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Neutral Citation Number: [2020] EWHC 1092 (Ch)

Claim No: HC-2016-002407

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION

Rolls Building, Fetter Lane,  
LONDON EC4A 1NL

Date: Tuesday 12<sup>th</sup> May 2020

**Before:**

**MR JEREMY COUSINS QC, SITTING AS A DEPUTY JUDGE OF THE  
CHANCERY DIVISION**

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**BETWEEN**

- (1) KOZA LIMITED  
(2) HAMDİ AKIN İPEK

**Claimants/Respondents**

**- and -**

**KOZA ALTIN İSLETMELERİ AS**

**Defendant/Applicant**

## **APPROVED JUDGMENT**

**Mr Jonathan Crow QC** and **Mr David Caplan** (instructed by **Mishcon de Reya LLP**, of Africa House, 70, Kingsway, LONDON WC2B 6AH) for the Defendant/Applicant

**Mr Stephen Innes** (instructed by **Latham & Watkins (London) LLP**, of 99, Bishopsgate, LONDON EC2M 3XF) for the Claimants/Respondents

Main hearing dates: 10<sup>th</sup> and 11<sup>th</sup> February

Consequential matters were dealt with by written submissions

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

Jeremy Cousins QC

### **MR JEREMY COUSINS QC:**

1. My judgment on the Application in this matter (“the Main Judgment”), the terms used in which I adopt below, was handed down on Monday 23<sup>rd</sup> March 2020. I directed on that occasion that, until further order, Koza must not, and Mr Ipek must not cause Koza to, provide or bind itself to provide the Investment Arbitration Expenditure as defined in the order of Mr Richard Spearman QC (sitting as a Deputy High Court Judge) dated 20<sup>th</sup> December

2017, or otherwise use its funds or assets or bind itself to use its funds or assets to finance IIL's Arbitration against Turkey. I gave directions for dealing with consequential matters in writing, and made provision for time for seeking permission to appeal to be extended until 21 days after I had disposed of such matters. This judgment deals with the consequential orders that I have been asked to make.

2. I have received from the parties the following written submissions on consequential matters:
  - (i) For Koza Altin, dated 30<sup>th</sup> March 2020 (from Mr Caplan).
  - (ii) For Koza and Mr Ipek, dated 6<sup>th</sup> April 2020. These were prepared by Mr Innes, who had not appeared for the Claimants on the hearing of the substantive Application.
  - (iii) For Koza Altin, dated 14<sup>th</sup> April 2020 (from Mr Crow QC and Mr Caplan).
  - (iv) For Koza and Mr Ipek, dated 17<sup>th</sup> April 2020 (from Mr Innes).
3. The agreed directions for the making of submissions, which I had given on 23<sup>rd</sup> March, did not contemplate that there would be any further written submissions going beyond Koza Altin's reply submissions of 14<sup>th</sup> April, but I have felt it appropriate to take Mr Innes' submissions of 17<sup>th</sup> April, like all others that I have received, fully into account. Koza Altin has not sought to respond further.
4. I should explain that although the position was not clear from Mr Innes' submissions of 6<sup>th</sup> April, in his later submissions he explained that Koza and Mr Ipek have sought permission to appeal the Main Judgment directly from the Court of Appeal, on an expedited basis, and that accordingly I am not asked to consider the issue of whether to grant such permission. In the circumstances I have not been supplied with the draft grounds of appeal, or any written submissions made in support of the application for permission to appeal, and Mr Innes has confirmed that therefore I am not asked to take such

submissions into account for present purposes, though, of course, I do take into account, having regard to Mr Innes' submission that I should order a stay of execution pending appeal, the fact that an application is presently pending in the Court of Appeal.

*An overview of the parties' respective contentions*

5. Koza Altin's position can be stated briefly. It is that it was the successful party and therefore, in the usual way, should recover its costs. Despite what Mr Crow and Mr Caplan describe as root and branch opposition to the grant of the injunction which I granted, they do not ask me to award costs on the indemnity basis, and in my view that was a realistic and appropriate stance to take. I do not regard the manner in which the Claimants had conducted the Application as taking the case out of the norm.
  
6. Mr Crow and Mr Caplan do maintain, however, that Mr Ipek alone should be ordered to pay Koza Altin's costs, and in that respect they rely upon the fact that this was the course adopted by the Supreme Court when, on 12<sup>th</sup> November 2019, it made its order consequent upon that Court's disposal of the appeal earlier that year. As well as maintaining that the Supreme Court thereby decided the principle of Mr Ipek's being solely liable for costs in the present circumstances, Mr Crow and Mr Caplan contend that justice demands that Mr Ipek alone should bear responsibility for costs, since otherwise he could route costs through Koza, without risk to himself, whilst being free to claim costs should his case prevail. As well as this objection founded upon asymmetry, it was said that in reality the Application before me concerned an attempt by Mr Ipek to cause Koza to fund a claim being prosecuted by IIL primarily for his benefit and that of his family, rather than for Koza.
  
7. Finally, Koza Altin seeks a payment on account of costs, pursuant to CPR 44.2(8) in the sum of £150,000, to be paid within a period of 14 days.

