Neutral Citation Number: [2020] EWCA Civ 1018

Case No: A3/2020/0647

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JEREMY COUSINS QC
[2020] EWHC 654 (Ch)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 31/07/2020

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

- -

Between :

(1) KOZA LIMITED **(2) HAMDI AKIN IPEK**	**Claimants/ Appellants**
- and -	
KOZA ALTIN ISLETMELERI AS	**Defendant/ Respondent**

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Vernon Flynn QC, Siward Atkins QC and Andrew Scott (instructed by **Latham & Watkins (London) LLP**) for the **Claimants/Appellants**
Neil Kitchener QC and David Caplan (instructed by **Mishcon de Reya LLP**) for the **Defendant/Respondent**

Hearing dates : 30 June, 1 July 2020

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Approved Judgment

Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand down is deemed to be 10 a.m. on Friday, 31 July 2020.

Lord Justice Popplewell :

Introduction

1. This is an appeal from the grant of an injunction by Mr Jeremy Cousins QC, sitting as a Deputy Judge in the Chancery Division, restraining the appellants, Koza Ltd and Mr Ipek, from using £3 million of assets belonging to Koza Ltd to fund an arbitration claim brought under the auspices of The International Centre for the Settlement of Investment Disputes ("ICSID"). The ICSID arbitration claim is brought against the Republic of Turkey by Ipek Investments Ltd ("IIL"), said by the appellants to be the holding company for the corporate group to which Koza Ltd belongs ("the Koza Group"). The Koza Group is a Turkish based mining and media conglomerate owned by Mr Ipek and members of his family.

2. The injunction follows an undertaking given by Koza Ltd earlier in the proceedings not to use its assets otherwise than in the ordinary and proper course of business. There is a dispute between the parties as to whether the funding falls within that exception, which has already been considered by this Court ([2019] EWCA Civ 891). This Court decided that the issue could not be definitively resolved either way on the basis of the written evidence in that application. It was common ground that it was equally incapable of definitive resolution on the injunction application before the Judge. The Judge granted the injunction on the grounds that he had a high degree of assurance that the funding would be a breach of the undertaking and the balance of least irremediable prejudice clearly favoured it. The application for permission to appeal against his decision was adjourned to the full Court for a rolled up hearing of the application and, if granted, the appeal itself.

Background

3. The proceedings involve a dispute over control of Koza Ltd. Koza Ltd is an English company incorporated on 24 March 2014 and capitalised by the respondent, Koza Altin, with £60m to carry out mining operations outside Turkey including ventures with other established international mining companies. Mr Ipek was one of its two directors and is now its sole director. Koza Altin is its immediate parent company owning all the equity shareholding.

4. Koza Altin is a Turkish company which is part publicly owned and part owned directly and indirectly by Mr Ipek and members of his family. It is not, however, currently controlled by Mr Ipek or his family. Mr Ipek says that the Turkish Government has illegally expropriated the Koza Group's assets for political reasons and has pursued a concerted campaign of harassment and oppression against the group and its shareholders and employees, including pursuing criminal proceedings against Mr Ipek and his family on the basis of allegations which Mr Ipek says are spurious. The Republic of Turkey sought the extradition of Mr Ipek from England to Turkey, but such extradition was refused on the grounds that the criminal proceedings against him in Turkey were politically motivated.

5. In proceedings in Turkey relating to the criminal investigation into the Koza Group, on 26 October 2015 the Fifth Ankara Criminal Peace judge appointed certain individuals as trustees of Koza Altin and 21 other Turkish companies in the group, pursuant to

article 133 of the Turkish Criminal Procedure Code, with power to control the affairs of those companies in place of the existing management. Pursuant to further decisions of that judge dated 13 January and 3 March 2016, five individuals were appointed as the trustees of Koza Altin. In September 2016 the trustees were replaced by the Tasarruf Mevduati Sigorta Fonu, the Savings Deposit Insurance Fund of Turkey ("the SDIF") as the single trustee of Koza Altin. The SDIF has appointed various individuals to the board of Koza Altin.

6. In order to defend his control of Koza Ltd, in September 2015 Mr Ipek caused a number of changes to be made to Koza Ltd's constitution and share structure. Resolutions were passed to create a new class of "A" shares and to amend Koza Ltd's articles of association to introduce a new article 26 which purported to preclude any further changes to the articles of association or any change of directors save with the prior written consent of the holders of the "A" shares. Two "A" shares were issued, one to Mr Ipek and one to his brother.

7. The validity and effect of these changes is in issue in these proceedings. The appellants contend that they are valid and lawful. Koza Altin contends that they are invalid and unlawful attempts to entrench Mr Ipek and his associates in control of Koza Ltd.

8. On 19 July 2016, the trustees of Koza Altin caused a notice to be served on the directors of Koza Ltd under section 303 of the Companies Act 2006, requiring them to call a general meeting to consider resolutions for their removal and replacement with three of the trustees. Mr Ipek did not call such a meeting, so on 10 August 2016 Koza Altin served a notice pursuant to section 305 of the 2006 Act to convene a meeting on 17 August 2016 to consider those resolutions. The service of this notice prompted Mr Ipek and Koza Ltd to make an urgent without notice application on 16 August 2016 seeking an injunction against the trustees and Koza Altin to prevent the meeting taking place and, so far as required, orders for service out of the jurisdiction and for alternative service.

9. Injunctive relief as set out in the application was sought on two bases. It was contended that (i) the notices of 19 July and 10 August 2016 were void under section 303(5)(a) of the 2006 Act because at least one of the holders of the "A" shares (Mr Ipek) did not consent to the proposed resolutions and so, if passed, they would be ineffective as being passed in breach of article 26 ("the English company law claim"); and (ii) the notices were void on the basis that the English courts should not recognise the authority of the trustees to cause Koza Altin to do anything as a shareholder of Koza Ltd, because they were appointed on an interim basis only and in breach of Turkish law, the Convention for the Protection of Human Rights and Fundamental Freedoms and natural justice, so that it would be contrary to public policy for the English courts to recognise the appointment ("the authority claim").

10. At the without notice hearing before Snowden J on 16 August 2016 the judge granted interim injunctive relief as sought by Mr Ipek and Koza Ltd and gave permission for alternative service at the offices of Mishcon de Reya LLP ("MdR"), the solicitors acting for Koza Altin and the trustees.

11. Mr Ipek and Koza Ltd issued their claim form on 17 August 2016 seeking a declaration that the notices were ineffective; an injunction to restrain Koza Altin and the trustees from holding any meeting pursuant to the notices and from taking any steps to remove

the current board of Koza Ltd; a declaration that the English courts do not recognise any authority of the trustees to cause Koza Altin to call any general meetings of Koza Ltd or to do or permit the doing of anything else as a shareholder of Koza Ltd; and an injunction to restrain the trustees from holding themselves out as having any authority to act for or bind Koza Altin as a shareholder of Koza Ltd and from causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Ltd.

12. Koza Altin and the trustees filed an acknowledgement of service indicating their intention to contest jurisdiction and then issued such an application. At the same time, Koza Altin filed a defence and counterclaim to the English company law claim. The counterclaim impugned the validity and effectiveness of the resolution amending the articles to introduce article 26, and the validity and effectiveness of the board resolution of Koza Ltd pursuant to which the two "A" shares were issued on the grounds that they were not made bona fide for the benefit of the company as a whole and/or were made for an improper purpose; and/or that they were ineffective to prevent the resolutions set out in the s. 303 and s. 305 notices as an unlawful fetter on powers conferred by statute, including the power under s.168(1) of the Act to remove a director by ordinary resolution. The relief sought comprises declarations that the resolution amending the articles, article 26 itself, and the resolution to allot and purported allotment of the "A" shares are all invalid and/or ineffective and/or unenforceable.

13. The application by Koza Altin and the trustees to challenge jurisdiction was heard by Asplin J, as she then was, in December 2016. Her decision upholding jurisdiction was appealed to the Court of Appeal and then to the Supreme Court, who held on 29 July 2019 that there was no jurisdiction in respect of the authority claim. The claim is therefore now proceeding against Koza Altin as the sole defendant and the action is concerned solely with the English company law claim and the counterclaim. Similar issues to those which would have arisen in the authority claim will fall to be resolved because the appellants have applied to strike out the defence and counterclaim on the grounds that those purporting to represent Koza Altin have no authority to do so in an English court given their association with the Erdogan regime and the alleged campaign of expropriation and oppression which the counterclaim is said to be furthering; that strike out application is to be heard at the same time as the trial. The action has not proceeded beyond statements of case and a first CMC is yet to be listed.

14. There was also listed to be heard before Asplin J in December 2016 the inter partes hearing for the continuation of the injunction granted by Snowden J. She continued the injunction on the basis of undertakings given by the appellants to the Court recorded in the First Schedule to her order dated 21 December 2016 ("the Asplin Order"), which included the undertaking which is relevant to the current appeal, namely that until trial or further order Koza Ltd would not dispose of or deal with or diminish the value of any funds belonging to Koza Ltd or held to its order "other than in the ordinary and proper course of its business" and other than spending a reasonable sum on legal advice and representation for the benefit of Koza Ltd ("the Undertaking"). Other undertakings in the First Schedule provided for prior notice to be given by Koza Ltd of an intention to spend money on new projects and of an intention to spend, or incur liability for, more than £25,000 on anything other than legal fees in the action. It was supported by a cross undertaking in damages by Koza Altin and one of the trustees in the same terms as would be required for a freezing order in those terms. The Asplin Order provided at

paragraph 2 for "permission to apply, including in relation to the undertakings set out in the Schedules".

15. The ICSID claim by IIL against the Republic of Turkey was initiated by notice on 6 March 2017 and registered on 29 May 2018 ("the Arbitration"). IIL is an English company. Its interest in the Koza Group is said to arise pursuant to a share purchase agreement dated 7 June 2015 ("the SPA"), under which members of the Ipek family sold their shares in Koza-Ipek Holding AS, the Turkish holding company for the Koza Group, to IIL, in return for IIL issuing shares to the Ipek family, the effect of which would be to insert between the Ipek family and the group an English holding company. The significance of the effective holding company for the group becoming an English company is that it introduced the international element relied upon by IIL to confer jurisdiction on the ICSID tribunal under the bilateral treaty between the English and Turkish governments. The authenticity of the SPA is disputed by the Republic of Turkey in the Arbitration and by Koza Altin in the current proceedings. It is alleged by them to be a sham and backdated document fraudulently created for the purpose of founding ICSID jurisdiction. The Republic of Turkey contends in the Arbitration, and Koza Altin contends in these proceedings, that the insertion of IIL under what they allege to be a fraudulent SPA, is the only basis for the jurisdiction of the ICSID tribunal, which otherwise would be concerned with a dispute solely between the Turkish Government and Turkish individuals and companies. The appellants maintain the authenticity of the SPA but further contend that the jurisdiction of the tribunal does not depend upon its authenticity, arguing that it is only one factor and that the share transfer itself, although unregistered, is sufficient to found jurisdiction irrespective of the authenticity of the SPA. The issue of jurisdiction in the Arbitration will be dealt with by the tribunal as a preliminary issue, with a hearing currently scheduled to take place from 14 to 18 September 2020.

The ICSID funding application and appeal

16. Shortly after initiating the Arbitration, on 5 April 2017 IIL made a formal request to Koza Ltd to assist it in funding the claim. Koza Ltd agreed to do so by a formal acceptance letter approved at a board meeting by Mr Ipek as sole director. Accordingly, Koza Ltd issued an application on 20 June 2017 seeking a declaration that Koza Ltd's proposed provision of funding to IIL to finance fees, disbursements and a possible adverse costs order in the Arbitration (as well as three other forms of expenditure) would be permissible under the terms of the Undertaking as within its ordinary and proper course of business; or in the alternative for an order varying the Undertaking so as to permit it ("the Funding Application"). The proposed funding was for expenditure on fees and expenses of £1.5 million over 18 months, and a further £1.5 million to be held on account against an adverse costs order ("the Funding").

17. The Funding Application was heard by Mr Richard Spearman QC, sitting as a Deputy Judge of the Chancery Division. Koza Ltd argued that the Funding was in the ordinary and proper course of Koza Ltd's business because 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, and 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 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 & Bockius LLP. Koza Altin argued that the Funding was prohibited by the Undertaking on the grounds (a) that any payment made for the purposes of relying on the SPA was not a proper use of Koza Ltd's funds because the SPA was "a sham and backdated, created in order to engineer a position in which IIL can attempt to bring an ICSID arbitration"; (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 tribunal to hear the dispute even if the SPA was authentic; and (d) that the evidence did not establish that Koza Ltd was the only source of funds available to IIL.

18. Mr Spearman handed down judgment on 16 November 2017 resulting in an Order dated 20 December 2017 following further argument. He accepted that it was at the lowest seriously arguable that success for IIL in the Arbitration would provide the commercial funding benefits to Koza Ltd which it claimed, and so could qualify as in the ordinary and proper course of Koza Ltd's business; that the authenticity of the SPA was open to very serious doubt; that he was not satisfied on the evidence that IIL had no alternative source of funding; and that the SPA, even if authentic, did not confer jurisdiction on the ICSID tribunal as a qualifying investment under the bilateral treaty; and that accordingly the expenditure was not permitted by the terms of the Undertaking. He also held that there should be no variation of the Undertaking on the grounds that there had been no material change of circumstance since it had been given. He therefore declined to make the positive declaration sought by Koza Ltd in relation to the Funding or to vary the Undertaking to permit it. Instead he made a negative declaration that the Funding would not be in the ordinary and proper course of business within the meaning of the Undertaking. This was at the request of the appellants, not Koza Altin who had not sought such a negative declaration and was content with a simple dismissal of the appellants' application for a positive declaration that the expenditure was permissible, but was the logical consequence of the Judge's finding on the jurisdiction issue.

19. Koza Ltd appealed, pursuing only its case that the Funding was permitted by the terms of the Undertaking; the application in the alternative for a variation was not pursued. Although Koza Altin had not itself asked the judge below to make the negative declaration, on the appeal it sought to support such relief. In the course of argument, Lord Falconer, appearing for Koza Ltd, pursued the claim for a positive declaration but argued as a fall back that the Court should make no declaration rather than a negative declaration.

20. The Court of Appeal's judgment was given on 23 May 2019 ("the Court of Appeal judgment") and its order made the same day. Floyd LJ, with whom Patten LJ and Peter Jackson LJ agreed, concluded that the critical issue upon which the appeal turned in relation to the Funding was the authenticity of the SPA. He said:

> "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.
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> 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.
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> 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."

21. He went on to say that the Judge had been wrong to conclude that the merits of the jurisdiction issue took the Funding outside the scope of what was permitted by the Undertaking, and to reject Koza Altin's other arguments, treating the availability of other sources of funding as of little if any weight. He expressed his conclusions in these terms:

> "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.
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> 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."

22. The Court of Appeal also heard, at the same time, an appeal from an order of Morgan J on Koza Altin's application that under the terms of the Undertaking Koza Ltd was prevented from funding the legal costs incurred by Mr Ipek in his defence of the extradition proceedings brought against him. Morgan J granted a declaration that it would not be in the ordinary and proper course of Koza Ltd's business to do so because it was more probable than not that Mr Ipek could pay for his own defence out of resources available to him. The Court of Appeal held that there was no basis on which to interfere with the factual conclusion that other resources were available to Mr Ipek, but that it was not relevant to whether the expenditure was in the ordinary and proper course of Koza Ltd's business. It held that such expenditure was in the ordinary and proper course of Koza Ltd's business because it was designed to secure the retention of Mr Ipek's services as a director. Accordingly it granted a positive declaration that the extradition expenditure was permitted by the Undertaking.

23. Koza Altin sought permission to appeal to the Supreme Court. The Court of Appeal refused permission to appeal but granted an order restraining the Funding and extradition expenditure pending the resolution of an application to the Supreme Court for permission to appeal, and until after judgment in the appeal if permission were granted. On 20 June 2019 Koza Altin made an application for permission to appeal to the Supreme Court.

