sources of funding, which, in the light of what was at stake in terms of the fruits of the arbitration, the availability of which could not be said to be unreal. These considerations played a part in considering the overall justice of the case and militated against a release of the undertaking.

15. As to the jurisdiction issue, Mr Spearman embarked, between [103] and [122], on a detailed analysis of the jurisdiction of the ICSID tribunal. The jurisdiction issue turned on the question of whether IIL had made a qualifying investment. The deputy judge had been supplied with, and had been referred to, three full lever-arch files of ICSID materials, and further materials had been added in the course of the hearing. At [121] he concluded that the various transactions in shares undertaken in pursuance of the SPA were:

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

16. The judge summarised his conclusions on the ICSID expenditure at [126] as follows:

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

> (1) Funding the successful pursuit of an ICSID arbitration by IIL would be of benefit to Koza Limited, and thus in the ordinary and proper course of business.
>
> (2) However, even if its authenticity was not in issue, the SPA did not give rise to a qualifying investment under the ICSID Convention and the material BIT.
>
> (3) Moreover, there are good grounds to doubt the authenticity of the SPA, not least in light of Mr Ipek's failure to address that in his evidence in these proceedings.
>
> (4) Those concerns are relevant not only to whether the expenditure would be made in good faith, consonant with Mr Ipek's fiduciary duty to Koza Limited, and in the ordinary and proper course of business, but also to whether or not the ICSID tribunal would have jurisdiction based on the SPA; and it is right for the court to take them into account when determining this aspect of the application.
>
> (5) Further, based on Mr Ipek's evidence and the lack of evidence about whether litigation funding has been explored, I am not satisfied that there is no available source of funding other than the assets of Koza Limited, and, in particular, that if this aspect of the application is refused it will not be possible to commence an ICSID arbitration to seek redress in respect of the alleged egregious conduct of the government of Turkey in respect of which Koza Altin has filed no evidence.
>
> (6) I am not persuaded that the circumstances which are said to justify this proposed expenditure are so different from those which appear to me to have been contemplated or intended to be governed by the Undertaking at the time that it was given that it would be appropriate to release Koza Limited from the burden of the Undertaking which it chose to give as an uncontested part of the Order.
>
> (7) In light of those factors, I do not consider that the proposed expenditure falls within the scope of the Undertaking, or that it would accord with the interests of justice overall to approve the expenditure, or that the balance of justice between the parties would make it appropriate to vary the Undertaking to permit it.
>
> (8) Accordingly, this part of the application fails and must be dismissed."

17. Given that the deputy judge concludes in sub-paragraph (7) that the expenditure does not fall within the scope of the undertaking, and is therefore not within the ordinary and proper course of business, his conclusion in sub-paragraph (1) that the expenditure "would be of benefit to Koza Ltd, and thus in the ordinary and proper course of business" must be understood to be subject to at least some of what follows

in sub-paragraphs (2) to (6). That would appear to indicate that he considered that it was the ICSID jurisdiction issue which took the expenditure outside the ordinary and proper course of business, particularly when read with [101] where he said, "in the event that [the ICSID expenditure] falls outside that ambit (as I consider that it does *in light of my findings on jurisdiction below*)". Moreover, in [101], the deputy judge clearly indicates that the possible availability of alternative funding was not something on which he relied to take the expenditure outside the scope of the ordinary and proper course of business. It is less clear whether the grounds for doubting the authenticity of the SPA formed part of his decision that the ICSID expenditure was not in the ordinary and proper course of business, as opposed to a reason for not exercising his discretion to grant a variation. He says in (4) that the grounds for doubting the authenticity were relevant to whether the expenditure was in the ordinary and proper course of business, but given the view he expresses in [88], which I understand to mean that he is not able to reach a concluded view on the issue, it is difficult to see how this could provide a basis for saying, definitively, that the expenditure was not in the ordinary and proper course of business.

18. Lord Falconer and Mr Vernon Flynn QC, who appeared on behalf of Koza Ltd, submitted that the deputy judge had fallen into four errors. First, the judge should not have addressed the merits of the ICSID jurisdiction issue. That was a decision for the board of Koza Ltd. Provided that they were acting in good faith, the court should not interfere with their decision making. Secondly, the judge had made no finding of a lack of good faith, and he could not do so on the material before him, so that the authenticity issue could not lead to a conclusion that the expenditure was not proper. Thirdly, the deputy judge's finding on the ICSID jurisdiction issue was wrong. Fourthly, the question of alternative funding was not relevant on the facts of this case.

19. Mr Crow QC, who argued the case for the respondent, submitted first, on the basis of his respondent's notice, that the judge had erred by not adequately addressing the logically prior question of whether the ICSID expenditure was in the "ordinary" course of business. Had he done so he ought to have held that the expenditure was not within the ordinary course of Koza Ltd's business because Koza Ltd was not a litigation funder but a mining company. Further, the arbitration was primarily for the benefit of IIL and the Ipek family. The benefit to Koza Ltd conferred by IIL's pursuit of the ICSID arbitration was too tenuous to lead to the conclusion that it was in the ordinary course of business.