8. In short, Mr Innes submitted that I should order that costs be costs in the case, or that costs should be reserved. In the event that I should be minded to make a costs order now in favour of Koza Altin, he contended that it should be for just 70 per cent of its costs, and that any such order should be made against both Koza and Mr Ipek. Further, he maintained that there should be a set-off of costs orders reflecting the order made in favour of Koza by the Court of Appeal on 23<sup>rd</sup> May 2019, relating to the appeal concerning the application which had come before Morgan J which was concerned with extradition expenses, as explained in the Main Judgment. If successful as to the principle of such set-off, there should be no order for a payment on account of costs in favour of Koza Altin, which, in any event, it was said, should not exceed a sum just below £83,000. Finally, both Koza and Mr Ipek ask me to grant a stay of execution of any costs order pending determination of the appeal as to which they seek permission from the Court of Appeal.
9. It is convenient for me to deal with these issues in respect of consequential matters individually, and to elaborate as I do so, upon Mr Innes' submissions, and those in response on behalf of Koza Altin.

*The appropriate form of costs order*

10. In support of his invitation to me to order costs in the case, or that costs be reserved, Mr Innes relied upon the decision of Neuberger J, as he then was, in *Picnic at Ascot Inc v Derigs* [2001] FSR 2. Mr Innes, referring also to the decision of Rose J, as she then was, in *Hospital Metalcraft Ltd v Optimus Metalcraft* [2015] EWHC 3093 (Ch), at para 9, described *Picnic at Ascot* as the leading case in relation to costs where an applicant obtains an interlocutory injunction on the basis of the balance of convenience. Mr Innes relied, in particular, on the following paras (with numbering as appears in the FSR) in Neuberger J's decision:

“6. It seemed to me that the following guidance can be obtained from the cases to which I have been referred:

7. (1) In a case without any other special factors, where a claimant obtains an interlocutory injunction on the basis of the balance of convenience, the court normally reserves the costs. While one can see

an argument, particularly under the new regime, for saying that an order more favourable to the claimant should be made on the basis that the claimant has won the issue in respect of which the costs have been directly incurred—namely, whether an interlocutory injunction should be granted or not—it seems to me that the reasoning of the Court of Appeal in the so far unreported case of *Desquenne et Giral U.K. Ltd v. Richardson* [now reported at [2001] FSR 1], indicates that an order reserving the costs is appropriate.

8. In that case the judge at first instance had ordered the trial of a preliminary issue but had continued the interlocutory injunction until the hearing of the preliminary issue, despite the defendant's contention that the injunction—which had been granted without notice—should be discharged, on the basis of the balance of convenience. While accepting that the question of costs was a matter for the judge's discretion, Morritt L.J. was on (*sic*) the view that the Court of Appeal was “entitled and indeed bound, to interfere with” that exercise of discretion. He said this:

“It is quite plain from the passage in the judge's judgment ... that he granted or continued the injunction on the basis of the balance of convenience in order to hold the ring until the dispute between the parties could be properly decided at a trial. It is inconsistent with an order such as that, that there should be successful or unsuccessful parties for the purposes of the rules either new or old.”

8. He then stated that, while the judge was right to consider the question of costs in the context of CPR rule 44.3, he was wrong to decide that the defendant was the unsuccessful party or that the claimant was the successful party. He said that the order which the judge had made—which was for costs in favour of the claimant and indeed an order assessing the costs to be paid forthwith—was wrong because

“there were no successful or unsuccessful parties at that stage, and the proper orders to be considered were those under the terms of the practice direction to which I have referred”.

8. The practice direction to which he referred contains the following provisions in paragraph 2.5, which Morritt L.J. quoted:

“There are certain costs orders which the court will commonly make in proceedings before trial. The following table sets out the general effect of these orders,”

and then follows costs in cause, costs reserved, costs thrown away.

9. One can see the force of that, particularly when one bears in mind that the balance of convenience will often be determined by reference to facts which may be contested, and the court may at trial conclude that it had been persuaded to grant an interlocutory injunction on the basis of assumed facts which turn out to be inaccurate, or even in the context of a claim which should never have been brought.

10. (2) As this present issue concerns the question of costs, it would plainly be wrong to treat *Richardson*, even bearing in mind that it is a recent decision of the Court of Appeal, as authority which ties the court's hands when it comes to the question of costs in a case such as this. However, in my view, it is plainly undesirable that there should be

inconsistency of approach to questions of costs between different courts. This is especially true when one bears in mind what was said, as long ago as 1990, about costs by Hoffmann J. in *Kickers International S.A. v. Paul Kettle Agencies Ltd* [1990] F.S.R. 436, at 436 :

“This is a dispute over costs. At one time it might have been said that it was only about costs. But litigation has become so expensive that there is no ‘only’ about costs any more. The ruling on costs can easily be the most important decision in the case.”

11. (3) A defendant who accedes to the grant of an interlocutory injunction before the hearing should not, for that reason alone, normally be the subject of a more disadvantageous order for costs than if he had fought and lost. It would be, as I see it, illogical and contrary to the modern approach if a defendant were discouraged from agreeing to a sensible course by knowing that he was likely to be worse off in terms of costs than if he incurred the cost, time and effort in fighting.