The Injunction Application

24. Meanwhile, immediately following the Court of Appeal's decision on the Funding Application appeal, MdR wrote to Gibson Dunn and Crutcher LLP, the then solicitors for Koza Ltd, on 23 May 2019 seeking confirmation that further advance notice would be given of any intention by Koza Ltd to use its assets to fund the Arbitration. Mr Kitchener QC told us that this was the result of a realisation that Koza Ltd might seek to make the funding despite having failed to achieve its positive declaration, as Floyd LJ had described it as free to do at its own risk in paragraph [48] of the judgment. He told us that this had only been perceived as a possibility on Koza Altin's side as a result of Lord Falconer's alternative submission inviting the Court simply to dismiss the application for a positive declaration rather than to make a negative declaration. At this time Koza Ltd could not incur such expenditure as a result of the Court of Appeal's order pending the resolution of an application to the Supreme Court for permission to appeal. Whilst that was pending the appellants changed their solicitors and instructed Latham & Watkins (London) LLP ("L&W"). MdR continued to seek assurances from L&W that should the Supreme Court refuse permission to appeal, a fresh notification would be provided of any intention to spend funds upon the Arbitration so that an application could be made to court to restrain such expenditure. The assurances were not given to the satisfaction of MdR, and therefore, prior to the Supreme Court's decision (which was given on 9 January 2020 refusing permission) Koza Altin issued the application which is the subject matter of this appeal on 9 December 2019. The application sought an injunction restraining Koza Ltd from incurring, or committing itself to, expenditure upon the funding of the Arbitration, and restraining Mr Ipek from causing Koza to take such steps ("the Injunction Application").

25. The Injunction Application came before the Court on 12 December 2019 on an urgent basis, but was adjourned on the appellants' undertaking to preserve the status quo pending the full hearing before Mr Cousins which took place on 10 and 11 February 2020. His Judgment was delivered on 23 March 2020.

The rival arguments

26. The rival arguments before the Judge were in their essential respects as follows. In summary Koza Altin contended:

(1) The appropriate principles are those applicable to interim injunctions set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

(2) There is plainly a serious issue to be tried, at the lowest, as to the authenticity of the SPA and accordingly as to whether the proposed expenditure would be in breach of the Undertaking and part of an allegedly fraudulent scheme.

(3) The balance of justice weighs heavily in favour of granting the injunction because if the injunction sought is not granted and it were later to be determined that Koza Ltd should not have funded the Arbitration, then Koza Altin will have suffered serious and likely irremediable prejudice, from the dissipation of its subsidiary's assets, whereby not only Koza Ltd's but also Koza Altin's value would be diminished; whereas if the injunction were to be granted and it should later be determined that Koza Ltd's funding of the Arbitration would have been proper, then Koza Ltd will not in fact suffer, or have suffered, any prejudice at all, because the evidence shows that the Arbitration can and will be otherwise funded.

(4) Before the Judge a further argument was advanced that it had recently become clear that the relief which was sought in the Arbitration was a claim for damages, not restitution (as had been the assumption on which the previous courts had been proceeding), which made it inconceivable that its pursuit would benefit Koza Ltd in any event. This further argument was rejected by the Judge and has not been pursued before us on the appeal.

27. The appellants submitted that what they characterise as exceptional relief should not be granted, in summary for the following reasons:

(1) The application was an abuse of process because (i) it collaterally attacks this Court's decision on the Funding Application that Koza should be free to fund the Arbitration if it chose at its own risk as to whether that would be a breach of the Undertaking, relying on *Hunter v Chief Constable of the West Midlands* [1982] AC 529; and in any case (ii) if the injunction application was to be brought at all, it could and should have been brought in the context of that prior application, relying on *Henderson v Henderson* (1845) 3 Hare 100.

(2) The application is legally unsustainable because to grant an injunction to restrain breach of an injunction, or an undertaking, is contrary to principle and has the effect of subverting the Undertaking agreed between the parties to hold the ring for the duration of this litigation begun nearly four years ago. The correct course

was either to pursue a remedy in contempt or to seek a variation of the Asplin Order. This was characterised as "the injunction upon an injunction point".

(3) The application is also legally unsustainable because Koza Altin has no underlying claim in support of which an interim injunction – let alone a freezing injunction - could properly be granted. There is no claim for injunctive relief in the counterclaim, which merely seeks declarations. This was characterised as "the no underlying claim point".

(4) There is no serious issue to be tried because none had been identified: the authenticity issue would not be tried between these parties in this forum but only in the Arbitration. It could not be the subject matter of an order for a trial here because the ICSID tribunal had exclusive jurisdiction under article 26 of the ICSID Convention.

(5) If these objections failed, the Court should apply the *American Cyanamid* principles in the way explained by Lord Hoffmann in *National Commercial Bank of Jamaica Ltd v Olint Corp Ltd* [2009] 1 WLR 1405. The balance of irremediable prejudice was against the grant of an injunction because:

(a) The issue whether the funding was a breach of the Undertaking was not going to be tried, at least before the funding was needed; accordingly the "interim" injunction sought would in practice be finally determinative and the Court was required to have a high degree of assurance that the funding would be a breach. It could not reach such a conclusion in relation to the authenticity of the SPA on the material before the Court.

(b) The balance favoured Koza Ltd because if the injunction were refused, there was a high risk that IIL would not be able to pursue its claim in the Arbitration, said to be worth about $5-6 billion, with the result that Koza Ltd would lose the opportunity to secure a substantial commercial benefit from it; and Koza Altin's cross undertaking in damages provided no adequate protection; whereas if the injunction were granted, it concerned only a disbursement of £3m at most.

28. The Judge's reasoning in accepting the arguments of Koza Altin and rejecting those of the appellants can be summarised as follows:

(1) As to the *Hunter* abuse point, the principle expressed in *Hunter* was limited to precluding a collateral attack on a final decision of a competent court by seeking to raise again the identical question already decided (Judgment [71]-[72]). That did not apply to the current circumstances. The Court of Appeal had not made a final decision that Koza Ltd was free to fund the ICSID arbitration: it expressly did not decide that question and did not do so finally (Judgment [73]).

(2) As to the *Henderson v Henderson* abuse point, the authorities made clear that the question was not whether the application *could* have been brought forward on the earlier occasion but whether it *should* have been, such that the failure to do so is abusive of the court process, a question which always depends upon the particular factual circumstances (Judgment [53]-[57]). Whilst there was a tension in the authorities as to whether the principle would be applied less

rigorously in relation to interlocutory hearings (Judgment [58]), it was not necessary to resolve it (Judgment [66]). There was nothing abusive in Koza Altin failing to make the current application before Mr Spearman in response to Koza Ltd's Funding Application, because Koza Altin could reasonably have assumed from the fact of the application and the material in support that Koza Ltd would only proceed to provide the Funding if it succeeded in getting the declaration it was seeking that it was permitted to do so by the terms of the Undertaking or the variation sought (Judgment [62]-[65]).

(3) In relation to the injunction upon an injunction point, the Judge observed that if the ingredients for an injunction were otherwise made out the point would, if correct, leave an unfortunate gap in the courts' ability to do justice where, as the Court of Appeal had held, it was in no position to determine finally at this stage whether the Funding would or would not breach the Undertaking (Judgment [78], [83]) and where it was necessary to ensure the effectiveness of an earlier order. The width of s. 37 of the Senior Courts Act 1981 and the decision in *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] 1 Ch 286 and dictum of Briggs J, in *Revenue and Customs Commissioners v Egleton & others* [2007] Bus LR 44 at [20] supported the view that an injunction can properly be granted as an ancillary order to ensure the effectiveness of an earlier order (or undertaking) (Judgment [79]-[82]).

(4) The Judge rejected the no underlying claim point on the grounds that as in *Egleton,* the relief was invoked for the benefit of a stakeholder in the outcome of the litigation, namely a shareholder, and that unless the litigation is to be a sterile exercise, the preservation of the value of the company is a proper concern for the court pending resolution of the dispute notwithstanding that there is no claim for financial remedy in the prayer for relief in Koza Altin's counterclaim; the preservation of the value of Koza Ltd's assets was clearly a direct and express object of the Undertaking, which the injunction sought was designed to render effective (Judgment [84]).

(5) On the merits of the dispute as to the authenticity of the SPA, the Judge referred to the additional evidence filed on behalf of the appellants since the Funding Application, and said that making all due allowance for it, there remained reasons for very serious doubt as to the SPA's authenticity, which was what both Mr Spearman and the Court of Appeal had determined on the Funding Application (Judgment [85]). At paragraph [106] he returned to the issue and said that on the evidence before him Koza Altin had the better of the argument, as it did on the issue addressed at paragraph [31] of the Court of Appeal Judgment, namely whether the jurisdiction of the ICSID tribunal could be established even if the SPA were not authentic. In expressing his conclusion at [109] he said he had a high degree of assurance that at trial it would appear that the injunction was rightly granted.

(6) In relation to what he termed the balance of convenience, the Judge referred to the summary of the principles by Lord Hoffmann in *National Commercial Bank v Olint* and his statement at paragraph [19] that the underlying principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other (Judgment [89]). He determined that if Koza Altin were right but the injunction were refused, it would suffer the

prejudice of a £3m depletion in Koza Ltd's assets and so in its shareholding (Judgment [89, 93]), for which damages would not be an adequate remedy. It was artificial to compare that £3m figure with the size of the claim in the ICSID Arbitration of US$5-6 billion, even if all went to plan for the success of that claim, because what Koza Ltd might receive from any success would depend on IIL's allocation of its recoveries and might not result in any financial benefit to Koza Ltd itself (Judgment [93]). But in any event, if the injunction were to be granted, it would be likely that IIL would be able to fund the Arbitration by the use of resources which the Judge inferred from the evidence were available to Mr Ipek, evidence which he set out in some detail (Judgment [89], [96]-[98] and [39]). This included the fact that Mr Ipek had refused to explain the evidence suggestive of the availability of substantial assets or to give any details of his assets, which the Judge regarded as significant on this issue applying the principles enunciated by Lord Sales in *Sarpd oil International Ltd v Addax Energy SA & another* [2016] 1 CLC 336 at [19]-[20] in the context of applications for security for costs and *Yorke Motors v Edwards* [1982] 1 WLR 444, 449B-E in the context of arguments that requiring payment into court as a condition of leave to defend a claim on a summary judgment application would stifle the ability to conduct the defence. Mr Ipek's explanation for this failure was a fear that there would be a leak to the Turkish authorities who would then seek to expropriate any such assets or use the information to further oppress him and his family. MdR had sought to meet this concern by offering a confidentiality club comprising only UK lawyers to which such disclosure would be confined. This was flatly rejected by Mr Ipek for what the Judge described as extremely unimpressive and unsatisfactory reasons (Judgment [101]-[103]). The Judge also concluded that Koza Altin's cross-undertaking in damages was sufficient to cater for the speculative loss which Koza Ltd might suffer in the unlikely event of the injunction having the effect of stifling pursuit of a valid claim in the Arbitration (unlikely both because of the availability of alternative sources of funding and the merits of the authenticity issue). His conclusion was that the balance of convenience came down clearly in favour of grant of an injunction and that there was a far greater risk of irremediable injustice if the injunction were refused than if it were granted (Judgment [109]).

The appellants' arguments

29. Before us, the arguments of Mr Flynn QC on behalf of the appellants were similar but not identical to those advanced below. In summary they were as follows:

(1) The application was an abuse of process. It could and should have been brought as a contingent cross-application before Mr Spearman, and was therefore an abuse under the *Henderson v Henderson* principle. It was an additional factor making it abusive that it was a collateral attack on the Court of Appeal decision. The Judge had misunderstood his reliance on *Hunter*. It was not contended that the relief sought was inconsistent with the *decision* of the Court of Appeal; rather it was a collateral attack on the decision because it sought to prevent the Funding without a determination of whether it was permitted by the Undertaking whereas the effect of the Court of Appeal decision, as Floyd LJ said at paragraph [48], was that Koza Ltd was free to provide the Funding albeit at its own risk as

to whether that would be a breach of the Undertaking. It would therefore frustrate the practical (not legal) outcome of the decision.

(2) The Judge was wrong to reject the no injunction upon an injunction point. The injunction could not be ancillary to the enforcement of the undertaking because that begs the question whether the Funding would be a breach. To amount to enforcement it must assume breach, yet that is what the Court of Appeal said could not be decided and what will never be decided in a forum binding the parties. Koza Altin's remedies are either to apply for a variation of the Asplin Order (which would require it to show special circumstances) or to proceed in due course with contempt proceedings. The relief sought is both novel and contrary to principle.

(3) The Judge was wrong to reject the no underlying claim point. It is necessary to identify an underlying claim because the grant of the injunction is not a legitimate exercise of any jurisdiction for ancillary enforcement of court orders. The counterclaim in the action cannot support the grant of the injunction because it is a claim for declarations and a freezing order cannot be granted in support of purely declaratory relief. *Egleton* and the cases there cited involved money claims or final injunctive relief. The authenticity of the SPA cannot be the "issue to be tried" because it does not fall for trial in this action. The result is that Koza Altin will have obtained by way of interim application a permanent injunction without the need for a trial.

(4) If these arguments are rejected, the Judge in any event erred at the discretionary stage because:

(a) he should have applied the principles applicable to freezing orders, not the *American Cyanamid* principles; alternatively

(b) he could not properly have had a high degree of assurance on the authenticity issue; he could not properly conclude that alternative sources of funding were available; and the balance of justice considerations came down firmly against grant of an injunction, which would put Koza at risk of losing access to assets worth US$5-6 billion, contrasted with the lesser prejudice to Koza Altin if the Funding took place of being at risk of being unable to recover £3m.

Ground 1: Abuse

The law

30. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at p. 536C Lord Diplock described the abuse of process jurisdiction as "the inherent power which any court must possess to prevent misuse of its procedure in a way which, whilst not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it or would bring the administration of justice into disrepute amongst right-thinking people".

31. In *Henderson v Henderson* 3 Hare 100 Sir James Wigram V-C said at pp. 114-115:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

32. The authoritative modern statement of the principle is to be found in the speech of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p30H-31F, with whom on this issue Lords Goff, Cooke and Hutton agreed:

> "It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v Henderson* : A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised

> before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not……….While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

33. Lord Millett, in a concurring speech, said at p59A-E that the principle had the same purpose as cause of action and issue estoppel, which was to bring finality to litigation and avoid subjecting a defendant unnecessarily to oppression, but went on to emphasise an important difference:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) . While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

34. There have been many decisions applying and refining these principles. In *Michael Wilson & Partners v Sinclair* [2017] 1 WLR 2646 Simon LJ reviewed a number of them and summarised their effect at [48] in the following terms:

> "48. The following themes emerge from these cases that are relevant to the present appeal.
>
> (1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's case* [1982] AC 529 , Lord Hoffmann in the *Arthur J S Hall case* [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's case*. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132; and the court's

> power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur J S Hall* case.
>
> (3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v Gore Wood & Co* and Buxton LJ in *Laing v Taylor Walton* [2008] PNLR 11.
>
> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur J S Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow case* [2004] Ch 1; or, as Lord Hobhouse put it in the *Arthur J S Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
>
> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.
>
> To which one further point may be added.
>
> (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 (formerly Contour Aerospace 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."

35. This last point was also made by Thomas LJ in *Aldi Stores Ltd v WSP Group Plc* [2008] 1 WLR 748 in these terms 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."

36. A further recognised category of abuse is where a collateral attack is made on a previous decision of the court. *Hunter's* case is one example of where a collateral attack was held to be abusive. Six defendants who came to be known as "the Birmingham Six" were convicted of a terrorist bombing of two public houses after a

trial in which they had challenged the admissibility of alleged confessions on the grounds that they had been extracted by the police by the application and/or threat of violence. Those allegations were investigated by the trial judge, Bridge J, in a lengthy voir dire and rejected. The defendants were convicted and unsuccessfully appealed. They were much later acquitted, upon a further reference of their case to the Court of Appeal Criminal Division. But long before that, they brought proceedings against the police for damages for assault, making the same allegations of violence and threats of violence which were directly contrary to the findings of the criminal trial judge on the voir dire. The claim was struck out as an abuse of process. Lord Diplock stated the principle being applied in the following terms at p. 541B-C:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purposes of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

37. In the *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 Lord Bingham said at [38]:

> "……the House of Lords did not decide in the *Hunter* case that the initiation of later proceedings collaterally challenging an earlier judgment is necessarily an abuse of process but that it may be. In considering whether, in any given case, later proceedings do constitute an abusive collateral challenge to an earlier subsisting judgment it is always necessary to consider with care (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such)."

38. There is a potential overlap between the *Henderson* and *Hunter* forms of abuse, and both may be engaged on the facts of any particular case. In the passage in Lord Bingham's speech in *Johnson v Gore Wood* quoted above he remarked that if the second set of proceedings amounted to a collateral attack on a decision in earlier proceedings it would be "much more obviously abusive".