20. Secondly, Mr Crow invited this court to hold that the ICSID expenditure was not within the ordinary and/or proper course of business because the SPA on which the ICSID arbitration was founded was a fraudulent document. He accepted that to invite a court, particularly an appellate court, to make a finding of this nature on the basis of written evidence and without disclosure or cross-examination was a "big ask", but he nevertheless submitted that such a conclusion was open to us, particularly in the absence of sworn evidence from Mr Ipek himself refuting the allegation.

21. Thirdly, Mr Crow invited us to hold that the ICSID expenditure was not in the ordinary and proper course of business in circumstances where the appellant had not discharged the burden of demonstrating that there were no alternative sources of funding. This was so given that the expenditure was largely for the benefit of others, and the benefits, such as they were, for Koza Ltd could be obtained without the need to incur the expenditure. Further, to the extent that the deputy judge had held that the

availability of alternative funding was not relevant at all to whether the expenditure was in the ordinary and proper course of business, this was an error, as it was plainly so relevant.

Law on "ordinary" and on "proper" course of business

22. We were referred to a number of cases in which the courts in this country and elsewhere have had to consider the meaning of "ordinary course of business" and "ordinary and proper course of business". Whilst these cases are, in a general sense, informative as to the way in which courts have approached these issues, they arise in widely differing factual and legal contexts. Thus, in *Countrywide Banking Corporation Ltd v Dean* [1998] AC 338, the Privy Council declined to formulate a universally applicable test for what was in the ordinary course of business for the purposes of a provision of the New Zealand Companies Act concerned with the avoidance of corporate transactions having a preferential effect. The judgment of the Board (given by Gault J sitting as an additional member) nevertheless stressed the need for "examination of the actual transaction in its factual setting", an examination which is "undertaken objectively by reference to the standard of the ordinary course of business". The judgment also noted that "there may be circumstances where a transaction, exceptional to a particular trader, will nonetheless be in the ordinary course of business" and that "[t]he particular circumstances will require assessment in each case" (page 349H-350B).

23. In *Ashborder BV and others v Green Gas Power Ltd and others* [2004] EWHC 1517 (Ch); [2005] 1 BCLC 623, financing arrangements included debentures including charges over assets of the Octagon group of companies. One issue was whether a transferee could take free of the charge because the transfer was "in the ordinary course of its business". At [227], Etherton J (as he then was) ventured a number of conclusions which he had reached in the context of assessing whether a transaction was in the ordinary course of business for the purposes of a floating charge. Whilst some of these are perhaps of more general application, others reflect the fact that the use of the expression occurs in the specific context of the interpretation of a charge document. For present purposes it is enough to say that I agree with Etherton J's proposition numbered (5) that "subject to any special considerations [arising out of the interpretation of the charge document] there is no reason why an unprecedented or exceptional transaction cannot, in appropriate circumstances, be regarded as in the ordinary course of the company's business." Like *Countrywide, Ashborder* was not concerned with whether the transaction was within the *proper* course of a company's business. Thus propositions (6) and (7) which state that a transaction may be within the ordinary course of a company's business if it is a fraudulent preference of one creditor over another, or in breach of a director's fiduciary duty, cannot, if correct, be read across to the present case.

24. *JSC BTA Bank v A* [2010] EWCA Civ 1141 concerned a freezing order which, by its terms, did not prevent A from dealing with or disposing of his assets in the ordinary and proper course of any business conducted by him personally, subject to a right to apply for express sanction from the court. At [75] to [76] the court explained that this format pointed to a narrower as opposed to a wider construction of the order, as unobjectionable transactions could always be sanctioned by the court. In the end, however, it was held that the transactions did not fall within the exception because they were either not Mr A's personal transactions but transactions carried out on the

independent decision of the vendor companies or were the activities of a private investor falling short of an investment business (see [78]).

25. In *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1028, the issue was whether certain payments were breaches of a freezing order which contained an exception in favour of dealing with or disposing of assets in the ordinary and proper course of business. Lewison LJ, with whom Gloster and Black LJJ agreed, said at [19] - [21]:

> "19. The issue was whether the payments made fell within the exception to the freezing order. In order to fall within the exception a disposal of assets (including a payment) must be both (a) in the ordinary course of business and (b) in the proper course of business. These are separate and cumulative requirements. They are also highly fact-sensitive questions. What is in the ordinary and proper course of business will, of course depend on what business is carried on by the respondent in question, and how it is carried on. A payment which might be made in the ordinary and proper course of one business may not satisfy that description in the case of a different business. Likewise, a payment which might be made in the ordinary and proper course of a business carried on in one location, may not satisfy that description in the case of the same kind of business carried on in a different location. In the present case the business of MWP is that of the provision of legal and business consultancy services, principally in Kazakhstan.
>
> 20. …
>
> 21. So the question then was: were the payments made "in the ordinary … course of business". That is not necessarily the same as asking whether the payments themselves were "ordinary": it is the course of business that the exception deals with. It is thus the course of business that must be "ordinary"."