12. (4) There will obviously be circumstances where it is right to depart from the general approach. Thus there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for the interlocutory injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes).

13. (5) It is also important to bear in mind that an order for costs reserved or an order for costs in the case may not turn out to be as sensible and fair as it seems at the time it is made. In *Kickers*, at 438 , Hoffmann J., pointed out that very often there is no trial. If there is no trial then the order for costs, whether it is reserved or in the case, effectively might as well not have been made. In some circumstances, that is a point which has less force than might appear, because, if the case does not go to trial, it may settle and, if it settles, the parties are perfectly able to take into account the potential order for costs, which costs reserved or costs in the case involves. However, the court should bear in mind that the case may not go to trial and may not settle, and that it is undesirable to encourage parties to go to trial or to discourage them from settling by having the uncertainty of an order for costs—such as costs reserved or even costs in cause—hanging over them. So far as the apparently preferred order of costs reserved is concerned, there is the additional problem identified by Mr Justice Hoffmann, which he describes at 438, as:

“the difficulty of reconstructing for the trial judge how things looked at the time of the interlocutory application, particularly when it involved questions of balance of convenience which were irrelevant at the trial”.

14. (6) In this context it seems to me that the court should adopt a realistic attitude where it is fair and possible to do so as to whether the case is likely to go to trial or not. At one extreme, one has *Richardson* , where the interlocutory injunction was granted or, more accurately, continued when the judge also ordered a preliminary issue, which was fixed to come on for hearing less than five weeks later. In that case, one can well understand the Court of Appeal thinking the judge should

have anticipated that, not only would the main issue in the trial be determined, and determined very shortly, but also that the issues and arguments at the interlocutory stage would be very much in everyone's mind. At the other extreme, there are the facts of *Direct Line Group Ltd v. Direct Line Estate Agency Ltd* [1997] F.S.R. 374, where Laddie J. formed a very clear view as to the merits: while he was only granting an interlocutory injunction, he not only made a favourable order for costs to the claimant but ordered those costs to be assessed and paid forthwith. In that case, it seems to me the tone of his judgment indicates that, not merely did he think that the substantive merits were very plain, but that, particularly in light of his judgment, he did not expect the case to go any further.

15. (7) On the other hand, where the court takes the substantive merits into account at the interlocutory stage, it must be careful, before also taking them into account on the question of costs. If, as in *Direct Line*, the court's view on the merits is based on incontrovertible facts or the construction of a document which is accepted by the parties as governing their relationship, then that is something which the court can, to my mind, properly take into account as pointing towards a more favourable order for costs from the claimant's point of view than costs reserved. On the other hand, if the court is faced with disputed facts, and believes the claimant's version of the facts is more likely to be accepted, it may be dangerous to take that into account in the claimant's favour when deciding what to do about costs. It is obviously conceivable that at trial the court's preliminary, even its strongly held, view as to the likely outcome of the dispute on fact may turn out to be wrong. It would be adding insult to injury if an unfavourable order for costs is made against the defendant, in addition to the injunction being granted at the interlocutory stage, on the basis of a wrong (as it turned out) view of the facts by the court.

16. (8) I have been taken by Mr Penny to a number of cases where the court has made favourable orders of varying degree to a defendant in cases where it has refused an interlocutory injunction. I have already referred to *Kickers*. In addition, there is *Silicon Graphics Inc. v. Indigo Graphic Systems (U.K.) Ltd* [1994] F.S.R. 403, and two cases where the Court of Appeal refused to interfere with the exercise of the judge's discretion in such circumstances, *Bushbury Land Rover Ltd v. Bushbury Ltd* [1997] F.S.R. 709 and *Mayfair Brassware Ltd v. Aqualine International Ltd* [1998] F.S.R. 135. While unnecessary for me to rule on the point, it may be that, at least in some cases, a claimant who brings an unsuccessful application for an interlocutory injunction is more at risk on costs than a defendant who unsuccessfully resists an application for an interlocutory injunction. In the one case, it is the claimant's choice to come to court. In the other case, the defendant is effectively forced to come to court. Perhaps one should not make too much of that distinction, because, in many cases where a claimant comes to court to seek an interlocutory injunction, it transpires, either at the hearing of the interlocutory application or at the final hearing, that the defendant has brought the proceedings on himself and has left the claimant with no alternative but to bring the

proceedings. A little indirect support for the view that there may not be equivalence between an unsuccessful claimant and an unsuccessful defendant, however, may be found in what Hoffmann J. said in *Kickers*, at 437. Having said that:

“No doubt it is desirable to encourage litigants to give up when they realise that a motion is hopeless” [(I add) or where they realise that opposition to a motion is hopeless, he added] “But it may be even more desirable to encourage them not to launch such motions in the first place.”

16. In cases where the defendant successfully fights off the injunction, Knox J. in *Silicon*, at 421, identified the two questions which, on the basis of the reasoning in *Kickers*, he thought had to be answered when considering what order for costs to be made. First, “Would it be unfair for the defendants to have the costs of the motion even if they lost at the trial?” Secondly, “And was the launch of the motion justified?” In a case where the claimant has obtained an injunction, despite the possible distinction between a case where the claimant wins and a case where the defendant wins, and the fact that *Kickers* and *Silicon* were decided under the Rules of the Supreme Court, it seems to me that those two questions, appropriately altered, can usefully be asked. Would it be unfair for the claimants to have their costs of the motion even if they lost at trial? Was the opposition to the motion justified?”