39. Mr Flynn's argument in this case is not that the injunction sought and granted is inconsistent with the decision of the Court of Appeal, so as to be on all fours with *Hunter*; but rather that it frustrates and prevents the practical consequences of that decision, and amounts to a collateral attack for that reason, engaging the principles against abuse which were also applied in the context of attacks on decisions themselves in *Hunter*. Mr Kitchener argues in response that a principle that it is abusive to prevent or frustrate the practical consequences of previous decisions is a new species of abuse which is not supported by *Hunter* or any other authority; and that it is amorphous and vague and would introduce a considerable and unwelcome degree of uncertainty to this area of the law.

40. Novelty is never a complete answer to an argument of abuse because the categories of abuse are never closed: see per Lord Diplock in *Hunter* at p.536D and per Lord Bingham in the passage quoted above in *Johnson v Gore Wood*. I would certainly

accept that there is no general principle that bringing proceedings which frustrate or prevent the practical consequences of a previous decision is an abuse as a collateral attack on such decision. I would not, however, hold that an attack on the practical consequences of a previous decision can never be treated as an abuse. Every case is fact specific and must be measured by the twin public and private interests which underpin the jurisdiction of the court to prevent misuse of its procedures. I shall return below to the application of the collateral attack principles to the particular facts of this case.

41. The *Henderson* and *Hunter* principles also apply to interlocutory decisions and applications. In the current case, the Judge said that there was a tension between some of the authorities concerned with interlocutory decisions. He referred to the judgment of Nugee J in *Holyoake v Candy* [2016] EWHC 3065 Ch which is a helpful summary of those cases and what is said to be a difference of approach between them:

> "13. In *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485 ("Chanel"), the plaintiffs, in an action for trade mark infringement and passing-off, obtained *ex parte* interlocutory injunctions; on the *inter partes* hearing the defendants felt constrained to give undertakings and by consent the motion was stood over to trial (without being opened or the evidence read) on the defendants giving undertakings "until judgment or further order". The defendants then carried out some research which led them to think they had an argument after all and applied to discharge the undertakings. Foster J refused the application, and the Court of Appeal refused leave to appeal. Buckley LJ held (at 492D) that an order (or undertaking) expressed to be until further order gave a right to the party bound to apply to have the order (or undertaking) discharged if good grounds for doing so are shown. He then said he would assume (without deciding) that the evidence the defendants had uncovered would have enabled them to resist the motion, and continued (at 492H):
>
> "The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."
>
> 14. In *Woodhouse v Consignia plc* [2002] EWCA Civ 275, a claimant who had unsuccessfully sought to lift a stay applied to do so a second time, and both the district judge and judge held that he could not have a second bite at the cherry. The Court of Appeal allowed an appeal. Brooke LJ, giving the judgment of the Court, said that there was a public interest in discouraging a party from making a subsequent application for the same relief based on material which was not, but could have been, deployed in the first application; that one of the reasons was the need to protect respondents to successive applications from oppression [55]; but

that although the policy that underpins the rule in *Henderson v Henderson* had relevance as regards successive pre-trial applications for the same relief:

"it should be applied less strictly than in relation to a final decision of the court, at any rate where the earlier pre-trial application has been dismissed." [56]

He then gave an example where an application for summary judgment under CPR Pt24 had been dismissed, but a second application was made based on evidence that, although available at the time of the first application, was not then deployed through incompetence, but which was conclusive; the second application ought to be allowed to proceed [57]. The district judge and judge had therefore been wrong to regard the fact that the second application was a second bite at the cherry as decisive [58], and the Court of Appeal proceeded to consider the second application on its merits, regarding the fact that it was a second bite at the cherry as an important factor [61], but in the event decided that it would be a disproportionate penalty for the claimant to lose his right to damages due to a pardonable mistake by his solicitor, and lifted the stay [63].

15. In *Orb a.r.l. v Ruhan* [2016] EWHC 850 (Comm) Popplewell J had to deal with a number of applications arising out of a freezing order made by Cooke J which had been obtained by the defendant (Mr Ruhan) against the claimants (the Orb Parties) [1]-[2]. The order required Mr Ruhan to fortify his cross undertaking in damages by charging certain shares [48]. Mr Ruhan had done so but the Orb Parties sought further fortification on the ground that the shares were inadequate security. Popplewell J dismissed the application for a number of reasons, the first of which was that it was open to the Orb Parties to take the point before Cooke J but they had failed to do so. None of the material relied on had come to their attention subsequently; Cooke J had given them an opportunity to raise any objections to the shares as fortification, but they had not raised the points now sought to be raised, although they were well known to them; there had been no significant or material change of circumstances [81]. Popplewell J continued [82]:

"That is fatal to this ground for discharge: see *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of

the judicial process by undermining the necessary finality of unappealed interlocutory decisions."

16. Mr Stewart also referred to a judgment of Etherton C in this action, *Holyoake v Candy* [2016] EWHC 1718 (Ch) . The Claimants had initially applied for a notification injunction, making the decision not to apply for a freezing injunction. I granted that application in a modified form. The Claimants then applied for a freezing order after all. It was that application which came before the Chancellor. He dismissed it. The Claimants' counsel, Mr Trace QC, had submitted that all that he needed to show was the usual prerequisites for a freezing order, namely a good arguable case on the merits, a real risk of dissipation and that the balance of convenience favoured the grant of the order [18]. The Chancellor disagreed, saying [21]:

"I do not agree with Mr Trace's statement of principle. The starting point in such a case as the present is that the claimants must point to something that has happened since the grant of the original order. They must show something material has changed to make it appropriate to investigate the same issues over again at yet another extensive hearing with even more voluminous evidential material. Absent any such change, the application for a freezing order is not only a disproportionate call on the court's resources, but an abuse of the court's process, in effect making successive applications for the same objective but testing the court's willingness each time to see how far the court will go, each such application involving, to a greater or lesser extent, duplication of issues, evidence and arguments."

He then examined, and rejected, various matters which were said to amount to a sufficiently material change of circumstances.

17. These authorities are not entirely easy to reconcile with each other. The decisions in *Orb v Ruhan* and *Holyoake v Candy* proceed on the basis that a party who has sought and obtained relief on an interlocutory application cannot return to court and ask to extend (or "upgrade", in the words of the Chancellor) the relief without showing a material change of circumstances. It is easy to see the policy reasons behind such a principle which are well articulated by both judges. Chanel indicates that similar considerations apply where a party has submitted to an order, and that the question does not turn on whether the applicant did in fact have the evidence at the earlier hearing but on whether it was reasonably available to him. Yet in *Woodhouse v Consignia* the Court of Appeal held that the rule in *Henderson v Henderson* was not applied so strictly in interlocutory matters, that the judges below had been wrong to dismiss the second application as a second bite at the cherry, and that it did not matter that the evidence deployed had in fact been available to the applicant at the time of the first application, at any rate if the evidence was conclusive.”

42. In my judgement the tension is more apparent than real. The *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in *Johnson v Gore Wood* that it is not sufficient to establish that a point *could* have been taken on an earlier occasion, but a recognition that where it *should* have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in *Woodhouse v Consignia* that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paragraphs [30] to [40] above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions.

Abuse: application to the facts

43. There is no doubt that Koza Altin could have brought the injunction application as a cross-application before Mr Spearman; and that had it done so a good deal of court time would have been saved and the appellants would have avoided the significant additional expense and burden which is the direct result of defending it in a separate application. There is a considerable overlap between the Funding Application and the Injunction Application. Not only were both broadly concerned with the same central purpose, namely whether Koza Ltd should be allowed to fund the Arbitration, but there was a substantial overlap in the evidence and issues which arose in each application. In each application it was necessary to put forward the same substantial material by way of background and context. In each application the courts were asked to consider whether the Funding would be a breach of the Undertaking, including addressing the merits of the authenticity issue, and whether alternative sources of funding were available, both of which questions occupied a significant part of the

evidence and argument on each occasion. The mere fact of such duplication, and that it could have been avoided had the injunction application been made to Mr Spearman, is not, however, determinative of the abuse issue. The first critical question is whether the Injunction Application should have been brought before Mr Spearman. If it should, then I would regard the bringing of it in a separate and subsequent application as an abuse. If, however, it cannot be said that it should have been brought then, I would not regard it as an abuse, given the important article 6 rights of access to justice emphasised by Lord Millett in *Johnson v Gore Wood*, unless it amounts to an abusive collateral attack on the Court of Appeal decision, which is the second critical question. I will take these two critical questions in turn.

44. In my judgement, the Judge was correct to hold that it was reasonable for Koza Altin to have thought that Koza Ltd would not provide the Funding unless it succeeded in getting a declaration or variation from the court in its favour on the Funding Application. Koza Ltd made the application for a declaration that it was entitled to fund, or alternatively a variation to permit it, and did not fund or threaten to fund whilst the application was pending at first instance or on appeal. Koza Altin's rhetorical question "Why make the application if the intention was to fund anyway?" is pertinent. Indeed at one point in the course of his submissions to us, when addressing the degree of overlap between the two applications, Mr Flynn submitted that "…on the prior occasion we debated over several days before Mr Spearman …whether the ICSID funding could be made. True, we did so in the context of our application for a declaration regarding the undertaking or variation of it, but the *whole point* of the exercise was to ascertain whether or not Koza Ltd could make the ICSID expenditure (my emphasis)." Yet his submission on *Henderson* abuse amounts to saying that Koza Altin should not have assumed that this was the whole point of the exercise, and should have appreciated that Koza Ltd would go ahead with the Funding whichever of the three outcomes which were available to Mr Spearman was adopted by him, namely positive declaration, variation, or refusal of relief.

45. Moreover the evidence in Mr Ipek's third witness statement was that the board resolution approving the funding stated that it would be incorporated in an agreement which was dependent on an ability to do so in accordance with the terms of the Undertaking "and related proceedings". This latter expression was a reference to the Funding Application which was to be issued. Mr Ipek was therefore confirming that funding was subject to the outcome of the Funding Application, as the appellants accepted before the Judge and in the skeleton argument on this appeal. Since the only outcomes contemplated at the time of the application to Mr Spearman were a positive declaration, a variation, or the refusal of either relief, funding would not have depended on the outcome if it was to be made in the last of these possibilities, since it would clearly be made in the event of either of the other two. Koza Altin was entitled to assume that what this meant was that the funding would only be made if the Funding Application was successful and Koza Ltd obtained the prior sanction of a positive declaration in its favour or a variation.

46. Mr Flynn advanced a number of criticisms of this reasoning, which is essentially the same as that of the Judge. He submitted that the answer to the rhetorical question was as follows. Koza Ltd considered that it had good commercial reasons for funding the ICSID claim for the purposes of the Undertaking. Koza Ltd wanted to have the comfort of the Court on this point. However those in control of Koza Altin had taken

(and continue to take) an extremely narrow and aggressive view of what projects and investments are permitted by the Undertaking and made very clear that they thought it would not be for the commercial benefit of Koza Ltd to fund the ICSID claim and that the Funding would be a breach of the Undertaking upon that basis. It was for this reason that much of the evidence filed in support of the Funding Application was devoted to showing why it would be of commercial benefit to Koza Ltd to fund the ICSID Claim. This was a major issue on the Funding Application, as it was on the appeal. Both Mr Spearman and the Court of Appeal held that, subject to the jurisdiction point (at first instance only) and the authenticity point (at first instance and on appeal), the Funding would be permitted by the Undertaking because it would be within the ordinary and proper course of Koza Ltd's business. Koza Ltd thus obtained the comfort it was primarily looking for on the Funding Application. It did not regard the jurisdiction point as a proper obstacle to the ICSID Funding - a view vindicated by the Court of Appeal - or the authenticity point either, because the relevant facts are all within its sole director's knowledge and he is sure that the point is ill-founded. This is why Koza Ltd wants to proceed with the Funding even though it did not obtain a positive declaration or variation on the Funding Application. The only obstacle to a positive declaration was the authenticity point and Koza Ltd knows there is nothing in it. Aside from that, Koza Ltd has the comfort of knowing that funding the ICSID claim would not be a breach of the Undertaking on grounds that it would not be within the proper and ordinary course of its business. The Funding Application was made principally to establish that point. Mr Flynn submitted that this was a complete answer to the rhetorical question. It lay clearly in the evidence before the Judge but he did not see it.

47. I am unable to accept that this provides any answer to this point. First it is wrong to say that this subjective explanation of the appellants' thinking lay clearly in the evidence before the Judge. It was not in the evidence at all. It is therefore an unfair criticism that the Judge failed to see something which was not there. Secondly what matters is not what was subjectively in the mind of the appellants, but how matters reasonably appeared to Koza Altin. An assessment of what they should or should not have done must be based on what was reasonably apparent to them at the time. There is no suggestion that this subjective thinking on the appellant's part (if indeed it was their thinking which is unevidenced) was communicated to Koza Altin, and I would not regard it something which they should have guessed, quite apart from its inconsistency with what Mr Ipek said in his third witness statement about the Funding being dependent on the outcome of the Funding Application.

48. Mr Flynn also submitted that what is necessary is some unequivocal representation by Koza Ltd that it would not go ahead and fund without a positive declaration, and that what Mr Ipek said in his witness statement was not such a representation. It would be wrong, however, to import a such a requirement, which is apposite when considering estoppel or election, into the broad merits based inquiry required by the *Henderson* principles. The particular question at issue here is the reasonableness of Koza Altin's failure to bring the injunction application earlier, and what was said by Koza Ltd is only one consideration. Nevertheless it is a significant one in this case, because, like the Judge, I regard what was said in Mr Ipek's witness statement as supportive of a reasonable understanding that the Funding would not be made without a positive declaration from the Court in the Funding Application, whether or not that statement would be held to be unequivocal for the purposes of an estoppel.

49. Mr Flynn further submitted that whether or not such an assumption on Koza Altin's part would have been reasonable, there is no evidence that it in fact made any such assumption. This is not a fair point. During the exchange of evidence, the closest that the appellants came to identifying that an argument of abuse of process would be advanced was in a passage in Ms Lamb QC's first witness statement relying upon what was said at paragraph [48] of Floyd LJ's judgment (wrongly identified as paragraph [47]) which was essentially that the application was a collateral attack on that finding, although it did not use that expression. There was no foreshadowing in the appellants' evidence of a *Henderson* abuse argument that a cross-application should have been made to Mr Spearman. That submission was identified for the first time once the skeleton argument for the hearing was served. In the course of the oral argument dealing with the point at the hearing Mr Crow QC, appearing for Koza Altin, made a submission in terms that Koza Altin was entitled to *and did* make this assumption. There was no objection from Mr Flynn then or at any stage before the Judge that this was unsupported by the evidence. The Judge gave the parties the opportunity to put in further evidence after the conclusion of the hearing on a number of issues, and had the present objection been taken at the time, no doubt Koza Altin would have recorded in a witness statement what must have been submitted on instructions. Indeed the overwhelming probabilities must be that Koza Altin did indeed make that assumption given that the Injunction Application was subsequently made. There is no suggestion of dishonesty on Koza Altin's part in deliberately holding it back or otherwise, and it is difficult to imagine why it would have sought to do so had it indeed appreciated at the time of the application to Mr Spearman that Koza Ltd would go ahead with the Funding even if it didn't get its positive declaration or variation. No reason was suggested, and although what Mr Kitchener told us about the penny dropping only when Lord Falconer positively advocated a "grey" result as a fall back in the Court of Appeal is not in the evidence, it is consistent with all the other evidence.

50. I would therefore conclude that, although Koza Altin could have brought an application for the injunction before Mr Spearman, it would be wrong to say that they should have done so. I turn therefore to the second critical question whether the injunction application is an abuse as a collateral attack on the Court of Appeal decision.

51. At is simplest, the argument is that what the Court of Appeal was asked to do was to determine whether the Funding should be permitted by determining whether it would be a breach of the Undertaking; it made a positive decision that it could not prevent the Funding by way of the negative declaration which Koza Altin sought; and that what Koza Altin is now seeking to achieve is the same result by way of injunction, and therefore a collateral attack on that decision. Mr Flynn developed his argument by submitting that the practical outcome of the Court of Appeal's refusal of both the positive and negative declarations sought was that Koza Ltd should be free to fund the Arbitration at its own risk, something which Floyd LJ said in terms at paragraph [48] of his judgment was a matter for its own decision at its own risk. The injunction prevents such conduct and so is a collateral attack upon the decision. The Injunction Application posits that the court can and should prevent the funding in circumstances where it cannot decide definitively that it would be a breach of the Undertaking, whereas the Court of Appeal decided that in such circumstances it was for Koza Ltd to determine whether to proceed with the funding. Moreover, he submitted, an

injunction would subvert the carefully agreed regime put in place by the Asplin Order, whereby Koza Altin agreed to leave Mr Ipek in control of Koza Ltd pending the trial subject only to undertakings designed to give transparency, and therefore free to take business decisions such as this one.