26. The present case does not involve a freezing order, although there is some force in the suggestion that it was entered into in similar circumstances. Just as with a freezing order, the purpose of the undertaking was not to interfere with the ability of Koza Ltd to carry on its ordinary business. Given that the defendants' purpose was to obtain control of Koza Ltd, however, it is understandable that they required reassurance that the assets would not be disposed of other than for the benefit of Koza Ltd's business. I think, therefore, that Lewison LJ's analysis is apt in relation to the present undertaking as well.

27. I would draw from these authorities the following propositions of relevance to the present case:

i) The question of whether a transaction is in the ordinary and proper course of a company's business is a mixed question of fact and law;

ii) "Ordinary" and "proper" are separate, cumulative requirements;

iii) The test is an objective one, making it necessary to consider the question against accepted commercial standards and practices for the running of a business;

iv) The question is not whether the transaction is ordinary or proper, but whether it is carried out in the ordinary and proper course of the company's business;

v) The questions are to be answered in the specific factual context in which they arise.

Discussion of the ICSID funding appeal

28. In approaching this issue, it is important to bear in mind a number of preliminary points. First, relief is now sought by Koza Ltd only on the basis that the ICSID expenditure falls within the undertaking. That is a hard-edged question about whether, on the facts found, the funding is or is not in the ordinary and proper course of Koza Ltd's business. It does not involve any exercise of the court's discretion. The court's discretion, and considerations of the interests of justice generally, were relevant to the variation originally sought by Koza Ltd, and refused by the deputy judge, but which is now no longer sought. Secondly, in terms of relief, it must be recalled that the court is being asked to grant a positive declaration that the ICSID funding is in the ordinary and proper course of business. The grant of such a declaration is discretionary, and may well be refused if there are serious doubts about the subject matter of the declaration, even if the court is not in a position to reach a concluded view one way or the other on the issue in question.

29. The third preliminary point is that, as Lord Falconer pointed out, there were three potential outcomes to the application which Koza Ltd made to the deputy judge. The first outcome – a positive declaration - would be a finding, and therefore a declaration, that the ICSID expenditure was within the ordinary and proper course of Koza Ltd's business. The second outcome (which the deputy judge adopted) would be to make the opposite finding and grant a negative declaration, namely that the expenditure was not within the ordinary and proper course of business. The third and final possible outcome would be to refuse any declaration because Koza Ltd had not satisfied the court to the civil standard of proof that the ICSID expenditure was within the ordinary and proper course of business, and the respondent had not satisfied the court that it was not. In those circumstances the court could simply dismiss Koza Ltd's application. Lord Falconer's primary position was that the judge should have granted the positive declaration, but his fallback position was that the judge should have dismissed the application rather than grant the negative declaration.

30. The key to the resolution of Koza Ltd's primary argument, in my judgment, is the authenticity issue. It is not necessary for me to rehearse all the arguments which led the judge to hold that the authenticity of the SPA was open to very serious doubt. On the basis of those arguments, which were repeated before us, the judge was plainly correct to reach that conclusion, and was in no position to accept the SPA as definitely authentic. Equally, in my judgment, he was correct not to go on and decide the very serious allegations against Koza Ltd and Mr Ipek which were engaged by the authenticity issue. What is clear is that, once there is accepted to be a seriously arguable case that the SPA was a forgery, as the respondent alleges, it was impossible for the deputy judge to declare, in advance of the expenditure being made, that the

expenditure was in the ordinary and proper course of Koza Ltd's business. The court plainly should not lend its authority to a transaction by granting a positive declaration that it is in the ordinary and proper course of business when there is a real possibility that the transaction is a fraudulent one.

31. Lord Falconer and Mr Flynn sought to avoid this conclusion by submitting that a valid SPA was not essential given that the share swap had been carried out and the shares in Koza Holding were now owned by IIL. Koza Altin contends, however, that the shares have not yet been registered in the name of IIL and could not be validly so registered. Ownership of the shares is governed by Turkish law, as to which there is no evidence. I do not think this argument provides a route to a potentially viable arbitration claim in the absence of the SPA. It follows that the positive declaration falls out of the picture.

32. For similar reasons, it seems to me that the authenticity issue could not itself form the basis of a negative declaration that the expenditure would not be within the proper course of Koza Ltd's business, given that neither the judge nor this court is in a position to make findings of this seriousness on the basis of the written evidence.