11. Mr Innes submitted that this was not a case where the balance of convenience was so clear, or the outcome so plain, that the Claimants could be said to have been wasting time or money, and in light of the terms of the Main Judgment, he argued that it could not realistically be concluded that the case is not likely to go to trial, and that only at that stage can it be said who has been successful; alternatively that such assessment could only be made after determination of the jurisdiction hearing in the Arbitration, which in turn is unlikely to settle or be abandoned. Thus, application of the principles discussed in Neuberger J’s judgment in the passage cited above, Mr Innes submitted, should lead to the conclusion that costs should be reserved. Mr Innes did not develop any submission in favour of a costs in the case order.
  
12. In my judgment, with regard to *Picnic at Ascot*, Neuberger J was not purporting to lay down any hard and fast rule as to how costs should be dealt with upon applications for interlocutory injunctions where the balance of convenience had been a decisive factor. Indeed, in terms, he explained in terms that what he was describing was a general approach. This was recognised in the judgment of Longmore LJ in *Albon v Naza Motor Trading*

*SDN BHD* [2007] EWCA Civ 1124, where his lordship explained that there was no invariable rule against awarding costs on such applications in which it would not be until trial that it could be known whether an applicant had the right for which he was contending. Neuberger J, of course, had never suggested that there was any such invariable rule.

13. *Albon* was a case in which an interim anti-arbitration injunction had been granted to the respondent pending a decision of the court as to whether the arbitration agreement was a forgery. The appellant's appeals against both the injunction and the costs order made against him at first instance were rejected. Mr Crow and Mr Caplan, in their reply submissions, cited a passage from para 21 in Longmore LJ's judgment in that case, which in my view is significant for present purposes:

“The narrow issue in the present case is what is to happen while the forgery issue is being determined; that does not depend on the claimant being right on the forgery issue. Granted that the forgery issue is to be determined in England, [the appellant] was perfectly able to form a view as to the likelihood of their persuading the court that the arbitration should continue meanwhile. The judge was entitled to conclude that they miscalculated and should suffer the consequences. This is very much a matter for the judge's discretion and I would refuse permission to appeal on this question.”

14. Mr Innes, in his supplemental submissions, sought to distinguish this case from *Albon* not least on the basis that the Application was made after the Court of Appeal had declined to grant declarations as to the impermissibility of the proposed expenditure concerned. But the issues before the Court of Appeal were different for the reasons explained in the Main Judgment. In this case, the Claimants were also well positioned to form a view as to the likelihood of their persuading the court that they should be free to continue funding the Arbitration. In particular, they were well-placed to identify the significance of the stifling argument in the assessment of the balance of convenience. They had been expressly warned as to the approach that Koza Altin intended to take if Mr Ipek declined to make confidential disclosure. In my judgment, they miscalculated when they decided not to do as they had

previously indicated that they would, and disclose, on confidential terms, relevant financial information to Koza Altin's legal advisers. As I stated toward the conclusion of the Main Judgment, I found that the balance of convenience came down clearly in Koza Altin's favour upon the Application, and the availability of funding was an important factor in that assessment. This is not to say that the result in this case was a close run thing on other issues, where the Claimants failed on all the major issues which they advanced. But whilst the case was so significantly against them on the balance of convenience, it is not, in my judgment, within the general approach described by Neuberger J. I consider that it would be wrong to treat it as such.

15. Further, I consider that it would be wrong for me to put off dealing with the matter of costs, almost certainly to another judge on a day perhaps well into the future. I heard this case over two days, and spent rather longer than that in reflecting upon the Main Judgment. I consider that I am likely to be rather better placed than another judge, who did not hear the extensive argument that I heard (although he would have available to him the transcript), to assess whether the Claimants really were justified in resisting the Application, and with the vigour that they employed, right to the very end. Moreover, that judge will not have to decide the particular question as to whether or not the Claimants should be permitted to continue with the funding of the Arbitration. The Claimants were, perhaps, invigorated by their then recent successes in the Court of Appeal, but those decisions were, as I have sought to demonstrate in the Main Judgment, on distinctly different points.

16. Whilst the Claimants were entitled to resist the Application as they did, and to incur very significant costs in that process, adopting such a course comes at a price. In my judgment, Koza Altin should have its costs of the Application, subject to the issue of whether there should be a limit of seventy per cent, or some other percentage, upon recoverable costs to reflect Koza Altin's conduct of the Application of which the Claimants complain. This has two aspects upon which the Claimants rely: first, in relation to the issue of use of confidential documents ("the confidentiality point"), to which I referred in the

Main Judgment, and secondly, as to what is described as the “excessive and wasteful reference to numerous irrelevant documents” exhibited to Mr Plowman’s 11<sup>th</sup> witness statement (“the excessive evidence point”).