52. This is a formidable argument, but I am afraid I am unable to accept it. The Court of Appeal was not asked to allow or prevent the Funding as such, but to determine by way of declaration that the Funding definitely was or definitely was not a breach of the Undertaking. That was all it was asked to decide. It decided on the evidence that it could do neither. On an application for a positive declaration the defendant bears the burden of putting before the court the evidence necessary to enable the court to make the declaration it seeks; see *JSC BTA Bank v Ablyazov No3* [2010] EWCA Civ 1141 at [79]. The converse is true of a claimant who seeks a negative declaration. If in each case the party fails to fulfil the burden, the court cannot make any declaration. That is what happened in this case. The Court was not engaged on the question whether the Funding could be enjoined on the hypothesis that the question of breach was arguable but unresolvable, which was what the Court determined, and all that it needed to determine for the purposes of the relief it was asked to grant.

53. It is therefore an unacceptable elision to say that the Court of Appeal was asked to decide whether the Funding should be permitted. The relief sought on each side was a declaration. Even a negative declaration would not in fact have been an order forbidding Koza Ltd from making the Funding, and had it done so in the face of such a declaration it would not have been in breach of any order made in the Funding Application. Only an injunction could perform that function. The Court was asked to decide by way of declarations whether the Funding was permissible as being within or without the terms of the Undertaking. That is a narrower question than the wider question whether the court will make an order permitting or forbidding it if the narrower question cannot be resolved. The Court was not asked to decide, and did not decide whether the Funding was to be permitted in circumstances where it could not definitively be decided whether it was within or without the terms of the Undertaking. That is the territory held by injunctive relief, upon which the Court was not invited to enter.

54. No doubt in many cases an application for a negative declaration will be accompanied by an application for an injunction (subject to the other points of principle which the appellants raise as to the jurisdictional availability of such an injunction which I address below); and if it is not, it may well be a *Henderson* abuse to seek it separately and later when it should have been included in the declaratory application. But this is not such a case and, for the reasons given, it was not abusive for Koza Altin to have failed to do so.

55. For the purposes of the present argument it is to be assumed that there is jurisdiction to grant the injunction, and that it should be granted on its merits, although that is in issue and is addressed below. I do not regard seeking such an injunction as an abusive collateral attack on the Court of Appeal's decision when that court was not asked to decide and did not decide that such an order could not be made, and the grounds on which such an order is sought are consistent with the conclusions the Court of Appeal reached on what it was asked to decide.

56. This last qualification is important. The Injunction Application does not seek to contradict or go behind any of the conclusions or the reasoning of the Court of Appeal decision, but rather to build upon them. It is concerned with the consequences of that decision. It takes as its starting point that there is an issue whether the Funding would be in breach of the Undertaking as something that cannot be definitively resolved on the documents, as the Court of Appeal held. It builds upon such arguability by invoking the *Olint* principles of least irremediable prejudice. The Court of Appeal decision was that it couldn't decide the breach question; the Injunction Application seeks relief consequent upon that inability.

57. This is subject to two possible objections which I should address. The first is that on the authenticity issue the Court of Appeal reached a conclusion on the merits that Mr Spearman was plainly correct to conclude that the authenticity of the SPA was open to very serious doubt. In the Injunction Application the Judge was required to address the merits of the issue and to consider whether he had a high degree of assurance that it was inauthentic, which he did. Although these expressions are at different points on the spectrum of arguability, I see no inconsistency between them. The Court of Appeal did not need to go any further than Mr Spearman's "very serious doubt" as justifying refusal of the positive declaration sought. It is not inconsistent with that finding for another tribunal to have a high degree of assurance on the issue.

58. The second objection relates to the question of the availability of alternative funding. In paragraph 47 of his judgment, set out above, Floyd LJ used the expression "in circumstances where it is not shown that IIL could fund the arbitration from other sources". If this paragraph stood alone it might well be thought that that was an important part of the reasoning for determining that the Funding would be permitted by the Undertaking but for the authenticity issue. However in the previous paragraph, at [46], he describes it as "not a factor which carries much if any weight", and in the context of the extradition expenses appeal, he accepted the finding of Morgan J that Mr Ipek could meet the expenses from other sources but held that that was not something which took the expenditure by Koza Ltd outside the ordinary and proper course of its business. If that be right, and the issue was largely or wholly irrelevant to the question to be decided by the Court on that occasion, there is nothing inconsistent with the decision in seeking to revisit the issue in the different context of least irremediable prejudice in an injunction application. In any event, I do not see any necessary inconsistency between the dictum that it had not been shown that IIL could not fund the Arbitration from other sources and the submission made to, and accepted by, the Judge in the injunction application at [105] that it was likely that Mr Ipek had other resources available to make the funding. Moreover even were there some room for conflict, which I do not think there is, I would not treat it as sufficient to make the Injunction Application abusive or an attack on the Court of Appeal decision. In the Injunction Application this was simply one of many issues, and looking at the abuse question in the broad based merits way required, Koza Altin should not be debarred from the relief to which it would be entitled (on the assumptions to be made for the purposes of the abuse argument) merely because it asked the second court to say that other funds were available on the evidence it subsequently put before that court.

59. Nor do I regard what was said by Floyd at paragraph [48] as any more than a recognition of the practical effect of what the Court had been asked to decide and had

decided. It is fallacious to elevate its characterisation, as the appellants' argument does, into a decision that Koza Ltd *should* be permitted to fund at its own risk. The practical effect of the position which existed at that stage was that Koza Ltd *would* be free to do so; but it was not a decision that no injunction would lie to prevent the Funding in circumstances where there could be no definitive resolution of whether the Funding would be a breach of the Undertaking. That question was simply not before the Court.

60. I would also reject Mr Flynn's submission that it is a collateral attack on, or in some way an attempt to subvert, the agreed regime put in place by the Asplin Order. Koza Altin did not, as Mr Flynn submitted, agree to cede control of the company to Mr Ipek to make whatever payments he saw fit prior to trial. It did so subject to their being in the ordinary and proper course of business with a regimen for prior notice to Koza Altin. The obvious purpose of such prior notice was to enable Koza Altin to go to court if it thought there would be a breach of the Undertaking, and to seek an injunction to prevent it. The application is not a collateral attack or subversion of that regime but made in accordance with and pursuant to it.

61. It follows that the Injunction Application is not abusive. My reasons are in substance those relied on by the Judge, although expressed differently. Mr Flynn has failed to convince me that the Judge erred in his approach in any of the ways identified by Thomas LJ in *Aldi Stores* at [16]. Accordingly although the Judge was not exercising a discretion, for this reason too it would be wrong to interfere with his judgment on the issue of abuse.

Ground 2: no injunction upon an injunction

62. In the course of argument before us, and in response to questioning, Mr Kitchener identified two bases for the jurisdiction to grant the injunction in this case. The first is a jurisdiction to make ancillary orders to render effective orders of the court, which applies to undertakings as much as to orders. What the Judge granted is said to be an injunction to enforce or render effective the Undertaking. The second is an original jurisdiction to grant a freezing order or other interim injunction in support of the relief in the action, in this case Koza Altin's claim to declarations in the counterclaim. The two are quite separate and distinct. The former takes as its starting point the fact of the Undertaking having been given, and is not concerned with any connection between the injunction and the relief claimed in the action. The latter does not rely upon the Undertaking having been given, but is concerned with the relief claimed in the action and said to be justified as being in support of it.

63. Both these bases were relied on in the course of argument below and by the Judge, although they do not appear from the judgment to have been distinctly identified at the outset as different jurisdictional bases, or to have had their differences explored: see paragraphs [1], [36(i)], [48], [49] and [84]. The failure to recognise their differences gave rise to some confusion of thought in the course of argument before us. I have found it helpful to distinguish the two bases and examine each separately.

Jurisdiction to make an ancillary order to enforce an injunction or undertaking

64. Section 37(1) of the Senior Courts Act 1981 provides that a court may grant an injunction, interlocutory or final, in all cases in which it appears to the court to be just

and convenient to do so. Section 37(3) specifically recognises freezing orders as an exercise of the power so conferred.

65. In *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] 1 Ch 286, Kerr LJ giving the judgment of the court said at p.303E-F:

> "Secondly, there is the authority of this court in *A. J. Bekhor & Co Ltd v Bilton* [1981] QB 923 and other cases that there is an inherent power under what is now section 37(1) to make any ancillary order, including an order for discovery, to ensure the effectiveness of any other order made by the court."

66. Mr Flynn does not dispute that the court has a jurisdiction to make ancillary orders for the purposes of enforcement of its orders or ensuring their effectiveness. Nor does Mr Flynn contest that such jurisdiction extends to making ancillary orders for the purposes of enforcing or rendering effective undertakings. The court's interest in seeing that undertakings given to the court are complied with is no less than its interest in seeing that its orders are complied with. He submits, however, that what has happened in this case is not the exercise of such a jurisdiction. It cannot be said that the court is enforcing or rendering effective an undertaking when there is an issue as to whether what is restrained is a breach of the undertaking, at least where, as in this case, it is not a question of holding the ring whilst that issue is determined in this forum within a short period of time, but one where the issue is never going to be resolved in a forum which binds the parties. Therefore, he argues, the injunction assumes that which is necessary to engage the jurisdiction, namely a breach of an undertaking given to the court, which is exactly what the Court of Appeal decision determines cannot be established.

67. Although at first sight it might seem surprising that the jurisdiction to make ancillary orders to enforce or render effective undertakings can be invoked when it is not, and never will be, definitively established that the threatened conduct is a breach of the undertaking, and there is no decided case revealed by counsel's researches in which it has been exercised in such circumstances, it seems to me that it is consistent with established principle and practice that such jurisdiction exists and can be exercised in such circumstances.

68. The starting point is that where the court has by injunction restrained conduct in general terms, the ancillary jurisdiction permits the grant of a further injunction to restrain something specific which is within the scope of the general restraint. This is a common feature of freezing orders. They are expressed to apply generally to all the defendant's assets and specifically to those identifiable at the time of the application. If, as often occurs, further assets are found, they can be made the subject of further specific freezing orders so that third parties can be notified, thereby rendering the freezing order effective in relation to the specific assets. The court is not required on each occasion to revisit the freezing order requirements as if it were granting an injunction for the first time. It takes the existing freezing order over all assets as its starting point.

69. Just as the court takes the previous order as its starting point without revisiting whether it was correctly granted, so in the case of an undertaking the court takes the undertaking as its starting point. A defendant may give an undertaking to the court to

refrain from conduct which the court could not or would not restrain by way of prohibitory injunction. Equally a defendant may undertake to do something which the court could not or would not order it to perform by granting a mandatory injunction. Both are a common experience in the many different circumstances in which interim injunctions are sought. This happens when in the defendant's perception it is only by giving such undertakings that it will avoid the grant of an interim injunction whose terms will have a more onerous or less welcome effect than the undertaking. Indeed it is the appellants' case that that is what happened in this case: Koza Ltd gave the Undertaking in return for the Asplin Order in circumstances in which Mr Flynn now argues that a freezing order in those terms is unavailable because it cannot be made in support of declaratory relief.

70. Where a defendant gives such an undertaking and threatens to breach it, the court has jurisdiction to make ancillary orders designed to see that it is obeyed. It does not revisit whether the undertaking should have been given or whether an injunction could or would have been granted in equivalent terms. It takes the undertaking, voluntarily given, as its starting point without searching for some original jurisdiction to make an equivalent order. So if, for example a foreign bank undertakes to provide books and records held abroad, and fails to do so, it is no answer to an application for the provision of information about them that the court would not grant such an order by way of original jurisdiction: *Mackinnon v Donaldson Lufkin and Jenrette Securities Corporation* [1986] Ch 482. So too if a defendant to a libel action undertakes not to publish until trial and subsequently threatens to do so, it is no answer to an application for an injunction to restrain him from a particular publication for him to say that he is running a defence of truth which normally precludes interlocutory relief.

71. *Kangol Industries Ltd v Alfred Bray & Sons* [1953] 1 All E R 444 is an example of the exercise of the ancillary jurisdiction in just such a case. The plaintiff brought an action to restrain the defendant from using its information relating to the construction of knitting machines and an order for delivery up of all the knitting machines similar to those made with the plaintiff's information, together with parts, jigs patterns and drawings in relation to them. On a motion for interlocutory relief, the defendant gave undertakings in the terms of the injunction and delivery up order sought, in return for the plaintiff agreeing to take no further steps in the action and pay money into court. The plaintiff had reason to doubt whether the delivery up order had been complied with and sought an order for information on affidavit as to what drawings existed and for the delivery into escrow of any such drawings retained by the defendant. The defendant argued that there was no power to make an interlocutory order for delivery up. Danckwerts J accepted that the court might not have had jurisdiction to make the delivery up order on the motion, but that the undertaking having been given, such objection could not be maintained. The court was entitled to require the information for the purposes of verifying compliance with the undertaking.

72. So when there is a threatened breach of an undertaking, the starting point is that the undertaking has been given to the court, not whether the threatened conduct would justify an injunction. If the court did not have such jurisdiction, it would be able to act only where the threatened conduct was of a kind which the court could and would restrain by an order in exercise of an original jurisdiction; it would be powerless where an undertaking was given which the court could not or would not have ordered. That

is unprincipled when the court has an equal interest in the enforcement of orders and undertakings.

73. So if in the present case it had been possible for Koza Altin to establish definitively that the Funding would be a breach of the Undertaking, there can be little doubt that the court would have jurisdiction to restrain the Funding as a breach of the Undertaking without revisiting whether the Undertaking should have been given or whether the court would have granted a freezing order in equivalent terms by way of original jurisdiction.

74. Next it must be recognised that the ancillary jurisdiction undoubtedly exists where there is a dispute about whether the threatened conduct is a breach of the court's order or undertaking. Normally the court will determine the issue of whether the threatened conduct is permitted by the undertaking or injunction in advance of trial. But it may not be able to do so immediately. In those cases it can exercise the jurisdiction to hold the ring until that can be done by giving the parties a fair opportunity to assemble the necessary evidence. *VB Football Assets v Blackpool Football Club (Properties) Ltd* [2019] EWHC 3294 Ch is a recent example of the routine exercise of such a jurisdiction. Again this does not involve revisiting the justification for making the original order. Indeed the court may proceed in such circumstances on the basis of a good arguable case of breach where that issue is not going to be resolved: see for example *Lakatamia Shipping Company Ltd v Nobu Su* [2020] EWHC 865 (Comm), although that case was not directly analogous to the present one because the order sought was not an enforcement of the existing order as such but an order to render it effective by other means. Nevertheless in common with cases which hold the ring pending the trial of an issue, the starting point is the order or undertaking which the court has already made, which does not have to be rejustified.

75. None of what I have said is novel or controversial, and it is reflected in the common practice of judges in the Commercial Court and Chancery Division. So if, for example, Koza Ltd had said in April 2017 that it proposed to provide the Funding without going to court, Koza Altin could have sought an injunction to restrain it from doing so pending determination of an issue as to whether it would amount to a breach of the Undertaking, invoking the court's ancillary jurisdiction. It would have been a routine "holding the ring" application which would have taken the Undertaking voluntarily given as its starting point without revisiting whether there would have been exercised an original jurisdiction to grant a freezing order in those terms.

76. The additional and unusual feature which has now arisen is that the issue of whether the threatened conduct is a breach of the Undertaking is never going to be definitively resolved, because there is no forum in which that issue is going to be tried between the parties to the action. Mr Crow suggested to the Judge, and Mr Kitchener to this Court, that if necessary the Court could direct a trial of that issue and give directions in these proceedings. However I accept Mr Flynn's submission that in the circumstances of this case it would have made no sense for the Judge to order such an issue to be tried between these parties in the action, even if it had been practical to give directions to enable such hearing to take place in advance of the jurisdiction hearing in the Arbitration. The funds which would otherwise be spent on preparing for the jurisdiction hearing would be duplicated in this forum, which on neither side's case would be a sensible use of the assets in dispute.