33. The remaining questions, therefore, concern whether any of the other grounds relied on by the deputy judge, or the additional grounds relied on by the respondent, are sufficient to support the negative declaration. It is an oddity of this case that when draft orders were exchanged following the issue of the draft judgment, it was Koza Ltd who proposed to the deputy judge that he grant a negative declaration, whilst the respondent's draft contented itself with a dismissal of the application. Be that as it may, the order we are concerned with is the one which the judge made, and the respondent is entitled to seek to uphold it.

34. The first ground which it is necessary to consider is that based on the judge's decision that the ICSID tribunal would not have jurisdiction. We heard some detailed and extremely able submissions from Mr Flynn both on the question of whether a domestic court is entitled to decide an issue of jurisdiction of the ICSID tribunal, or whether that is a question exclusively for the tribunal itself, and also on the correctness of the judge's decision that IIL had not made a qualifying investment for the purposes of the BIT or the ICSID Convention. Those submissions were responded to with equal ability by Mr Crow.

35. In order to bring itself within the jurisdiction of ICSID, it is necessary for IIL to show that the dispute falls (a) within Art 25(1) of the ICSID Convention, and (b) within Article 1 of the BIT.

36. Art 25(1) of the ICSID Convention provides that the jurisdiction of ICSID extends to "any legal dispute arising directly out of an investment". The Convention contains no definition of "investment". As the Executive Directors said in their Report on the Convention (the *travaux preparatoires*):

> "No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which the Contracting States can make known in advance, if they so desire, the classes of dispute

> which they would or would not consider submitting to the Centre (Article 25(4)).”

37. The BIT does contain a definition of “investment”, albeit in apparently broad terms. Art 1 provides:

> “For the purposes of this Agreement:
>
> (a) “investment” means every kind of asset and in particular, though not exclusively, includes:
>
> …
>
> (ii) shares in and stock and debentures of a company and any other form of participation in a company”

38. The issue between the parties is whether the mere holding of shares by IIL in a Turkish company is sufficient to give the ICSID tribunal jurisdiction under these two instruments, as Koza Ltd contends, or whether something more is needed, as Koza Altin contends. So far as the BIT is concerned, Mr Flynn showed us some tribunal decisions (albeit not ICSID tribunals) which had adopted constructions of the term “investment” in similar bilateral investment treaties which were consistent with Koza Ltd’s case. Mr Crow submitted that, even taking these at face value, it was necessary for Koza Ltd to show that the investment also satisfied Art 25(1) of the ICSID Convention, and there were decisions, on which the judge relied, which showed that for that purpose something more than a mere holding of shares was necessary. Mr Flynn’s response was that it would be surprising if the broad definition of “investment” agreed by the governments of Turkey and the United Kingdom for the purposes of their BIT, was constrained by a narrower one in the ICSID Convention, notwithstanding that “investment” in Article 25(1) of the Convention was deliberately left undefined. This was particularly so as the BIT was the means, referred to by the Executive Directors, through which Contracting States expressed their consent to the class of disputes which were intended to be subject to arbitration.

39. I think, however, that attempting to resolve the issue of the jurisdiction of the ICSID tribunal in the meticulous and detailed manner attempted by the deputy judge, and repeated by the submissions made to us, is to approach the problem from the wrong end. The issue was whether providing funding for this arbitration was in the ordinary and proper course of the business of Koza Ltd. The decision to pursue the funding of the arbitration is taken before, not after, the ICSID tribunal has ruled on its jurisdiction. It is therefore a matter to be considered from the perspective of the board of Koza Ltd, deciding whether to embark on the funding. In my judgment, therefore, unless the prospects of success in the arbitration are so manifestly poor that they throw doubt on the board’s motives in pursuing it, those prospects do not have any relevance to the issue.

40. Support for that approach can be seen in *Halifax v Chandler* [2001] EWCA Civ 1750, where Clarke LJ, with whom Dyson LJ agreed, said at [18]:

> "In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment. As I see it, that is because the purpose of a freezing injunction is not to interfere with the defendant's ordinary business or his ordinary way of life."

41. I therefore respectfully disagree with the deputy judge that his conclusion on the merits of the jurisdiction issue took the ICSID expenditure outside the scope of the undertaking. In my judgment, the judge should have gone no further into the merits than was required to satisfy himself that IIL had a case which Koza Ltd's board could properly support in good faith. Had he approached the matter in that way, I have no doubt he would have concluded that IIL had such a case, and that the merits of the arbitration therefore fell away as a relevant consideration.

42. That brings me to the question of whether we should nevertheless hold that the expenditure is outside the ordinary course of business of Koza Ltd for the reasons advanced by the respondent in its first additional ground. I agree with Mr Crow that it does not follow from the fact that a particular activity will benefit the company that it will be in the ordinary course of the company's business. An unprecedented new venture for a company, though deemed beneficial, would not necessarily be in the ordinary course. It is necessary to examine the existing business of the company, and decide whether, in the light of all the circumstances prevailing at the time when the activity is embarked on, it can properly be described, objectively, as within the ordinary course.