17. As to the confidentiality point, in the Main Judgment I described, at paras 13-14, the Confidentiality Issue and how it came to be resolved. Mr Innes identifies it as a discrete issue, and reminds me of the provisions of CPR 44.2(4)(a) (and I would add that I have also taken into account 44.2(4)(b)) which obliges me to have regard to all of the circumstances, including success on part of a case. Mr Innes correctly identifies features of the investigation of the Confidentiality Issue which undoubtedly gave rise to significant costs; these included the opportunity extended to Turkey to make representations (which it took up), the obtaining of a ruling from the ICSID Tribunal, and the making of submissions by the parties on the Issue in accordance with directions that I had given. Mr Innes submits that as a result of the exercise in dealing with the Confidentiality Issue, the Claimants estimate that they incurred costs of £114,500, inclusive of VAT, of which solicitors’ costs were about £79,000 and counsel’s fees about £35,500. He invites me to treat the Claimants as successful on the Confidentiality Issue, and by implication to treat Koza Altin as having been unsuccessful.

18. I reject Mr Innes’ submission as to the approach to be taken to costs incurred, as they undoubtedly were, on the Confidentiality Issue. The entitlement to use documents generated in the course of an arbitral process will give rise to a potential issue as to confidentiality, and the party seeking to deploy those documents in litigation in the High Court will need to reflect in advance of any hearing how it can justify such use in court. Even when another party does not object, the court of its own motion might do so. In the present case the issue was raised, by Mr Crow, in the course of submissions being made by Mr Flynn QC, leading counsel for the Claimants on the hearing of the Application. As I noted in para 13 of the Main Judgment, the issue appeared not to have been canvassed between the parties before the hearing. Both parties recognised, when the point came up, that Turkey might wish to make

representations on the Issue. It seemed to me that the only way that the Issue could be given the proper consideration that it deserved was to give directions for written submissions so that the parties, and Turkey, after reflection could state their respective positions. This is what happened, and Koza Altin stated its “neutrality” on the Issue. (Mr Innes, in his later submissions, disputed this “neutrality”, relying on a finding by the ICSID Tribunal that the “purported” trustee of the Koza Group, including Koza Altin, is an agent and organ of Turkey. But that does not go to the point as to whether Koza Altin adopted a neutral position on the Confidentiality Issue.) I do not see, in the circumstances, how the outcome on this Issue could be regarded as a victory for the Claimants or a defeat for Koza Altin. Costs were incurred on this Issue, but points of this kind will emerge in the course of litigation, and they have to be addressed. They form part of the general costs in the case. In this instance it is not as if Koza Altin adopted unnecessarily an uncompromising and intransigent position on which it was ultimately demonstrated to have been wrong. In my view it was entirely proper for Mr Crow to raise the point that confidentiality might be a concern, and once he did so, the matter had to be considered and investigated.

19. As to the amount of costs incurred on the point, I have to say, I am surprised at the estimated sums, though I have no doubt that a very thorough review was undertaken on behalf of the Claimants. I observe also that much of these costs will have been taken up with objections raised by Turkey.

20. I would regard it as wholly wrong and unjustified for me to reduce the percentage of costs which Koza Altin should otherwise recover on the basis of the confidentiality point.

21. As for the excessive evidence point, again Mr Innes relies upon CPR 44.2(4)(a) and the need for me to have regard to the conduct of the parties. He submits that Mr Plowman’s 11<sup>th</sup> witness statement introduced over 750 pages of documents which dealt with matters concerning the 2016 Undertakings, the order of Asplin J, and correspondence which was historic, and not needed for

the Application, and which did not figure at all in the hearing. This, he submits, generated a great deal of costs not only in production, but in consideration, on both sides.

22. I consider that this point too is ill-founded. The background to this case was highly relevant to the Application. I certainly found it necessary to have regard to the circumstances in which the 2016 Undertakings came to be given, and to pay close attention to the ICSID Funding and Extradition Expenses Applications in order fully to understand the significance and implications of the Court of Appeal's judgment in relation thereto for the present Application. It would have been unhelpful not to have had the background material. Anyone preparing a bundle of the kind which the Application required can never know in advance of a hearing precisely how much background material to include; it was particularly difficult in this case because of the degree of interconnection between what had gone before, and what I had to consider. I therefore reject Mr Innes' excessive evidence point.

23. In the circumstances I shall make no order restricting the proportion of Koza Altin's costs that should be recoverable.

*Should the costs order be against both Claimants, or Mr Ipek alone?*

24. I have outlined above Koza Altin's case as to why Mr Ipek alone should bear the costs of the Application, based upon what would otherwise give rise to an asymmetric costs exposure, and the reality of the case being that the pursuit of the Arbitration is in truth for the benefit of Mr Ipek and his family. In my judgment I cannot approach this case on the basis that the Arbitration should *solely* be seen as for the benefit of Mr Ipek or those close to him. The Court of Appeal, in its judgment [2019] EWCA Civ 891, given on 23<sup>rd</sup> May 2019, has recognised potential benefit for Koza from the funding of the Arbitration.

25. In his attractively presented submissions, Mr Innes argued that this was a case for a joint and several costs order against Koza and Mr Ipek because they had made common cause on the Application and ran the same arguments.