77. Nevertheless the inability to resolve the issue between these parties in this jurisdiction is not, to my mind, fatal to the existence or exercise of the ancillary jurisdiction. The court has developed principles catering for just such a situation when exercising its original jurisdiction to grant interim injunctions. Cases not infrequently arise of "interim" injunction applications where the circumstances mean that the grant or refusal of relief will in practice be finally determinative. In such situations the court does not say that it has no power to restrain a threatened invasion of a disputed right simply because there will never be a final determination of that issue. Rather it recognises that the grant or refusal of the injunction will be a permanent and unjustified invasion of one party's rights, and so grants or refuses an injunction on the basis of the least irremediable prejudice, recognising that there is a heightened emphasis on the merits of the claim and that the court may need to have a high degree of assurance that the threatened conduct is an actionable invasion of the claimant's rights. It is not necessary to cite extensive authority for this well- known practice and the applicable principles: see, for example: *NWL Ltd v Woods* [1979] 1 WLR 1294; *Lansing Linde v Kerr* [1991] 1 WLR 251; and *Forse v Secama Ltd* [2019] EWCA Civ 215. There is still a threshold of a "serious issue to be tried" in the sense of a seriously arguable case that the threatened conduct is an invasion of the claimant's rights even though, if the injunction be granted, there will never be a trial of that issue. But the merits on the issue also come in at the discretionary stage of balancing the least irremediable prejudice and may be a very important part of that balancing exercise.

78. If it is permissible for a court to grant an original injunction to restrain the alleged invasion of a right in circumstances where there is a dispute about whether the conduct in question is or is not such an invasion, and such dispute is never going to be definitively resolved, I do not see why it should be any less permissible where the invasion in question is the breach of an existing order of the court, or undertaking, and the court is exercising its ancillary jurisdiction. A breach of an undertaking may be a breach of a private contractual right quite apart from the duties to the court punishable in contempt: see *Midland Marts Ltd v Hobday* [1989] 1 W.LR. 1143 at pp.1145-1146; *Phonographic Performance Ltd v Reader* [2005] F.S.R. 42 at [11]; and *JSC BTA v Ablyazov (No.14) (a.k.a. Khrapunov)* [2018] UKSC 19, [2018] 3 All ER 293, [2018] 2 W.L.R. 1125 at [23]; in which case what is alleged as a breach of the undertaking will be the invasion of a private law right. Moreover and in any event the court has an interest in the performance of its orders and undertakings, just as a claimant has an interest in the performance of its private rights. In each case the fact that the issue is not going to be determined, and that the injunction is in practice going to afford final relief, is an important factor in the exercise of discretion importing what will usually be a higher threshold on the merits of the issue. The court does not, however, simply throw up its hands and say that unless it can be sure that the claimant is right on the disputed issue, it is powerless to prevent what it has a high degree of assurance will be a breach.

79. This is simply an aspect of the flexibility of the s. 37 jurisdiction which recognises that, although in a perfect world the court would resolve definitively all issues relevant to the grant of interlocutory relief, in practice it is often not possible or proportionate to do so. For example a claimant seeking a freezing order may rely on conduct by the defendant in some transaction which has nothing to do with the claim in the action which is said to be fraudulent, for the purposes of seeking to establish a real risk of unjustified dissipation of assets. The court does not seek to have that issue tried and

resolved for the purpose of considering whether to grant a freezing order, but may take the evidence into account and form a provisional view as to the strength of the allegation of fraud based on the written evidence of the parties. A similar approach applies in the exercise of the ancillary jurisdiction to render orders effective. A claimant may seek further disclosure orders in support of a freezing order on the basis that there is a strongly arguable case that the defendant has breached the order. That is a routine example of the exercise of the ancillary jurisdiction, sometimes characterised as doing what is necessary to "police the order". The court does not have to try the issue and find that there definitely has been a breach of the freezing order before it can order further disclosure: it proceeds upon a criterion of sufficient arguability, as the court commonly has to in many different interlocutory contexts. There is no principle that the court cannot grant interlocutory relief unless it has reached a definitive resolution of an issue which is relied on to support the entitlement to relief.

80. Mr Flynn submitted that to recognise such jurisdiction in the circumstances of this case would be to circumvent the well-established principle that a party seeking to vary a prior interim order of the court must show a material change of circumstance, and in the context of an agreed undertaking or injunction under an agreed order, must go further and show special circumstances such as to justify departing from the agreement reached, relying on *Di Placito v Slater* [2004] 1 WLR 1605. However, the exercise of the jurisdiction in this case is not in substance a variation of the Asplin Order; nor of the Undertaking as part of the regime put in place under such order. On the contrary, it does not seek to establish any greater entitlement than to restrain an alleged breach of the Undertaking, in fulfilment of the agreement reflected in that order.

81. Mr Flynn also suggested that to grant the injunction in exercise of the jurisdiction in this case would be to circumvent the procedural safeguards in bringing a contempt application, including the criminal standard of proof. However, the enhanced standard of proof is only required in contempt proceedings because they are quasi-criminal in nature by virtue of the fact that they carry penal sanctions, including up to two years imprisonment. No such sanction is in play in the current application and the issue of breach, if it were to be tried outside the context of contempt proceedings carrying penal sanctions, would be determined on the civil balance of probabilities, as indeed would a contractual claim for breach of an undertaking.

Original freezing order jurisdiction

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

83. Section 37(1) of the Senior Courts Act 1981 is in very wide terms. Mr Flynn emphasised that the power must be exercised in accordance with principle, relying on what was said by Lord Nicholls in his dissenting judgment in *Mercedes Benz AG v Leiduck* [1996] AC 284, in a passage at p. 308 cited more recently with approval by this Court in *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658, [2017] Bus LR 1 at [46]). The passage was concerned to emphasise the

width and flexibility of the s. 37 jurisdiction to adapt to changing conditions and standards, but I accept that its exercise must be principled. Where a claimant has a proprietary claim to assets, there is obviously a principled basis for preserving those assets pending trial, and a proprietary freezing order is commonly granted in such circumstances. In the present case Koza Altin has no proprietary claim as such to the assets in question: the Funding will be from assets owned by its subsidiary, Koza Ltd. However, a parent company does have an interest in the use by its subsidiary of the latter's assets because such use affects the value of its shareholding in the subsidiary, and such interest is proprietary in nature because the shareholding is a species of property. It is, therefore, in accordance with principle that the court's wide jurisdiction under section 37 should be exercisable to protect such a proprietary interest in appropriate circumstances. Koza Altin's proprietary interest in preserving the value of Koza Ltd's assets, and the consequent value of its own shareholding, is a legitimate interest which is capable of justifying protection by the grant of a freezing order. It is a separate question whether the circumstances justify the grant of such an injunction in any particular case; but the existence of a power to grant it is consistent with principle. Indeed if Mr Flynn were right and there were no such power, it would leave an unfortunate gap in the court's ability to do justice where the circumstances justified making such an order.

84. The existence of the jurisdiction is supported by two authorities. *Reiner v Gershinson* [2004] EWHC 76 Ch, reported as *In re Ravenhart Services (Holdings) Ltd* at [2004] 2 BCLC 376, concerned an unfair prejudice petition under what was then s. 459 Companies Act 1985. The petitioning 50% shareholder sought interlocutory injunctions restraining the directors and other shareholders from making or procuring payments by the company otherwise than in the ordinary course of business, and in particular from making payments to two of the directors by way of consultancy fees or remuneration. It was argued on behalf of those directors that the court had no jurisdiction to grant such an injunction because the petition did not seek recovery of sums allegedly wrongly paid out of the assets of the company and there was no claim for restitution of any such amounts, relying on a decision of Pumfrey J in *Re Premier Electronics (GB) Limited* [2002] 2 BCLC 634. Etherton J, as he then was, rejected the argument. Having concluded that it was an appropriate case for exercise of the jurisdiction if it existed, he said at [102]:

> "In my judgment, [counsel's] reliance on *Premier Electronics* is misplaced. In that case Pumfrey J declined to continue freezing orders against the respondents, who were executive directors, in the absence of any substantive cause of action against them in the s. 459 proceedings. Those freezing orders were in respect of their personal assets. In the present case, the interim relief which is sought is designed to protect the assets of the Company from dissipation or further dissipation. No order is sought freezing the personal assets of Mr or Mrs Gershinson [a director and shareholder respectively]. Bearing in mind the other conclusions I have reached, it seems to me to be manifestly proper and sensible to grant such interim relief, protecting the assets of the Company pending the determination of the Petition. Indeed, Pumfrey J expressly acknowledged, at p.638e, that such an order might be made in s.459 proceedings, albeit he described it as "Mareva" relief. In so describing

> the relief, I believe that Pumfrey J was there referring to an order preventing further dissipation of the assets of the company."

85. In *Revenue and Customs Commissioners v Egleton* [2006] EWHC 2313 (Ch), [2007] 1 All ER 606, [2007] Bus LR 44, the court was concerned with a creditors' winding up petition brought by the Commissioners on the basis that the company owed it some £35m as a result of a VAT missing trader/carousel fraud. Interim freezing orders in respect of personal assets were granted on a without notice application against a director of the company, and against another company and its directors. The Commissioners did not claim any cause of action of its own against the respondents, nor did it undertake to bring any proceedings against them. The injunctions were sought on the basis that when the company was wound up the liquidator would have substantial claims against them arising out of the fraud which he would be likely to pursue, the recovery of which would be for the benefit of the Commissioners as creditors. At the return day, Briggs J, as he then was, held that there was jurisdiction to grant such freezing orders, and continued them pending the hearing of the winding up petition, although he held that such injunctions should normally only be granted upon application by the provisional liquidator. His judgment on this issue merits substantial citation, and is relevant to Mr Flynn's third ground of appeal, the "no underlying claim point":

> "10. I turn to the legal principles regulating the extent of the court's jurisdiction to grant freezing orders. They are a sub-set of the principles governing the court's jurisdiction to grant interim relief generally, conferred by section 37(1) of the Supreme Court Act 1981, "in all cases in which it appears to the court to be just and convenient to do so".
>
> 11. The purpose of a freezing order which, by contrast with some injunctions, is essentially interim in its nature, is, in the words of Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210, 253:
>
> "to ensure that there will be a fund available within the jurisdiction to meet any judgment obtained by a plaintiff in the High Court against a defendant who does not reside within the jurisdiction and has no place of business there."
>
> Subsequent cases have made it clear that the purpose extends also in relation to defendants resident or carrying on business within the jurisdiction. In the words of Aikens J in *C Inc plc v L* [2001] 2 All ER (Comm) 446, para 31, the purpose "remains the protection of assets so as to provide a fund to meet a judgment obtained by the claimant in the English courts". More generally, its purpose is so that the court can "ensure the effective enforcement of its orders": per Sir Thomas Bingham MR in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366*,* 377e .
>
> ....
>
> 14. Miss Smith therefore advances two distinct submissions in support of her case that the court has no jurisdiction to make or continue freezing

orders against her clients. The first is that Customs is pursuing no cause of action for a money judgment for the effective enforcement of which a freezing order would preserve a fund……….

15. Miss Smith is of course correct to submit that although the purpose of a creditors' winding up petition is for the creditor ultimately to obtain payment in whole or in part of the debt owed by the company, and although it is not infrequently misdescribed as a form of debt enforcement, it does not seek a money judgment. If successful, it merely brings into existence a statutory scheme for the getting in and distribution of the company's assets among its stakeholders, of whom the petitioner is no more than a member of a particular class, namely an unsecured creditor. But in my judgment the particular nature of the relief sought by means of the presentation of a creditors' winding up petition does not disable the petitioner from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction upon the court to grant appropriate interim relief, whether by way of freezing order or otherwise.

16. In *In re Premier Electronics (GB) Ltd* [2002] 2 BCLC 634, the petitioners in a petition under section 459 of the Companies Act 1985 obtained freezing orders both in relation to the property of the subject company and in relation to the assets of its two executive directors up to the value of £500,000 each. On the adjourned return day Pumfrey J discharged the orders in relation to the executive directors on the grounds that the petition disclosed no cause of action against them sufficient to confer jurisdiction to grant or continue such orders. The question whether the petition disclosed a cause of action against the company itself does not appear to have been argued in any detail, because by the adjourned return date it appeared that sufficient protection against the dissipation of the company's assets was in place to make the continuation of a freezing order in relation to the company's assets unnecessary: see p 636 d . But Pumfrey J said, at p 638:

"In the context of a section 459 petition I can well understand that it may be appropriate to grant Mareva relief against the company itself, in order to preserve the value of the interests of the members in the company. The petition, if it has a respondent, is primarily the company itself."

17. I consider it implicit in that passage that Pumfrey J must have thought that a section 459 petition, which is no more in essence a monetary claim than a creditors' winding up petition, was none the less based on a sufficient cause of action to give the court jurisdiction to grant interim relief, including a freezing order. It is a curiosity of that case that although it was alleged that the executive directors had misappropriated some £250,000 worth of the company's money, the court was not referred to any of the *Chabra* line of authorities, most but not all of which had by then already been reported. But that curiosity relates to the second rather than the first of Miss Smith's objections.

18. More recently, in *In re Ravenhart Service (Holdings) Ltd* [2004] 2 BCLC 376, petitioners in a combined section 459 and contributories' winding up petition sought interim relief of a type similar to but not quite identical with an ordinary freezing order but which was designed specifically to prevent the assets of the company from dissipation, and similar relief against certain of the company's subsidiaries. Relying on *In re Premier Electronics* (GB) Ltd [2002] 2 BCLC 634 , counsel for the respondents submitted that the application for that interim relief was fatally flawed because the petition did not assert any cause of action for restitution or other monetary payment, but rather an order for the purchase of the petitioner's shares by one or more of the respondents, or alternatively an order for compulsory winding up.

19. The continuation of relief against the subsidiaries appears to have been abandoned by consent, but Etherton J rejected counsel's submissions based upon *In re Premier Electronics (GB) Ltd* . It is clear from para 102 of his judgment, in which he expressly adopted Pumfrey J's conclusion that a section 459 petition asserted a sufficient cause of action against the company to justify Mareva relief, that an interim order preventing the dissipation of the company's assets pending the hearing of the petition was well within the court's jurisdiction as a means of preserving the effectiveness of any order which might be made upon the hearing of the petition.

20. It is of course correct, as Miss Smith submitted, that neither of those cases concerned a creditors' petition. Both concerned section 459 petitions and the *Ravenhart* case [2004] 2 BCLC 376 was also concerned with a contributories' winding up petition. But that is in my judgment a distinction without a difference. It is a common feature of winding up petitions both by creditors and contributories and of section 459 petitions that none of them is concerned in essence with the obtaining of a monetary judgment by the petitioner (albeit that there may be circumstances in which such an order might be made on the hearing of a section 459 petition). All three types of proceedings consist of an invocation of the power of the court to intervene in the affairs of a company for the benefit of its different classes of stakeholder. For my part, using the analysis of Sir Thomas Bingham MR in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, 377e to which I have already referred, I can see no reason why the grant of appropriate interim relief, including if necessary orders freezing the assets of the company itself, should not in a proper case be made so as to ensure the effective enforcement of the court's orders.

21. Furthermore, if Miss Smith's first objection were correct, it would apparently follow, as she indeed conceded, that although in the case of a disputed debt, the creditor would be asserting a cause of action sufficient to found an application for interim relief, both before and after judgment, a case in which the absence of any dispute as to the debt meant that the only necessary proceedings consisted of a creditors' winding up petition would fall into a curious lacuna in which, because of the absence of a

> cause of action, interim relief was wholly unavailable. That seems to me an irrational and unjust result and one which the court should avoid unless compelled to do otherwise. The authorities on interim relief in relation to company petitions have, happily, led me to the opposite conclusion, and therefore Miss Smith's "no cause of action" objection fails. The reason why freezing orders are not in practice sought or obtained in relation to the assets of companies the subject of creditors' winding up petitions is probably that statutory provisions such as those invalidating transactions after the presentation and/or advertisement of the petition generally afford appropriate protection to the company's creditors."

86. Mr Flynn submitted that these authorities were distinguishable because in the *Ravenhart* case the relief sought on the s. 459 petition was not only a buy out at fair value or the winding up of the company but also in the alternative a final injunction restraining dealing with the company's assets; and in *Egleton* there would ultimately be money payment orders; whereas in the present case the only relief sought by Koza Altin in the counterclaim is in the form of declarations. He submitted that a freezing order cannot be granted in support of a claim for purely declaratory relief, relying on a statement in Gee on *Commercial Injunctions* 6th ed at 12-001 that *The Siskina* has left as a legacy "a rule that Mareva relief will be granted only in support of a "cause of action" which cannot be solely a claim for a declaration…"

87. The grounds on which Mr Flynn seeks to distinguish the two cases are not germane to the principles which they identified and applied. In the *Ravenhart* case, the reasoning at paragraph [102] was not dependent on there being a claim for final injunctive relief in the alternative. The reasoning justified the granting of the freezing order in support of the claim for buy out at a fair value or a winding up. In that case there were no money claims against the other director or shareholder, and their absence formed the very basis for the argument that there was no jurisdiction to grant the interlocutory relief, an argument which was rejected. The absence of such a money claim was irrelevant because the injunction sought to restrain dealings with the assets of the company, not those of the individuals. Protection of those assets was justified by the fact that the petitioner had an interest in the value of the company if it was wound up, or if his shareholding were to be bought out at fair value. What mattered was preserving the value of the company in circumstances in which the petitioner had a legitimate interest in such preservation.