43. It is relevant, therefore, to consider the circumstances in which Koza Ltd finds itself at the time at which it wishes to incur the ICSID expenditure. It is clear, on the basis of the judge's findings, that the board of Koza Ltd thought it reasonable, in order to protect the company's core mining business and its access to funding for larger projects, to embark on support for the arbitration. Whilst this might be described as exceptional expenditure, I am far from being persuaded that it was, in the circumstances in which Koza Ltd found itself, expenditure outside the ordinary course of Koza Ltd's core business. It was expenditure which was targeted at protecting that core business, notwithstanding that it was unprecedented. It was only unprecedented because Koza Ltd had not faced these circumstances before.

44. I think the critical question is whether the fact that the arbitration is being prosecuted by IIL rather than Koza Ltd takes the funding of it outside the ordinary and proper course of Koza Ltd's business. There is, of course, no possibility of Koza Ltd commencing the arbitration itself, because it is not a holder of any shares in a Turkish enterprise. There is, therefore, a rational commercial explanation for proceeding in this way. It is true that a consequence is that the arbitration will also benefit others, in particular IIL, and that the benefit to Koza Ltd is in one sense indirect, but I do not think those factors are sufficient to take the funding outside the ordinary and proper course of Koza Ltd's business. It is true that Koza Ltd is a mining company and not a litigation funder, but to view the transaction as one in which Koza Ltd is embarking

on a new business of litigation funding is to misdescribe it. Koza Ltd is funding the litigation because it considers that doing so will facilitate the continuation of the ordinary and proper course of its mining business, which is currently being constrained in its access to the funding it requires.

45. Finally, there is the question of whether the judge was wrong not to have treated the absence of evidence as to alternative sources of funding as relevant to whether the expenditure was in the ordinary and proper course of business. There is no dispute that considerations of alternative sources of funding can be relevant to whether there should be a variation of an undertaking to permit a particular type of expenditure. Where the court is exercising a discretion to vary the undertaking, it may be reluctant to allow access to the funds which are otherwise protected against disposal where this is not shown to be necessary. The ability of a party to fund expenditure from outside the frozen fund may also be relevant when a court decides whether to write in an exception to a freezing order to permit such expenditure, which is also a discretionary exercise. I think this is what Clarke LJ had in mind when he said in *Halifax v Chandler* (cited above) that "in the *Mareva* case, in order to be allowed to spend from frozen monies, the defendant must show that he has no other assets which he can use." I do not understand Clarke LJ to be saying that, where an exception has been allowed in an order or undertaking in favour of "the ordinary course of business" or for legal expenses, the party restrained must show, in the case of each individual payment, that he has no other assets to which he can have recourse.

46. I would be reluctant to lay down any rigid rule that alternative funding is a factor which is irrelevant to whether expenditure is in the ordinary or proper course of business. Depending on the facts, it may or may not be relevant. To my mind, however, it is not a factor which carries much if any weight in the case of the ICSID funding in this case. Other factors aside, it was entirely reasonable and proper, in my judgment, for Koza Ltd to decide to fund the litigation itself, rather than call upon IIL to resort to outside sources of funding.

47. Overall, the question which the court must ask itself (on the assumption for these purposes that the SPA is shown to be genuine) is whether it is shown that the provision of funding to IIL for an arbitration (a) which is arguable, and (b) which could be of benefit to Koza Ltd's core business by unlocking access to funding, is within the ordinary and proper course of Koza Ltd's business in circumstances where it is not shown that IIL could fund the arbitration from other sources. I would, on balance, have concluded that the ICSID expenditure was within the ordinary and proper course of that business.

48. In the result, however, I would allow the appeal from Mr Spearman's order to the extent of discharging the negative declaration which he granted. I would not replace the negative declaration with a positive declaration, because the authenticity of the SPA remains in doubt. It follows that if Koza Ltd pursues the funding of the ICSID arbitration it will do so at their own risk that it may be shown to be in breach of its undertaking to the court.

The extradition expenses appeal

49. On 2 February 2017, the 4th High Criminal Court of the Republic of Turkey issued an extradition request directed at the United Kingdom seeking the extradition to Turkey

of Mr Ipek. The request itemised nine offences, including "Attempting to Violate the Constitution of the Government of the Republic of Turkey" and "Attempting to Abolish the Government", both of which were said to carry sentences of "Aggravated Lifelong Imprisonment".

50. On 2 May 2018, an arrest warrant was issued against Mr Ipek under the Extradition Act 2003 for the purposes of securing his return to Turkey. Mr Ipek was arrested by voluntary attendance and, at a preliminary hearing at Westminster Magistrates Court on 23 May 2018, he was granted bail. On 7 June 2018, a request was made pursuant to Asplin J's order in these proceedings for a payment of £75,000 to be made to BCL Solicitors for legal advice to be provided to Mr Ipek in connection with the extradition proceedings. The defendants objected to the payment.