Consequently, there was no sensible basis for differentiation. He relied upon a passage in *Friston on Costs*, 3<sup>rd</sup> edition at para 7.32-33, citing the decision of Newey J, as he then was, in *GHLM Trading v Maroo*, unreported 27<sup>th</sup> February 2012. He submitted, further, that Mr Ipek is not a party to the Counterclaim, and the challenges made to Koza's Articles and a board resolution; the injunction was granted for the preservation of the value of that Counterclaim. Moreover, Mr Ipek was not a party to the 2016 Undertakings. Mr Innes pointed out that Mr Ipek had not been a party to the ICSID Funding Application heard by Mr Spearman QC, so that an order for costs was made only against Koza (although he acknowledged that Koza Altin was given liberty to apply for costs against Mr Ipek, but did not actually do so), and that in the Extradition Expenses Application, costs were ordered against Koza only, and not Mr Ipek.

26. The parties devoted a significant amount of their submissions on this issue to the precedential value and persuasiveness of the Supreme Court's order made on 12<sup>th</sup> November 2019 (which, of course, did not relate to an appeal from the decision of the Court of Appeal in May 2019, but to other matters as explained in the Main Judgment) whereby Mr Ipek was ordered to be solely responsible for Koza Altin's and the trustees' costs. Mr Innes placed heavy reliance on the fact that on 10<sup>th</sup> December 2019, by e-mail, the Supreme Court expressly declined to give reasons for its costs decision despite an invitation from Koza Altin to do so on the basis that the order had determined issues of principle in costs disputes between the parties that were likely to arise again. The Supreme Court's declining to give reasons for its decision on costs was, as its e-mail stated, consistent with its usual practice, and indeed that which had for a very long time previously been followed by the House of Lords. Given the absence of a reasoned decision, the order made by the Supreme Court cannot, in my judgment, be said to have determined a principle applicable to the present application for costs purposes, and the decision is not a factor to which I can give particular weight, especially since it was a decision reached on a completely distinct application, and where there was not even a complete identity of parties.

27. I consider the following features of the case to be particularly important to the point that I am presently considering:

- (i) Mr Ipek, though only the holder of one share in Koza, is in fact in control of Koza at least for the time being. It is also he and his family, through their ownership of IIL, who stand to be the immediate beneficiaries of any success in the Arbitration, with there being no certainty that Koza would directly benefit. In my view, Mr Ipek can be fairly described as “the real master of the litigation” (to borrow Lord Reed’s phrase from Scots law which he used in *Travelers v XYZ* [2019] 1 WLR 6075, SC, a case unlike the present in that it was concerned with the liability of non-parties for costs) on the Claimants’ side.
- (ii) Koza is, as was submitted for Koza Altin, the object of the present litigation. It would be inconsistent with the objective which underpins the grant of an injunction to prevent the dissipation of Koza’s assets, for Koza then to have imposed upon it (albeit along with Mr Ipek) the costs of the application which achieved that very relief for Koza Altin, where that application was occasioned by the conduct of another, here Mr Ipek, through the control which he has over Koza. Koza’s decision not to give assurances which would have avoided the need for the Application was a decision taken by those in control of it; that was the reality of the situation. I refer to Floyd LJ’s description of the position in relation to corporate control, at para 9 of his judgment, which I cited in the Main Judgment.

28. With regard to Mr Innes’ submission that Koza and Mr Ipek made common cause, running the same arguments, so that a costs order should be on a joint and several basis, in my judgment there is no invariable rule that this must follow. The passage to which I was referred in *Friston* states that “in general, joint (or joint and several) orders will be made against two or more losing parties only if the claims or defences that they ran were linked in such a way as to make it just that they each be liable for the winning party’s costs, which generally means that they had made common cause in litigation”. This is

describing a justification for a joint and several order, without any suggestion that such an order is necessarily to be made in the circumstances described. The decision of Newey J in *GHLM* to which Friston refers is only very briefly summarised in a Lawtel Note of which Mr Innes was helpfully able to provide a copy, even though that Note is no longer generally available. That Note contains no elaboration upon the factual circumstances pertaining to the case. I have, however, been able to locate (on Westlaw) a copy of the decision [2012] EWHC 61 (Ch) of Newey J upon the trial of the action which gave rise to the costs order concerned. From that report it is apparent that the underlying claim in that case concerned a claim by a company against its former directors and a third party in connection with the directors' misappropriation of company assets in breach of their duties, and the improper transfer of certain assets to the third party concerned. On those facts, the order made by the judge was, if I may say so, entirely one to be expected. That case had none of the unusual features of the present case to which I have referred both in the Main Judgment and above, those features including one Claimant's being an object of the litigation concerned, and where that object is effectively controlled by the other of the two Claimants.

29. In this case, having regard to all the circumstances which I have described in the Main Judgment, and the features which I have mentioned in para 27 above, I consider not only that an order for costs against Mr Ipek alone is justified, but that it would give rise to an injustice for me to order that Koza also should be liable for the costs, and I shall make a costs order accordingly.