88. In *Egleton,* the interim relief did extend to the personal assets of the respondents on the basis of personal money claims which the liquidator would have against them in causes of action based on breach of fiduciary and directors' duties and dishonest assistance constructive trust. But that was not sufficient in itself to found interlocutory relief at the suit of the claimant Customs Commissioners, because they had no such causes of action themselves. Their only claim was a petition that the company be wound up. The presentation of that creditors' petition, however, created a sufficient legitimate interest as a stakeholder in the company, as Briggs J put it, which founded jurisdiction to grant interim freezing order relief. The Commissioners had a legitimate interest in the preservation of the personal assets of the respondents because those assets might ultimately be amenable to recovery by the company through a claim brought on its behalf by the liquidator; and so the preservation of those assets was a

legitimate target by way of protection of the Commissioners' legitimate interest in the value of the company's assets which was the subject matter of their winding up petition. It was that legitimate interest in preserving assets potentially available to the company which could be afforded protection under the wide jurisdiction conferred by s. 37(1) of the 1981 Act.

89. In this case the protection which Koza Altin seeks relates directly to the assets of the company, as in the *Ravenhart* case, not to assets of third parties which might become available to the company, as in *Egleton*, and so is a more direct invocation of the jurisdiction than was the case in *Egleton*. Nevertheless both cases are examples of the application of a principle that where a claimant has a legitimate interest in preserving the assets of, or potentially available to, a company, that is a sufficient interest to support interim injunctive relief to protect it.

90. In this case the absence of a claim to final injunctive relief is no bar to jurisdiction to grant interlocutory freezing order relief in relation to the assets of Koza Ltd. Final injunctive relief was not the basis of jurisdiction in either the *Ravenhart* case or *Egleton*; and the principled basis for the jurisdiction I have endeavoured to identify does not logically require any such claim. Moreover if Koza Altin were to succeed in its counterclaim and Mr Ipek or Koza Ltd were to do anything to obstruct the exercise by Koza Altin of the rights which the court held it to enjoy so as to be entitled to regain control of Koza Ltd, I have little doubt that the court could and would grant injunctive relief to prevent such obstruction. It would be a triumph of form over substance if the court were now to be deprived of the jurisdiction to grant interlocutory relief to preserve the company's assets merely because Koza Ltd has not threatened such obstruction and so no quia timet injunction is yet justified.

91. Nor is it a bar to jurisdiction that no money orders are sought or contemplated. The declaratory relief sought is designed to regain control of a company the disposition of whose assets directly affects the value of Koza Altin's shareholding. The declarations are remedies which are sought to vindicate existing rights to control, not rights which will arise at the conclusion of the trial: if Koza Altin be right on the merits of the counterclaim, it should be in control of Koza Ltd now; and in those circumstances its proprietary interest in the value of its shareholding would not need the court's protection. It is that arguable existing right vested in Koza Altin to enjoy control of the company, and thereby to enjoy its proprietary rights to its shareholding in the company, which is what provides a jurisdictional basis for preserving the assets of Koza Ltd at Koza Altin's suit pending determination of the rights in issue in the counterclaim. If Mr Flynn's argument were correct, it would have the unfortunate consequence that the court would be powerless to prevent Mr Ipek asset stripping Koza Ltd so as to make the counterclaim not worth pursuing (in the absence of the Undertaking which for the purposes of testing the argument of an original freezing order jurisdiction must be ignored).

92. The statement in Gee on *Commercial Injunctions* that a freezing order cannot be granted in support of a declaration is not justifiable in such unqualified terms, and is not supported by the authorities cited in the footnote in support. All depends on whether rights which are sought to be vindicated by the declaration are rights which merit interim protection. If so a freezing order may be granted in an appropriate case. So in *Newport Association Football Club Ltd v Football Association of Wales Ltd* [1995] 2 All ER 87, Jacob J granted an interlocutory injunction in support of a claim

for declarations that the conduct restrained would be an unreasonable restraint of trade, and expressly rejected the submission that there was no power to do so which was advanced on the grounds that the only cause of action relied upon was for a declaration (see p. 95c), albeit that there was in that case a claim for a final injunction by way of ancillary order to the "cause of action" for a declaration (see p.93e-g).

93. Had the Judge been exercising this original freezing order jurisdiction independently of the existence of the Undertaking, he would have applied the well-established principles recently summarised by Males LJ in *Crowther v Crowther* [2020] EWCA Civ 762 at [47]-[48] and the cases there cited. In particular he would have had to determine whether there was a real risk that the Funding would be an unjustified dissipation of assets. It would only be unjustified if it were otherwise than in the ordinary and proper course of Koza Ltd's business. Such a test would be satisfied if, as Mr Spearman and the Court of Appeal held, the authenticity of the SPA was open to very serious doubt, because that would create a real risk that the funding was an unjustified dissipation as being otherwise than in the ordinary and proper course of business. That would not, however be an end to the inquiry: the *Olint* principles of balancing the least irremediable prejudice, including a heightened attention to the merits of that issue, would remain applicable to the exercise of the discretion whether to grant the injunction sought in the particular circumstances of this case where there will not be a final determination of whether the funding is in the ordinary and proper course of business and therefore "unjustified". In other words, the principles applicable to the discretionary issue would be exactly the same as if the jurisdiction being exercised were that to make ancillary orders to enforce or render effective the Undertaking, and exactly the same as were applied by the Judge in this case, subject to one caveat.

94. The caveat is that in the case of a freezing order the court must be satisfied that the claim in support of which the relief is sought reaches a merits threshold of good arguable case. The Judge did not address in the course of his judgment whether the merits of the company law issues involved in the counterclaim enabled Koza Altin to meet such threshold, notwithstanding that the counterclaim was identified as an underlying claim sufficient to support the grant of the injunction. As I understand it the appellants raised no issue about the merits threshold of the counterclaim. If my understanding is wrong, it would have been necessary to remit that merits issue to the Judge if the only basis on which the Judge could have granted the injunction was by way of an original freezing order jurisdiction. As it is, however, my conclusions on the existence of the Undertaking as an alternative basis for jurisdiction render it unnecessary to explore this possibility further.

95. The recognition of such jurisdiction does not, as Mr Flynn again submitted in this context, cut across the agreed Asplin Order regime. It is a jurisdiction to make an order which is consistent with the terms Koza Ltd offered in the Undertaking. It merely addresses the question which arises as much under the terms of the Undertaking as by way of original jurisdiction, namely whether particular expenditure which has subsequently been identified as threatened should be restrained in circumstances where it cannot be definitively resolved whether such expenditure would be in the ordinary and proper course of business. Mr Flynn's argument on this point amounts to saying that the effect of the Undertaking is that where Koza Altin cannot definitively establish that threatened conduct will be a breach, Koza Altin has

agreed that it should be permitted. That is not what Koza Altin has agreed in accepting the Undertaking, just as that would not be the effect of a court order in equivalent terms in the exercise of the freezing order jurisdiction. On the contrary the Undertaking is to be construed as permitting Koza Altin to invoke whatever jurisdiction the court might have where there is a dispute as to whether threatened conduct is a breach.

96. Nor, as Mr Flynn submitted, would it offend the principle in *Di Placito v Slater* that a party will normally have to show special circumstances to justify variation of an agreed order. No such variation is sought, either in form or substance.

Ground 3: no underlying claim

97. It follows from what I have said above that there is no merit in Koza Ltd's argument on this ground. Insofar as the jurisdiction being exercised is the power to make ancillary orders in order to render effective the Undertaking, there is no need for an underlying claim or cause of action. The court can enforce an undertaking freely given even where it could not grant an order in such terms. Insofar as the jurisdiction being exercised is an original freezing order jurisdiction, the counterclaim is a sufficient underlying claim to support the exercise of the jurisdiction for the purposes of preserving the assets of the company.

Ground 4: exercise of discretion

98. Mr Flynn's first criticism was that the Judge ought to have applied the freezing order principles, not the *American Cyanamid* principles, relying on *Polly Peck International (No 2)* [1992] 4 All ER 769 at 786. This criticism is unfair because it is apparent that he positively invited the Judge to apply the *American Cyanamid* and *Olint* principles if his other points of principle were rejected. It is in any event unsound. It is trite law that the principles applicable to the grant of freezing orders are those summarised in *Crowther* and that they differ from a simple *American Cyanamid* approach. However where the court is making orders ancillary to an existing freezing order, or undertaking, it does not have to, and does not in practice, revisit the criteria which justified exercise of the original jurisdiction. The existing freezing order or undertaking is taken as the starting point. Moreover in the particular circumstances of this case, the exercise of an original freezing order jurisdiction by the judge would have resulted in exactly the same discretionary criteria when considering whether there was a real risk of unjustified dissipation of assets, and if so whether the balance of irremediable prejudice favoured the grant of discretionary relief.

99. Mr Flynn next criticised the Judge's conclusion that he had a high degree of assurance that the funding would be a breach of the Undertaking. There were two aspects to his submissions. The first was that a finding of such a high degree of assurance as to the authenticity of the SPA went further than the findings of the Court of Appeal and Mr Spearman, which were only that there were grounds for very serious doubt about its authenticity; and that movement in that direction was impermissible when the "dial had moved the other way" by the only additional evidence before the Judge being in Koza Ltd's favour. The second was that the Judge could not have had such a high degree of assurance in relation to IIL's alternative basis for the ICSID tribunal's

jurisdiction, based on the mere fact of share transfer even if the SPA was a fraudulent sham.

100. As to the first, Mr Flynn's submissions initially placed great reliance on a statement from Selman Turk, a former employee of Goldman Sachs and close associate of Mr Ipek, stating that he had witnessed signature of the SPA on the date in question. It emerged, however, that this statement had been before Mr Spearman and the Court of Appeal in the Funding Application. It was not therefore new evidence. The only new evidence was a witness statement made by Mr Ipek in the Arbitration, and some answers of his under cross examination, and a statement served in the Arbitration by an anonymous witness. The Judge considered afresh all the evidence before him on authenticity and expressly acknowledged in his judgment that he had considered the additional evidence. We do not have all the evidence which was before the Judge. Nevertheless it is apparent from the material which we do have that the two additional pieces of evidence are not such that they must invalidate the Judge's evaluation of all the evidence in reaching his view of the merits of the authenticity issue. One comes from Mr Ipek himself, who is party pris, and the other from someone whose identity is unknown and without support from any contemporaneous documents. It is questionable whether the latter is properly to be regarded as evidence in the application at all given that no attempt was made to justify anonymity on this application, whatever the position in the Arbitration. But however that may be, the two statements do little if anything to dent the weight of the other evidence in the form of contemporaneous documentation (or its absence), the course of events, and the inherent probabilities, all of which point against authenticity. This is not a case where it can be said that no judge could properly reach such a conclusion in the face of the two pieces of additional evidence, taking account of all of the other evidence which was before the Judge and is before this Court pointing to the inauthenticity of the SPA. Nor is the Judge's conclusion an impermissible movement from the Court of Appeal's assessment. All that was necessary for the purposes of the Court of Appeal's decision to refuse the positive declaration sought by Koza Ltd was a sufficiently arguable case that the SPA was inauthentic. The Court did not need to decide where on the merits spectrum the degree of arguability fell. Nothing said by the Court of Appeal would be inconsistent with their taking the view that they had a high degree of assurance that it was inauthentic if that had been something which they had had to address. They simply did not have to address it and did not do so. Mr Flynn submitted that the Judge ought to have set out his reasoning in relation to the merits of the point by addressing the new evidence in detail and explaining why it did not in his view preclude a high degree of assurance of the inauthenticity of the SPA. Whilst it might have been helpful had he done so, there is no basis for concluding that he failed to take it into account in his review of all the evidence: he said that he had done so, and there is no reason to doubt that statement in what is clearly a careful as well as lengthy judgment. Nor can it be said that the conclusion he reached was not reasonably open to him. This therefore provides no ground for this Court interfering with the exercise of his discretion.

101. The evidence before the Judge about the alternative share transfer basis for the ICSID tribunal accepting jurisdiction was exiguous, and the point did not feature in oral argument before him at all (and is not identified in the grounds of appeal). There is a reference in Ms Lamb's first witness statement to the authenticity of the SPA being only one factor relied on to establish jurisdiction, but an alternative basis was not there

articulated with any clarity and there was no supporting evidence about the way the point was to be advanced before the tribunal. The Judge dealt with the point at [106] stating that Koza Altin had the better of such argument and referring to what Floyd LJ said at paragraph [31] of his judgment. Floyd LJ there said "I do not think this argument provides a route to a potentially viable arbitration claim in the absence of the SPA". That amply justifies the conclusion drawn by the Judge.

102. Mr Flynn also attacked the Judge's conclusion that he could draw the inference which Mr Crow invited him to draw, namely that it is likely that the Arbitration can and will be funded, at least through the jurisdiction stage, with alternative sources of funding available to Mr Ipek: paragraphs [36(ii)], [103] and [105]. The Judge rehearsed some of the aspects of the evidence which led to this conclusion, including bank statements from 2015 to 2016 suggesting the transfer of sums in excess of US$20 million between Mr Ipek and members of his family; and a reference to Mr Ipek's evidence to the ICSID tribunal in July 2019, a little over 6 months before the Injunction Application hearing, which comprised a witness statement saying that "my available assets are very substantially less than $10 million", which he explained when cross examined about it meant that "the amount of cash that I can use at my disposal is less than $10 million, but this doesn't mean that the worth of my assets are below $10 million." Since the funding needed to pursue the Arbitration to the conclusion of the jurisdictional stage of the Arbitration is said to be of the order of about £1.5m, evidence in these terms does not suggest the unavailability of assets available for that purpose (I have taken the figure as £1.5m not £3m, because £1.5m is all that is said to be necessary for IIL's fees and expenses, the balance being a reserve to meet an adverse costs order; but if only £1.5m is available from other sources, that would be sufficient to meet any argument that the injunction will stifle IIL's ability to pursue the Arbitration to the jurisdiction stage). Moreover the "less than $10 million cash" evidence is to be contrasted with a witness statement made by Mr Ipek just over a year earlier in which he had said he was down to his last £400,000. On 12 November 2019 Mr Ipek paid £557,000 in discharge of a costs order against him personally in relation to the jurisdiction challenge, almost £400,000 of which came from him personally from an unexplained source, and the balance from a company he owns and controls. The Judge also relied on Mr Ipek's failure to address this evidence, or to provide any evidence as to the nature or whereabouts of his current assets, and said that it justified drawing adverse inferences, relying on the *Sarpd* case and *Yorke Motors v Edwards*. The Judge was unimpressed with Mr Ipek's failure even to engage with the proffering of a confidentiality club to meet his explanation for his reluctance to identify his assets for fear that the Turkish authorities would expropriate them or use the information to oppress or harass him or his family. The Judge also noted Mr Ipek's failure to address the availability of commercial sources of litigation funding, despite Mr Spearman having specifically relied upon the absence of such evidence when the Funding Application was before him.

103. I have little hesitation in saying that the Judge was entitled to reach the conclusion he did on the basis of the evidence before him. He was also entitled to treat the outright rejection of the confidentiality club proposals as unreasonable so as to justify the drawing of adverse inferences from Mr Ipek's reticence to explain that evidence or put before the court evidence of assets available to him. Mr Flynn submitted that a confidentiality club provided no adequate protection because the material would inevitably have been deployed in open court. That is not so: the court often deals with

material which there is good reason not to make public by having parts of hearings in private or by handling the material in a way which keeps it confidential without the need to do so, and could have done so in this case. Such steps were not considered only because Mr Ipek rejected the concept of a confidentiality club in principle.