51. On Saturday 16 June 2018, the defendants issued an urgent application for a declaration that the payment to BCL solicitors was prohibited under the terms of Asplin J's order. The application was supported by the eighth witness statement of Hugo Plowman which asserted that, whilst Koza Altin recognised that Mr Ipek was running Koza Ltd as its sole director, it was concerned that he was not exercising independent judgment in the best interests of the company and was prioritising his own interests above those of Koza Ltd. Mr Plowman went on to say that he believed that Mr Ipek could finance his defence to the extradition proceedings from his own funds.

52. On 18 June 2018, Mr Ipek responded by way of his fifth witness statement to the assertions concerning his funds. He referred to an earlier witness statement where he had explained that the vast majority of his assets were in Turkey and out of his reach as they had been seized by what he described as the Erdoğan Regime. He said that before his arrest in connection with the extradition proceedings his available assets were just over £500,000, but these had been depleted by deposits with his solicitors and a sum lodged for bail. He accepted that his company Encore Mining Consultancy Limited was drawing a fee of £250,000 a year from Koza Ltd, but explained how his family and other expenses were high, and that he "simply [did] not have the resources to also fund the defence of the extradition proceedings." Koza Ltd also served the second witness statement of Mehmet Evran, the Business Development Manager of Koza Ltd since October 2016, who explained Koza Ltd's business and Mr Ipek's role. He repeated, and confirmed as still correct, what he had said in an earlier witness statement:

> "Mr Ipek is unquestionably the driving force behind Koza Ltd and is involved on a daily basis. He has significant experience in mining projects from their early stages through to full production. In addition to providing valuable industry expertise and access to a wide network of business contacts in the mining sphere and beyond, Mr Ipek's work for Koza Ltd in the time since I joined the company has included: determining the vision for the company and developing a strategy consistent with this vision; setting the criteria against which projects should be assessed …; assembling a team in the UK to run the company effectively; making the key decisions, namely whether to proceed or to withdraw from an existing one; and taking the lead role in negotiations with potential business

> partners. I speak with Mr Ipek daily to provide an update on all matters, including issues raised by our geologists and business partners. On a day-to-day basis Mr Ipek oversees the due diligence process for each new project, evaluates the updates from existing projects, follows up with business contacts and monitors all corporate expenses. He is extremely focussed on the detail of Koza Ltd's projects and is kept abreast of all developments. I am clear that Koza Ltd would have little chance of surviving, let alone prospering, as a business without his energy, contacts, insight and judgment".

53. In a further witness statement served on the day of the hearing Mr Plowman exhibited a number of bank statements showing substantial balances moving through accounts with which Mr Ipek was associated, albeit in 2015. The judge offered Koza Ltd an adjournment if it wished to answer this evidence. Mr Ipek's position has been that he does not wish to disclose details of his assets for fear that they will be targeted by the defendants and the Turkish state.

54. The application came before Morgan J in the Interim Applications List in the Chancery Division on 19 June 2018. The Judge granted declarations that:

> "(1) It would not be in the ordinary and proper course of the First Claimant's business, within the meaning of paragraph 2(1) of the First Schedule to the Order of Mrs Justice Asplin DBE herein dated 21 December 2016 (the Order), for the First Claimant to make payments to BCL Solicitors for fees incurred or in relation to legal advice, assistance and representation to the Second Claimant in connection with the Republic of Turkey's request that he be extradited to Turkey (BCL Payments).
>
> (2) BCL Payments would not constitute payments that properly relate to legal advice and representation for the First Claimant's benefit within of paragraph 3 of the First Schedule to the Order."

The judgment of Morgan J

55. The judgment of Morgan J was delivered *extempore* at the conclusion of the hearing, amongst the usual pressures of the business of the applications court in the Chancery Division. Having summarised the background and the evidence, he said he would give his provisional views on what the terms of the undertaking meant.

56. In his view "the reference to the ordinary and proper course of its business … would appear to require an assessment of an objective character". He pointed out that his provisional view was that it was implicit in the structure of the order that the controls on disposals and dealing were in the context of Mr Ipek continuing to be in control of the business until trial or further order. So it was not open to Koza Altin to say that something was impermissible because it was being done by Mr Ipek, in control of the business. Similarly, if the company was able to make good an assertion that something is in the best interests of the company because it enables the company to

retain Mr Ipek, that too should not be open to challenge just because it is Mr Ipek who is being retained and is being said to be of assistance to the company.