*Should there be a costs set off?*

30. Mr Innes submitted that there should be set off against any costs order made in favour of Koza Altin, the costs order made under para 5 of the Court of Appeal's order of 23<sup>rd</sup> May 2019, which costs, it is said, total £330,844.52, of which a payment on account of £50,000 has been made. The order related to the Extradition Expenses Appeal.
31. The relevant principles, Mr Innes submitted, are summarised in Friston at para 21.05, namely, that the court's power to direct a costs set off may arise from

both s51 of the Senior Courts Act 1981, and from the court's inherent jurisdiction, but that the latter may afford to the court greater flexibility than the application of statutory or equitable principles; see *per* Neuberger J, as he then was, in *Izzo v Philip Ross* (2001) *The Times*, 9<sup>th</sup> August Ch D, and Brooke LJ in *R (on the application of Burkett) v Hammersmith and Fulham LBC* [2005] 104 at paras 38–47. Mr Innes emphasised that Neuberger J found, obiter, in *Izzo*, at pp11-12 of the judgment, that an order could be made notwithstanding a lack of mutuality in terms of the parties' identity. He also drew attention to Friston's commentary to the effect that whilst procedural rules are contained in CPR 44.12(1) the court has even greater freedom under CPR 44.2(6) and (7) to take set off into account when making an order that a party be awarded only part of its costs.

32. For Koza Altin it was submitted that no question of set off in the present case can arise in favour of Mr Ipek even though the position might have been different had Koza been ordered to pay the costs of the Application rather than Mr Ipek as I have directed above. Reliance was placed on what was said by Brooke LJ in *Burkett* at para 58: "A, when sued by B, cannot set-off against B a debt or liability owed to A by C, however close in fact, as opposed to law, the relationship between the three parties may be." There is a clear distinction to be drawn between Mr Ipek, a director of Koza, and Koza itself.

33. I accept Mr Innes' submission that there is greater flexibility in permitting set-off under the court's inherent jurisdiction than there may be under statutory provisions, the CPR, or even equitable principles. It is clearly supported by the judgment of Brooke LJ, delivering the judgment of the Court of Appeal (Brooke, Buxton, and Carnwath LJJ) in *Burkett*. Having demonstrated by reference to statute and authority the very broad discretion available to a judge with regard to permitting a costs-set off, he continued at paras 46-47:

"46. None of this has anything at all to do with a discretionary balance between two sums of costs. *First, it is for the judge to decide, in his discretion, what costs order is appropriate.* The exercise of striking a fair balance between such payments is quite different from the judge's

task in a case of equitable set-off as just discussed, where he has to decide as a matter of law, not of discretion, what claims can be asserted, and then, but only then, decide whether the rules governing equitable set-off permit the one claim to be set-off against the other. *Secondly, and illustrative of the point just made, no right to costs arises until the judge decides that the right exists. Since he has discretion in creating the right, so he has discretion in deciding the amount in which, and the form in which, that right should be enforced.*

47. In our view, therefore, the objections raised to Newman J.'s [the first instance judge in that case] order in terms of lack of mutuality, or the failure of the one set of costs to impeach a claim to the other set of costs, simply beat the air. They are drawn from the jurisprudence of equitable set-off as a defence to action brought. They are irrelevant (except possibly as a guide for the judge to the exercise of his discretion) to the discretionary jurisdiction as to costs.”

(Emphases added)

34. Even so, the scope for permitting set-off is not unbounded. This was recognized by Neuberger J in his judgment in *Izzo*. In that case, an order for costs was made in favour of a Mr Faryab by the Court of Appeal in December 2000 against Philip Ross, a firm of solicitors. Pursuant thereto, and taking into account the costs of an application to him, in February 2001, Laddie J made an order for costs against Philip Ross, including £6,500 by way of an interim payment under the Court of Appeal’s order, in the total sum of £7,500. In March 2001, in further proceedings brought by Mr Faryab against a Mr Golinsky, a partner in Philip Ross, Neuberger J struck out those proceedings and made an order for costs against Mr Faryab in favour of Mr Golinsky and ordered an interim payment in favour of Mr Golinsky against Mr Faryab in the sum of £6,500. By this time, on 4<sup>th</sup> March 2001, Mr Faryab had executed an assignment to Dr Izzo in respect of the right to recover the costs due to him from Philip Ross. In July 2001, Dr Izzo made an application before Neuberger J for an order for payment of the £7,500 by Philip Ross. The application was initially resisted on three grounds, only one of which, the third, was pursued before Neuberger J, namely that the right of Mr Faryab to payment of the £7,500 should be set off against the £6,500 and/or other costs awarded to Mr Golinsky by the judge in March 2001.

35. Having described the background, Neuberger J continued:

“I turn then to the main argument. Mr Faryab on behalf of Dr Izzo contends that there should be no setting off of the order for costs in respect of the £7,500 interim costs order in his favour (now assigned to Dr Izzo) against the £6,500 and the costs to be assessed by a detailed assessment made in Mr Golinsky's favour on 15<sup>th</sup> March. First he says it is not possible to set off orders for costs in principle. Secondly he says it is not possible to set off the two costs orders in the present case because he would be seeking to enforce an order against Philip Ross (I say “he would” because of course it is Dr Izzo), whereas the order against Mr Faryab is in favour of Mr Golinsky. ...