104. Mr Flynn submitted that the appellants were under no obligation to help Koza Altin build a case that the injunction would not stifle the pursuit of the arbitration claim. However the evidence in this case gave rise to a positive inference of the availability of alternative sources of funding funds in the absence of a contrary explanation; and no such explanation was put forward. The argument advanced by Koza Altin was based on all the evidence, quite apart from the absence of direct evidence from Mr Ipek as to the nature and whereabouts of his assets, including the evidence of Ms Lamb on the appellants' behalf, who whilst accepting that Mr Ipek was not impecunious and declining to identify, on information and belief, the nature or size of the assets available to him, put the matter no higher than that it was "wholly unclear" whether alternative sources of funding would be available. If it was unclear to her, that can only have been as a result of her client leaving it unclear, which cannot have been the result of any concern about the detail being revealed to the Turkish authorities. This is a case in which the Judge was entitled to draw adverse inferences from the reticence of Mr Ipek to address the issue in his evidence and to conclude, upon the basis of all the evidence before him, that alternative sources of funding were likely to be available. The Judge reached a conclusion on this issue which was open to him. Indeed I would have reached the same conclusion. There is therefore no basis for interfering with the exercise of his discretion by reference to the availability of alternative sources of funding.

105. Nor is there any other basis for interfering with the Judge's exercise of his discretion.

Conclusion

106. I would therefore grant permission to appeal but dismiss the appeal.

Lady Justice Asplin :

107. I agree with Popplewell LJ and would dismiss the appeal for the reasons he has given.

Lord Justice Moylan :

108. I have come to a different conclusion on this appeal to that reached by Popplewell LJ and, whilst acknowledging the powerful reasoning he deploys in support of his conclusions, for the reasons set out below, I would have allowed Koza Ltd's appeal and have set aside the injunction granted by the Judge. In doing so, I gratefully adopt the detailed account of the background to this appeal as set out in Popplewell LJ's judgment. I also do not propose to rehearse much of his analysis of law.

109. The question at the centre of this appeal is whether the Judge was wrong to exercise the court's discretionary power under section 37(1) of the Senior Courts Act 1981 and grant an injunction restraining Koza Ltd from using its resources to provide IIL with funding for the purposes of the ICSID Arbitration. Although a number of distinct arguments

have been advanced both here and below, in my view they have at times had the result that this key question has become obscured. I say this because whilst the arguments have to be considered individually, the ultimate question on this appeal is whether, collectively, they demonstrate that the judge was wrong to decide that the grant of this injunction was "just and convenient".

110. Having said that, for the purposes of determining whether the judge was wrong, I propose to consider certain of the issues as formulated by the parties and as addressed in Popplewell LJ's judgment. This is, in part, because the issue of whether a party can obtain an, effectively, permanent injunction on the basis that a proposed disposition is alleged to be a breach of an existing undertaking (or injunction) is an issue of principle on which there is no direct authority, or certainly no direct appellate authority, and which raises significant questions about the court's powers to grant and police injunctions.

111. In this case, this issue has been characterised as an injunction on an injunction. The specific form the issue takes is that the proposed disposition (the funding) is *alleged* to be a breach of the undertaking because it is *alleged* not to be expenditure permitted by the business exception in that it is, I repeat, *alleged* not to be expenditure in the ordinary and proper course of business.

112. I, first, deal with some elements of the background to the application by Koza Altin for an injunction which was determined by Mr Cousins.

113. A critical feature is that by Koza Altin's application the court is, again, being asked to determine whether Koza Ltd can use its resources to fund the Arbitration. Further, the court is again being asked to consider whether that funding is or is not permitted by the agreed structure put in place by Asplin J's Order and, in particular, the terms of Koza Ltd's undertaking. These are the same issues which the court, including the Court of Appeal, was required to address in what is described as the Funding Application. Mr Spearman's decision on that application is reported as *Koza Ltd and another v Akcil and others* [2017] EWHC 2889 (Ch); the Court of Appeal's decision is reported at [2019] EWCA Civ 891.

114. That these issues, in particular the former, are again having to be addressed could hardly be described as being consistent with the requirement under the overriding objective that cases should be dealt with proportionately, including by saving expense and allotting to a case an appropriate share of the court's resources. I would suggest that this case is an example of the very opposite, when, to repeat, the court is again being asked to address the *same* issues.

115. The specific application now being considered is, of course, not the same as the form in which these issues were before the court in the Funding Application. The current application is for an injunction to restrain the proposed funding. The previous application was for a declaration that the proposed funding was permitted by the terms of the Undertaking (as being within the ordinary and proper course of Koza Ltd's business) and, alternatively, as described by Mr Spearman, at [2] of his judgment, "that the Undertaking be varied … to permit" the funding. However, the fact that the form is not the same does not mean that the substantive issues are not the same.

116. Mr Spearman decided, at [126(7)], that the proposed funding was not "within the scope of the Undertaking" because it was not in the ordinary and proper course of business. He, accordingly, had also to determine the application to "vary" the Undertaking. I would mention at this stage that the Court of Appeal, at [17], analysed Mr Spearman's approach to the business exception in some detail, as set out below.

117. It is not clear how the variation application was formulated because, as a matter of jurisdiction, as Lord Wilson said in *Birch v Birch* [2018] 1 All ER 108, at [5]: "A court has no power to impose any variation of the terms of a voluntary promise". He went on to explain:

> "A litigant who wishes to cease to be bound by her (or his) undertaking should apply for "release" from it (or "discharge" of it); and often she will accompany her application for release with an offer of a further undertaking in different terms. The court may decide to accept the further undertaking and, in the light of it, to grant the application for release. Equally the court may indicate that it will grant the application for release only on condition that she is willing to give a further undertaking or one in terms different from those of a further undertaking currently on offer. In either event the court's power is only to grant or refuse the application for release; and, although exercise of its power may result in something which looks like a variation of an undertaking, it is the product of a different process of reasoning. In *Cutler v Wandsworth Stadium Ltd* [1945] 1 All ER 103 at 105 Morton LJ said:
>
> > '… the court does not vary an undertaking given by a litigant. If the litigant has given an undertaking and desires to be released from that undertaking, the application should be an application for release … Litigants are not ordered to give these undertakings; they choose to give them, and an application to have an undertaking already given varied is wholly wrong in form.'"

Lord Wilson then considered when the court might exercise its power to release a party from an undertaking. After discussing a number of authorities, including, at [8]-[9], *Kensington Housing Trust v Oliver* (1998) 30 HLR 608, which appeared to suggest, at [9], that "the sole criterion was whether it would be just to grant release" and, at [10], *Mid Suffolk DC v Clarke* [2007] 1 WLR 980, which decided that "it was no doubt necessary for a grant of release to be just but that it had also to be predicated on a significant change of circumstances", Lord Wilson said:

> "[11] It is, I suppose, inconsistent with the admitted existence of a discretionary jurisdiction to say that it can never be exercised unless a particular fact, such as a significant change of circumstances, is established. If a discretionary jurisdiction is shackled in that way, the result is, instead, that the jurisdiction does not even exist unless the fact is established. For all practical purposes, however, the Court of Appeal in the Mid Suffolk case gave valuable guidance. I summarise it as being that, unless there has been a significant change of circumstances since the undertaking was given, grounds for release from it seem hard to conceive."

This judgment (given before the hearing in the Funding Application) makes clear that an application to "vary" an undertaking engages the court's discretionary jurisdiction and that what is just will depend significantly on whether there has been a significant change of circumstances.

118. Although Mr Spearman referred to the application as being one to "vary" the Undertaking, he also used the word "discharged", at [51], and referred to authorities which had dealt with applications to be released from an undertaking: *Di Placito v Slater* [2004] 1 WLR 1605 and *Emailgen Systems Corp v Exclaimer Ltd & Anor* [2013] 1 WLR 2132. Accordingly, although there was no reference to *Birch v Birch*, it seems clear that the substantive issue (in what I am calling the variation application) was, if the court declined to declare that the proposed funding was in the ordinary and proper course of business, whether by release or otherwise Koza Ltd should *or* should not be permitted to fund the ICSID Arbitration.

119. In addition, it was said, at [51] of Mr Spearman's judgment, to be common ground that "good grounds" needed to be shown to justify the undertaking being "varied (or discharged)" and that this "typically requires a material change of circumstances". Importantly, Mr Spearman also considered, at [52], that the application "engages policy considerations concerning the desirability of finality in litigation". This was not to be applied "rigidly" but depended on "the interests of justice".

120. The application to vary or to be released from the Undertaking was refused. Mr Spearman, at [124] accepted Koza Altin's contention that Koza Ltd had not "shown 'good grounds' for varying the Undertaking to allow that expenditure [i.e. the ICSID finding] to be made". This was because there had been no material change of circumstances. Koza Ltd's case was that, by the date of the proceedings, "the Turkish Government, through the agency of the Trustees and more generally, had embarked over many months on implementing a 'larger plan to destroy the Koza Group, Mr Ipek and his family'". Accordingly, "at the time the Undertaking was given, IIL was in a position to articulate a claim to be submitted to ICSID arbitration". In addition, at [125], "to the extent that the events identified by Mr Ipek which have occurred since the date when the Undertaking was given relate to the seizure of personal assets belonging to him and other members of his family, they do not assist Koza Limited with 'good grounds' for being released from the Undertaking".

121. Mr Spearman's conclusions, at [126], are set out in the Court of Appeal's judgment at [16] and I do not propose to repeat them all. At [126(6)], he said:

> "(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."

In addition, picking up the test of the "interests of justice" (see paragraph 12 above) he concluded:

> "(7) In the 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 the balance of justice between the parties would make it appropriate to vary the Undertaking to permit it."

As can be seen, this latter conclusion included consideration of the interests/balance of justice between the parties.

122. Accordingly, Mr Spearman expressly determined the issue of whether Koza Ltd should or should not be permitted to fund the Arbitration and decided that they should not. It is, however, clear that, in respect of the variation application, the balance of justice *might* have led to the conclusion that Koza Ltd should be released from the Undertaking and permitted to fund the Arbitration.

123. As referred to by Popplewell LJ, Koza Ltd only appealed the judge's decision that the proposed funding was not permitted by the Undertaking and the negative declaration to that effect. However, the Court of Appeal's decision was part of a process in which the court was determining, I repeat, *whether* Koza Ltd should or should not be permitted to fund the Arbitration. As Mr Flynn submitted (see paragraph 44 above in Popplewell LJ's judgment) "the whole point of the exercise was to ascertain whether or not Koza Ltd could make the ICSID expenditure".

124. In the course of his judgment, Floyd LJ analysed Mr Spearman's approach to the business exception in some detail, as follows:

> "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."

125. The Court of Appeal went on to determine, what was described at [28], as the "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". However, although this was a hard-edged question, Floyd LJ noted that the "court's discretion and considerations of the interests of justice generally, were relevant to the variation originally sought by Koza Ltd". He also noted that, in terms of the relief sought, namely a declaration, the "grant of such a declaration is discretionary".

126. Counsel then acting for Koza Ltd, Lord Falconer, identified three potential outcomes, at [29], namely the court finding that the proposed expenditure was within the ordinary and proper course of Koza Ltd's business; the court making the opposite finding; or, thirdly, the court refusing to make any declaration because it was not satisfied either that the funding was within the business exception or that it was not. Counsel for Koza Altin sought to uphold the negative declaration granted by Mr Spearman and also sought, at [20], a finding from the Court of Appeal that the proposed funding would not be in the ordinary and/or proper course of business because the Arbitration was based on "a fraudulent document" (the SPA).

127. Floyd LJ agreed, at [30], with Mr Spearman's conclusion that "the authenticity of the SPA was open to very serious doubt". He also rejected, at [31], an alternative route by which it was said the ICSID tribunal would have jurisdiction. This meant that a positive declaration could not be granted. Equally, he determined, at [32], that it would not be right to grant a negative declaration "given that neither the judge nor this court is in a position to make findings of this seriousness (on the authenticity issue) on the basis of the written evidence".

128. Floyd LJ summarised his conclusions as follows. But for the dispute about the authenticity of the SPA, he would have decided, at [47], that the proposed funding was within the ordinary and proper course of business. However, because of that dispute, which (as referred to above) the court could not determine, the negative declaration had to be discharged. That dispute also meant that it would not be right to grant a positive declaration (namely that the funding was not within the exception). This meant that, at [48], "if Koza Ltd pursues the funding of the ICSID arbitration it will do so at its own risk that it may be shown to be in breach of its undertaking to the court".

129. I have referred to the nature and progress of the previous application at some length in order to identify the issues which it engaged and to set the framework for my consideration below of the extent to which that application overlaps with the subsequent application for an injunction.

130. Briefly in respect of the injunction application, as set out in Mr Cousins' judgment, at [1], the basis of the application was:

> "… that, first, there is a serious issue to be tried as to whether the proposed funding would be both a breach of undertakings previously give to the court by Koza, as well as being part of an allegedly fraudulent scheme, an important part of which was a false instrument … and, secondly, that the balance of convenience firmly favours the grant of such relief"."

Although the judge referred to "both" the undertakings and the allegedly fraudulent scheme, in my view, it is clear that the injunction application was based on the allegation that the funding would arguably amount to a breach of the Undertaking because it would arguably not be in the ordinary and proper course of business. This can be seen also from his judgment, at [36(i)], in which the Judge, again, referred to the "serious *issue*" (my emphasis) as being the authenticity of the SPA and whether "the funding would constitute a breach of the 2016 Undertakings".

131. Although the arguments before us ranged widely, in my view this was the substantive basis of the jurisdiction on which Koza Altin sought, and on which the Judge granted, the injunction. In this I agree with Popplewell LJ's conclusion, at [94] of his judgment, that the existence of the Undertaking provided the jurisdictional basis for the order made by the Judge.

Injunction upon an injunction

132. I now turn to consider the issue of whether a party can obtain an, effectively permanent, injunction to restrain an alleged breach of an existing undertaking (or injunction). As referred to above, the more specific issue is whether the court can grant an injunction which would, effectively permanently, restrain what is *alleged* would be a breach of the Undertaking because it is *alleged* that the proposed funding is not expenditure in the ordinary and proper course of business. For the reasons I set out below, in my view, the answer is that the court cannot permanently restrain such expenditure on this basis.

133. It is clear, of course, that either party can apply to the court to determine whether a proposed payment will or will not be within the scope of the exception. This is what happened in the Funding Application. Another example of such an application, which was not referred to during the hearing, is *PJSC Commercial Bank Privatbank v Kolomoisky and Others* [2018] EWHC 1910 (Ch). That case involved a conventional application for the court to determine whether certain payments were within the business exception or whether a respondent needed to obtain permission before making them. The applicant (the claimant) sought declarations that certain payments were not within the business exception of an existing freezing order. Fancourt J decided that they were not and that the respondent would, therefore, need the claimant's agreement or permission from the court before making them.

134. The question raised by this appeal is, in contrast, novel; novel in the sense that, as referred to above, it has not been addressed in any of the authorities cited to us. In particular, I do not consider that any of those authorities have dealt with the question of whether the court can grant an interim injunction permanently to restrain an alleged breach of an existing undertaking (or injunction); permanently, because the question of whether the proposed act does constitute a breach will never be determined. If such a jurisdiction exists and an injunction is granted, the effect would be that the party in whose favour it has been granted will have permanently prevented the other party from taking the proposed step simply on the basis that it *might* be a breach of the undertaking or injunction. As I will endeavour to explain below, the result, in my view, is that the party who has obtained this second, subsidiary, injunction has obtained a derivative advantage from the existence of the previous injunction which, as submitted by Mr Flynn, does not support the previous injunction or make an order which is ancillary to it, but which changes its character, in particular as to the application of the business exception.

135. I characterise the issue this way, in respect of the permanent effect of the subsidiary or derivative injunction, because there is undoubtedly power to restrain a party from acting in alleged breach of an undertaking, when there is an issue as to whether what is proposed would breach the undertaking, pending resolution of that issue.

136. An example of this is *VB Football Assets v Blackpool Football Club (Properties) Ltd* (paragraph 74 above). The order in that case was made when, at [2], there was a dispute "as to the true scope and effect of the Freezing Order". Marcus Smith J, at [9], could not "reach a concluded view on the true meaning and scope of the Freezing Order nor, in consequence, can I reach any concluded view as to the propriety" of proposed dealings with certain assets. He had to decide, at [9], what order to make pending "another hearing, to determine which construction of the Freezing Order is correct and – as a result – whether the [proposed] dealings … are or are not in breach of the Freezing Order". He decided, at [11], that pending "determination of the true meaning and effect of the Freezing Order, the *status quo ante*" should be maintained. He made an interim order, at [14], "ensuring that the situation is made clear".

137. There is also undoubtedly power to make *ancillary* orders to support an injunction. A list of orders typically made for this purpose are set out in Gee on *Commercial Injunctions* 6th ed, at 23-001. This list is not exclusive but it does not include an injunction to restrain an alleged breach of an existing undertaking or injunction. In my view, to describe an injunction to restrain an alleged breach as an ancillary order to support the efficacy of an existing injunction begs the question which is *whether* the proposed act does in fact constitute a breach of the injunction. This was why, I would suggest, Marcus Smith J rightly recognised that, at a future hearing, he would have to determine whether the proposed dealings "are or are not in breach of the Freezing Order".