57. The judge went on to say that it was common ground between counsel that "ordinary" is not to be contrasted with "extraordinary". It was not said that defending an extradition warrant expressed in the terms of this extradition warrant brought by the Republic of Turkey was so extraordinary as to be outside the ordinary course of business. The judge went on to say:

> "what "ordinary" seems to be endeavouring to describe is that one is looking at something which is much more like the established course of business rather than a fundamental departure from the established course of business. That, as such, does not cause a particular difficulty in this case."

58. Next the judge explained his view of the requirement that the disposal be "proper". He said:

> "It seems to me that if it is not proper for Mr Ipek, as a director of Koza Limited, to procure Koza Limited to make a substantial payment to him, the payment would not be in the ordinary and proper course of the company's business."

59. On the question of legal advice and representation, the judge read paragraph 3 of schedule 1:

> "in the sense contended for by the claimants. In other words, the paragraph does extend to legal advice and representation for someone, which is not necessarily the company, but that is subject to the proviso that the funds spent must properly, again the word "properly", relate to legal advice and representation for the company's benefit."

60. The judge went on to reject Koza Ltd's submission that Mr Ipek's ability to pay his legal fees in connection with the extradition from the financial resources available to him was irrelevant. He thought it was plainly relevant as a matter of construction of the ordinary words of paragraph 2(1) and paragraph 3, because those paragraphs refer to "proper" expenditure by Koza Ltd and Mr Ipek's ability to pay the fees himself will be relevant to that matter.

61. The judge concluded that, although there was plainly some room for doubt, it was more probable than not that Mr Ipek could pay for his own defence from the financial resources available to him. The evidence as to the very substantial sums at his disposal, in comparatively recent times, pointed strongly to that conclusion. The judge went on to hold:

> "35. That finding, that Mr Ipek has money available to him, adequate to fund his defence, seems to me to provide the answer to the issues which have been argued.

> 36. Dealing with paragraph 2.1 of the first schedule, can it be said that the company is acting in the ordinary and proper course of its business by funding Mr Ipek's legal expenses?
>
> 37. The case for the company is that it wishes to see Mr Ipek succeed. It wishes Mr Ipek to remain in this jurisdiction. It does not wish to see him extradited to Turkey. But there is no reason for the company to fund Mr Ipek's defence. On my findings, Mr Ipek can fund his own defence.
>
> 38. Of course, insofar as Mr Ipek controls Koza Limited, and Koza Limited has the necessary funds, Mr Ipek appears to be saying that he should be free to fund his defence from the company's money and not from his own money. I do not regard that as the proper course of the business of Koza Limited. It appears to be a case of a director of a company acting in breach of his fiduciary duty by using the company money for something which is not the ordinary course of the company's business but is primarily for the benefit of the director on a personal level.
>
> …
>
> 40. So my conclusion is that the intended payment by Koza Limited to Mr Ipek to enable him to pay his legal fees, is not a payment in the ordinary and proper course of a company's business.
>
> 41. As to paragraph 3, the intended payment by Koza Limited to Mr Ipek does not "properly" relate to legal advice and representation for the company's benefit.
>
> 42. First of all, if I am right that it is not a proper item of expenditure, it does not properly relate to that matter.
>
> 43. Secondly, it is not for the company's benefit because the company does not need to make the payment to improve its prospects of retaining Mr Ipek within the jurisdiction. Mr Ipek has his own resources. There is no question of Mr Ipek not using his own resources to resist the extradition warrant. Mr Ipek will use his own resources for that purpose.
>
> 44. If he is extradited, it will not be for want of a payment by the company. If he is not extradited, again, it will not be anything to do with payment or non-payment by the company."

Discussion

62. Lord Falconer submitted that Morgan J had erred in essentially two ways. First, there was no basis for the judge's factual conclusion that Mr Ipek could afford to pay for

the extradition case. Secondly, he was wrong as a matter of law to regard the availability of alternative funding as necessarily fatal to the application.

63. As with the ICSID funding appeal, Mr Crow advanced a number of points by way of respondent's notice. First, he contended that the expenditure was not within the ordinary course of Koza Ltd's business, contrary to the judge's provisional view. This argument followed the lines of that advanced in relation to the ICSID funding appeal. Secondly, he argued that availability of alternative funding was relevant not only to whether the funding was proper but also to whether it was ordinary. Thirdly, the judge had been wrong to hold provisionally that paragraph 3 of the undertaking was not confined in its scope to the legal expenses of Koza Ltd. Fourthly, although not with much vigour, Mr Crow contended that the extradition expenditure could not fall within paragraph 3 because it did not constitute a reasonable sum within the meaning of that paragraph in circumstances where Mr Ipek could pay the relevant expenses himself.

64. I deal first with Lord Falconer's argument that we should upset the judge's factual finding that Mr Ipek could pay for his own defence of the extradition proceedings. Whilst Mr Ipek's desire not to expose his assets to scrutiny by his opponents in this litigation and elsewhere is, perhaps, understandable, the court can only act on the material before it. The judge's factual conclusion is reasoned, and based on the material which was before him. There is no proper basis on which we could interfere with it.