138. The disputed right, namely the alleged breach of an undertaking, is clearly not a substantive right in the current proceedings. It is a derivative right based on the existence of an undertaking. The court is, therefore, being asked to restrain what is alleged to be a threatened breach of that undertaking without deciding whether what is proposed is or is not a breach. In this way, Koza Altin, is seeking to use the existence of the Undertaking to obtain a new, enhanced, remedy, namely prohibiting expenditure which may *or* may be prohibited by the Undertaking as being outside the ordinary and proper course of business. I propose to call this a derivative injunction.

139. Accordingly, if Koza Altin's argument was correct, and a party could use an existing undertaking or injunction to obtain a derivative injunction as sought in this case, the effect of the standard exception for dealings or dispositions in the ordinary and proper course of business would change. Rather than such dealings or dispositions being permitted unless they were not in the ordinary and proper course of business, they would potentially only come within the exception and be permitted if it was not arguable that they might not be in the ordinary and proper course of business. This is because they could be prevented simply on the basis that there was a serious issue that they were arguably in breach of the undertaking or injunction because they were *arguably* not in the ordinary and proper course of business. This is a very different threshold or test and it would no longer be "the hard-edged question" referred to by Floyd LJ, at [28]. It would also, I suggest, turn an exception which is "given a narrower rather that a wide meaning" (per the Court of Appeal, at [76], in *JSC BTA Bank v Ablyazov (No 3)*) into something of a Trojan horse in that it would become a platform

for a further injunction on the basis of an alleged potential breach and turn what would otherwise be an exception with a narrow application in favour of a defendant into an exception with a much wider application in favour of a claimant.

140. In this context, some of the observations made by Maurice Kay LJ, when giving the judgment of the court in *Ablyazov (No 3)*, are relevant. They were made in respect of an application made by a defendant for clarification of the meaning and effect of a freezing order and, in particular, the scope of the business exception. The exception in that case was in paragraph 9(b) of the order and was as follows:

> "This order does not prohibit the first to third and fifth to seventh respondents from dealing with or disposing of any of their assets in the ordinary and proper course of any business conducted by them personally."

Maurice Kay LJ set out the approach which the court should take when determining whether proposed dispositions fell within the exception:

> "79. The judge took the view that if there were unresolved issues on the evidence as to whether the disposals of the underlying assets were carried out by the companies themselves or by him as part of his own business, the burden rested on the bank to show that the transactions were outside the para 9(b) exception and that they had not done this. This was, in our view, the wrong approach. Most of the evidence in support of the application was provided by Mr A in his second witness statement of 16 March 2010 and his fourth witness statement of 17 May 2010. On an application for committal the burden is undoubtedly upon the applicant to prove the breaches relied upon to the criminal standard of proof. This includes the burden of showing that a disputed transaction is not within an exception to the order such as that contained in para 9(b): see *Nokia France SA v Interstone Trading Ltd* [2004] EWHC 272 (Comm). But where the defendant chooses to seek guidance or clarification from the court as to whether certain transactions have contravened or will contravene the terms of the injunction, it seems to us that it is incumbent on him to provide the court with the evidence upon which it can properly answer the question posed by the application. Declaratory relief is discretionary and if the applicant is unwilling to do this the judge should simply decline to make the order and leave it to the claimant to decide in due course whether it wishes to pursue committal proceedings of its own. In any such proceedings the court would have to decide whether the disposals were disposals by Mr A of his assets at all and, if so, whether they were made in the course of his own business. But the court is not obliged to adjudicate upon the defendant's compliance or otherwise with its orders on the basis only of whatever material the defendant chooses to put before it.
>
> 80. We therefore take the view that, even if otherwise unobjectionable, the transactions involving the shares in BTA Kazan and Omsk Bank and the re-investment of the proceeds of sale were not within the exception contained in para 9(b) and that the judge should have dismissed the application for declaratory relief in that respect. If

> Mr A is right about the nature and purpose of the transactions then the breach of the freezing order is likely to be a technical one in the sense that permission for the transactions would have been granted and, in those circumstances, is unlikely to have much influence on the court on the central question whether Mr A would be likely to breach the freezing order in the future. We have not therefore taken these breaches into account in deciding whether the judge was right to make the receivership order. But that is not a matter for us and would have to be dealt with in a further application by Mr A if so advised."

141. There is no reason, in my view, why the discipline, and burden, which applies to an application for guidance or clarification made by a defendant, as set out in *Ablyazov (No 3)*, should not equally apply to a claimant. I do not see how it would be a fair exercise of the jurisdiction under section 37 to permit a claimant to avoid this burden by the simple expedient of applying for an injunction on the basis of an arguable breach of the business exception.

142. It is also relevant to note that, at [79], Maurice Kay, Longmore and Patten LJJ said that, based on the well-known principle that declaratory relief is discretionary, the judge "should simply decline to make the order and leave it to the claimant to decide in due course whether it wishes to pursue committal proceedings of its own". It was not suggested that the claimant could simply have obtained an injunction to restrain the proposed disposals on the basis that they were arguably outside the scope of the exception.

143. The same approach was, of course, adopted in the Funding Application appeal in this case, when Patten LJ was again a member of the constitution. I repeat what Floyd LJ said at the conclusion of that part of his judgment dealing with the appeal from the order made by Mr Spearman:

> "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."

There is, again, no reference to the simple expedient of an application for an injunction to restrain proposed expenditure on the basis that it is an arguable breach of the business exception.

144. In conclusion, in my view, to permit an application for an injunction to be made, on the basis that the proposed expenditure is allegedly in breach of an undertaking because it is allegedly not expenditure permitted by the business exception, turns the exception on its head. Rather than being an exception to the prohibitive or mandatory terms of a freezing order by reference to whether dispositions or dealings are or are not in the ordinary and proper course of business, it enables a claimant to use the exception, without any determination of that issue, to seek to prevent expenditure on the ground that it is arguably not permitted by the exception. This converts the exception into the justification for a further injunction, and uses it, as the basis for the lower threshold of

an arguable breach. The serious issue to be tried is not an issue in the substantive proceedings but simply the issue of whether the proposed expenditure is arguably in breach of the exception. In my view, as submitted by Mr Flynn, this does not support the effectiveness of the existing undertaking or injunction; rather than ensuring its effectiveness it provides a subsidiary or derivative basis for extending the reach of the undertaking or injunction detached from the underlying proceedings.

145. The effect can also be seen from the impact the jurisdiction to grant an injunction on this basis would have had on the Funding Application in this case, and indeed any application for a declaration or determination as to the effect of an existing undertaking or injunction. The Funding Application and any other similar application would become otiose, or very significantly circumvented, because such an application would inevitably be met by an application for a further injunction based on the allegation that the proposed disposition was *arguably* not in the ordinary and proper course of business. The remaining substantive issue, as demonstrated by the decision in this case, would be the balance of convenience determined by reference to the arguable breach.

146. If this was a route open to a party, it would avoid the need for any determination of whether expenditure was or was not within the exception and, with conventional notice provisions, would be likely to lead to many applications for derivative injunctions. This is because the requirement, merely, for an issue of arguability, that proposed expenditure was not within the exception, would open the door to the grant of an injunction. Again, I do not see this as supporting the court's order or being a policing provision but rather as undermining the jurisdiction to grant injunctions and as undermining the structure created by an existing undertaking or injunction.

147. Finally, I make clear that if a party wants to obtain a further injunction restraining a particular proposed transaction (or transactions), they can, of course, make a new substantive application for such an injunction on a conventional basis. They would have to demonstrate that it was not an attempt to relitigate what had already been determined or "good grounds" to justify varying the existing order. But, as I stress, the application would be determined on conventional grounds and not on the basis, merely, that what was proposed would arguably be in breach of the existing injunction and exception.

Abuse

148. The other issue I propose to address has been given the label abuse. Although this issue would not arise if I am right, as set out above, that the judge was wrong to decide that the injunction should be granted on the basis of an arguable breach of the Undertaking and exception, it would arise on Mr Kitchener's alternative argument (as referred to by Popplewell LJ at [62] of his judgment) that the judge was exercising "an original jurisdiction to grant a freezing order or other interim injunction". I will deal with it briefly because, as referred to above, I agree with what I understand to be Popplewell LJ's conclusion that the judge did not in fact base his decision on the exercise of an original jurisdiction.

149. Although the issue has been phrased in terms of abuse, in my view the wider question in the present case can be framed, as set out by Popplewell LJ, at [42], as engaging "the court's duty to ensure efficient case management and the public interest in the best use of the court's resources". As Popplewell LJ goes on to say, and I agree, "the application

of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing". This was, effectively, the test which was applied by Mr Spearman when determining Koza Ltd's variation application and is consistent with the approach set out in *Birch v Birch*. In my view, the test should apply both ways: in other words a respondent equally cannot seek to re-litigate what was previously litigated consequent on an application made by an applicant absent "good grounds" for being permitted to do so.

150. In simple terms, in my view, the application for an injunction by Koza Altin conflicts with this principled approach. This is because Koza Altin is seeking to achieve, by a different legal route, the determination of the same question which was determined in the Funding Application, namely whether Koza Ltd can use its resources to fund the Arbitration. I repeat Mr Flynn's submission, referred to above, that "the *whole* point of the exercise was to ascertain whether or not Koza Ltd could make the ICSID expenditure".

151. Koza Ltd sought both a declaration *and* a variation of Asplin J's Order. There were a number of possible outcomes which included that the court would grant the positive declaration sought by Koza Ltd or would grant the variation application. Koza Altin would, therefore, have been confronted from the outset of the Funding Application with the prospect of Koza Ltd being given express permission to make the proposed funding. Koza Altin decided to meet that prospect not by making a separate application for an injunction but by opposing the applications at first instance and, on appeal, seeking to uphold the judge's negative declaration.

152. It is, with respect, no answer to this for Koza Altin to say that they did not expect Koza Ltd to proceed with the funding if they did not succeed in obtaining the court's express approval. First, the court might have given express approval on the basis of the applications made by Koza Ltd and, secondly, contrary to the Judge's conclusion, it would be for Koza Ltd to decide how to proceed in the light of the court's determination of those applications. If Koza Altin wanted to argue that there was an alternative basis on which Koza Ltd should be refused permission for or prohibited from funding the Arbitration they could and should have brought that alternative before the court at the same time as the Funding Application.

153. In my view, this conclusion is not undermined by Popplewell LJ's conclusion, at [53], that the declarations sought by the parties from the Court of Appeal in the Funding Application was a "narrower question". By the time the proceedings came before the Court of Appeal, the issue might have become narrower. But when the Funding Application is viewed as a whole, in my view, it is clear that the issue was much wider and included Koza Ltd being expressly permitted or enabled to make the funding. I deal, below, with the argument as to Koza Altin's expectation based on what took place during the hearing before the Court of Appeal.

154. In paragraph 54, Popplewell LJ acknowledges that it may well be an abuse to seek an injunction separately when it had not been sought previously at the same time as an application for a declaration. In my view, as referred to above, this principle applies both ways; both to the party who was previously the applicant and to the party who was

previously the respondent. I consider that this would apply in this case even if the previous application by Koza Ltd had been confined to the application for a declaration. It is, however, made even clearer because Koza Ltd expressly sought, in the alternative, the variation of Asplin J's Order to permit them to fund the Arbitration. The obverse to both these applications, or if not the obverse, at the very least an alternative formulation, is the subsequent application by Koza Altin for an injunction to restrain the same expenditure at issue in the previous applications. In summary, I consider that the application to restrain Koza Ltd from funding the Arbitration is, to put it colloquially, the other side of the same coin or sufficiently the other side of the same coin for the principle to be engaged.

155. I appreciate, of course, that Koza Ltd did not appeal Mr Spearman's refusal to vary the Asplin Order. But the reason for referring to the Funding Application, both on appeal and at first instance, is for the purpose of addressing Koza Altin's argument, as accepted by the Judge at [51], that they had no reason "to anticipate that [Koza Ltd] would not obtain the declaratory relief that they had previously sought, yet nevertheless seek to go ahead and make payments to fund the Arbitration".

156. With respect to the Judge, in my view this misstates the relevance of the Funding Application for the purpose of deciding whether Koza Altin can justify their subsequent application for an injunction. The importance of the Funding Application does not depend on how Koza Ltd might or might not have been expected by Koza Altin to respond to the outcome of that application. Its importance derives from the issue which the *court* was determining, namely whether Koza Ltd should or should not be permitted to fund the Arbitration. As referred to above, if Koza Altin wanted to argue, on alternative grounds, that Koza Ltd should be injuncted from funding the Arbitration, then it was incumbent on them to make that application at the same time as Koza Ltd's application for a declaration and a variation.

157. I would describe the current application as fighting "over again a battle which has already been fought", adopting what Buckley LJ said in *Chanel* (quoted in *Holyoake v Candy* [2016] EWHC 3065 Ch, as set out by Popplewell LJ in [40] above). I also consider that it falls within the scope of the principle set out by Sir Terence Etherton, Chancellor of the High Court (as he then was) in *Holyoake v Candy* [2016] EWHC 1718 (Ch), at [21], (as also quoted in [40] above) which again, in my view, apply both ways. In other words, the principle he sets out is not confined to an application being made by the same party, but applies whenever the application concerns the same issues which have already been addressed by the court. To apply the principle otherwise would, I suggest, be contrary to its purpose and to the overriding objective. I propose to quote again Sir Terence Etherton's observations:

> "[21] I do not agree with Mr Trace's statement of principle. The starting point in such a case as the present is that the claimants must point to something that has happened since the grant of the original order. They must show something material has changed to make it appropriate to investigate the same issues over again at yet another extensive hearing with even more voluminous evidential material. Absent any such change, the application for a freezing order is not only a disproportionate call on the court's resources, but an abuse of the court's process, in effect making successive applications for the same objective but testing the court's willingness each time to see how far the

> court will go, each such application involving, to a greater or lesser extent, duplication of issues, evidence and arguments."

I accept that the application of the principle would need to reflect whether it was the same or a different party making what could properly be described as a "successive" or a repetitive application. But that is a factor which would influence how, not if, the principle was engaged.

158. I now turn to deal with the submission made on behalf of Koza Altin, and accepted by the Judge, that it was only during the hearing of the appeal in the Funding Application that Koza Altin "perceived as a possibility" that Koza Ltd might make the funding even if they did not get a positive declaration. This was said to be, as referred to in Popplewell LJ's judgment, at [24], "as a result of Lord Falconer's alternative submission inviting the Court simply to dismiss the application for a positive declaration rather than to make a negative declaration".

159. I consider that this submission overlooks the nature of the process and the nature of the applications involved in the Funding Application. As referred to above, a possible outcome of the applications was that Koza Ltd would be given permission. In my view, it was incumbent on Koza Altin to advance any alternative basis for preventing Koza Ltd from doing so at that time. Further, however, I consider that it overlooks the well-known principle, referred to by the Court of Appeal in *Ablyazov (No 3)* and by Floyd LJ in this case, that declaratory relief is discretionary. I do not see how this "alternative submission" could have come as a surprise when it would always have been a potential outcome to the application because of this well-known principle.

160. In conclusion, therefore, if Koza Altin wanted to argue that there was an alternative basis on which Koza Ltd could and should be prohibited from funding the Arbitration, they could and should have made their application for such an injunction at the same time as the applications determined in the Funding Application. Further, I do not consider that any good grounds have been shown to justify the application being made subsequently because I do not accept their attempted justification for not having made the application then.

Conclusion

161. In conclusion, for the reasons set out above, I have come to the clear conclusion that it would not be just and convenient to grant the injunction sought by Koza Altin to restrain the proposed funding by Koza Ltd and I consider that the judge was wrong to do so.

162. In summary, my reasons are as follows.

(a) It would not be consistent with the overriding objective, in that permitting Koza Altin to pursue their application for and to grant an injunction would not be dealing with the case justly and/or at proportionate cost.

(b) It would not be an appropriate use of the court's powers under section 37 to grant the injunction sought by Koza Altin because the serious issue to be tried, on which it is based, is the allegation that the proposed expenditure would arguably be in breach of the Undertaking because it is allegedly not expenditure permitted by the business

exception. For the reasons set out above, this is not a proper basis for the grant of the injunction.

(c) Koza Altin could and should have made their application for an injunction to prohibit the funding at the same time as the applications which were determined in the Funding Application and no good grounds have been established for permitting them to do so by a subsequent application.