65. Lord Falconer is on firmer ground with his second argument, however. The judge appears to have regarded Mr Ipek's ability to pay for the extradition expenses as determinative of whether to do so would be proper. I do not agree.

66. In my judgment the phrase "proper course of business" in the present undertaking means that the course of business must be in accordance with acceptable standards of commercial behaviour in conducting that business. It would be unwise to attempt a categorisation of what would not satisfy this definition. For present purposes it is enough to say that it does not necessarily exclude disposals which can be regarded as unnecessary.

67. Whilst it may be described as uncommercial or imprudent for a company to pay for something which its director or employee might or would pay for if the company did not, the decision of the company to pay for those expenses in those circumstances is not necessarily outside the proper course of its business. From the point of view of Koza Ltd, Mr Ipek is a vital asset. The fact that he would pay his expenses if Koza Ltd does not is not asufficient reason for regarding their payment by Koza Ltd as outside the proper course of its business.

68. I would also reject the suggestion that the payment of the extradition expenses becomes the payment of an unreasonable sum on the footing that Mr Ipek can pay them himself. The phrase "reasonable sum" in paragraph 3 of the undertaking is directed to the quantum of the payment for legal advice and representation, and does not import considerations of necessity or prudence.

69. I take next the question of whether paragraph 3 of the undertaking, in its reference to "spending a reasonable sum on legal advice and representation, [which] properly

relate to legal advice and representation for the Company's benefit" is restricted to payments for the legal representation of Koza Ltd, and cannot extend to other legal advice taken for Koza Ltd's benefit.

70. Mr Crow drew our attention to the standard form of wording of the undertaking in a freezing order which is:

> "This order does not prohibit the Respondent from spending £x a week towards its, her or his ordinary living expenses and also £y [or a reasonable sum] on legal advice or representation"

71. Mr Crow submitted that the words "for the Company's benefit" were intended to cut down, not to expand the scope of the exception. It was therefore only payments for legal advice to and representation of Koza Ltd which fell within the scope of the exception. It excluded legal advice to and representation of Mr Ipek.

72. I cannot accept that argument. It seems to me that the meaning of "legal advice or representation for the Company's benefit" is clear, and the only requirement for the payments to be permitted is that the legal advice and representation should be of benefit to Koza Ltd. It therefore seems to me that the expenditure on advice to and representation of Mr Ipek in defending him against the extradition request fell squarely within the legal expenses exception in paragraph 3 of the undertaking. The phrase "legal advice or representation" in the standard form of freezing order takes its meaning from the different context.

73. Paragraph 2(1) of the undertaking requires the expenditure to be in the ordinary as well as the proper course of business. Mr Crow said there were five reasons why the extradition expenditure was not in the ordinary course of Koza Ltd's business. These were: (i) Koza Ltd was a mining not a litigation funding company; (ii) the extradition expenditure would not involve the settling of a pre-existing liability; (iii) the extradition expenditure would only be of direct benefit to Mr Ipek personally; (iv) the indirect benefit to Koza Ltd was intangible and unquantifiable; and (v) the expenditure did not relate directly to Mr Ipek's activities as a director of the company. Although he accepted that a successful extradition of Mr Ipek would result in Koza Ltd losing his services, he submitted that Mr Ipek was not irreplaceable.

74. I do not accept these arguments either. Because these arguments are similar in many respects to those advanced in relation to whether the ICSID expenditure was in the ordinary course of business, I can deal with the points made by Mr Crow very shortly. As to point (i), it is not fair to characterise the payment of Mr Ipek's extradition expenses as litigation funding, and therefore as a new departure from the ordinary course of Koza Ltd's business. The payments are made to protect Koza Ltd's existing and legitimate mining interests. My answer to point (ii) is that the exception to the undertaking is not restricted to the settling of pre-existing liabilities. Were it to be so restricted, it would effectively freeze Koza Ltd's business, contrary to the underlying purpose of the undertaking, namely to allow Koza Ltd to continue to trade. Points (iii) and (iv) create a distinction between direct and indirect benefit to the company which, in my judgment, deflects attention from the real issue. What matters is whether what is proposed is in the ordinary course of business. As to point (v), the payments were designed to secure the retention of Mr Ipek's services as a director of

the company and were consequently sufficiently closely related to his activities as a director.

75. I would therefore allow the extradition expenses appeal.

Conclusion

76. For the reasons I have given I would (i) allow the ICSID funding appeal only to the extent of discharging the negative declarations in Mr Spearman's order; and (ii) allow the extradition expenses appeal and substitute for the negative declarations in Morgan J's order, positive declarations that the payments fall within both paragraphs of the undertaking.

Lord Justice Peter Jackson:

77. I agree.

Lord Justice Patten:

78. I also agree.