First, can orders for costs be set off against each other? It seems to me clear that judgments for damages going in different ways between the same parties and/or orders for costs going different ways between the same parties, whether in different actions or the same action, can be set off against each other, provided that the parties are acting in the same capacity. No set off would be appropriate for obvious reasons if, in one action, a party was acting for himself beneficially, and, in the other action, he was acting as a bare trustee for somebody else.

The existence of a discretion in the court to allow set off under its inherent jurisdiction in such cases was specifically upheld in *Edwards v Hope* [1885] 14 QBD 922, *Reid v Cupper* [1915] 2 KB 147. Indeed those cases seem to suggest that absent special circumstances the court will normally order a set off (see per Mr Justice Younger in *Puddephalt v Leith (No 2)* [1916] 2 Ch 168. Relatively recent support for that view appears from the decision of Mr Justice May in *Curry & Co v The Law Society* [1977] QB 990 at 999–1000.

I turn to the second argument, namely that it is not possible to set off because different parties are involved, namely Philip Ross in the one case and Mr Golinsky in the other. In my judgment there are two separate answers to this contention of Mr Faryab. The first is that the power to set off judgment debts or orders for costs arises from the court's inherent jurisdiction: it is not a case of normal equitable or common law or statutory set off. *It is fair to say that where there is not a precise mutuality in the sense of identity of parties to the two debts, then there may be difficulties and points of some nicety relating to the ability to set off.* However, as I have mentioned, a set off of court orders arises from the inherent jurisdiction and not on a more classical familiar basis — see Derham on Set Off, 2nd edn. 1996 at p.35 and in particular the reasoning in *Edwards*, QBD 926–7 and in *Reid* [1915] 2 KB 149–151 and 153. Although the word “equitable” in the context of the set off was used by two members of the Court of Appeal in the former case it was the concept of fairness rather than of technical equity with which the Court of Appeal was concerned (see per Lord Justice Buckley in the latter case at 149). *In these circumstances the difference between Mr Golinsky and Philip Ross is not of the essence. In the present case, Mr Golinsky was a partner in Philip Ross and was being sued as such in the action which I struck out and where the order*

*for costs was made. Secondly both Philip Ross and Mr Golinsky are backed by the same insurers. Third, authority tends to support the permissibility of a set off in such cases (see Dennie v Elliot [1795] 2 HB1. 587 and Mitchell v Oldfield [1791] 4TR 123).*

Quite apart from this it is important to my mind to bear in mind that this is not a case where Mr Faryab is seeking a set off against two different parties who object. This is a case where Mr Golinsky and Philip Ross, the two different parties, are prepared to agree a set off of costs orders. It seems to me that it is scarcely open to Dr Izzo to object to them agreeing that course, given that he is saying, and it is the essence of his case, that the benefit of a costs order can be assigned: he says the order in favour of Mr Faryab was assigned to him. Accordingly, as I see it, Mr Golinsky can notionally assign the benefit of his costs order to Philip Ross to give them the benefit of the set off argument. Accordingly I think there is nothing in Mr Faryab's second point.”

(Emphases added)

36. In the passages which I have emphasised in the text cited, Neuberger J specifically recognised that a lack of precise mutuality could give rise to difficulties, but in that case they did not for the reasons mentioned by him later, the most significant of which, to my mind, were the partnership and insurance features of the case described by Neuberger J. No such features or equivalent considerations arise in the present case. Mr Ipek was a shareholder and a director of Koza, but they were not in partnership, or in any sense the same legal entity. I cannot accept that in these circumstances it would be appropriate to permit a costs set off. But there are other aspects of this case which, in my view, would also make it inappropriate to do so.

37. First, it has been recognised in earlier decisions that allowing set-off might be inappropriate where cross-orders relate to completely different issues in the litigation. Friston, at paragraph 21-37, refers to this principle, and, in a footnote, identifies the decision of Silber J in *Zeppia v Middle East Construction Ltd v Clifford Chance* (unreported 12<sup>th</sup> April 2000, but available as a Westlaw transcript). The relevant passage is at page six of the judgment. (Friston’s footnote incorrectly refers to the judge as Neuberger J, and gives a reference to another decision, again not of Neuberger J, in the same case.) The issues in the present Application were different from those which gave rise to the costs orders previously made by the Court of Appeal, and which it is

sought to set off. In the Main Judgment I explained, in particular in relation to abuse of process, the respects in which the issues differed. I need not repeat what I said on that occasion.

38. Further, there are the features of the case to which I referred above when considering whether a costs order should be made solely against Mr Ipek. In my judgment, having regard to the reality of the interests of Mr Ipek and his family, and the control over Koza which Mr Ipek is able to exercise, it would be wrong to shield him from the costs consequences that I have otherwise considered to be just, at the expense of Koza Altin or Koza itself.

39. In the round, as explained by Brooke LJ in the passage which I have cited from *Burkett*, I have decided the costs order which should be made, namely that Mr Ipek alone should pay Koza Altin's costs of the Application, and I must also decide the amount and form in which that order should be enforced. I conclude for the reasons discussed above that it should be enforced against Mr Ipek without any set-off. This conclusion does not affect the rights of Koza under the costs order made in its favour by the Court of Appeal, but it does prevent Mr Ipek from unfairly taking advantage of that.

40. In the circumstances, I direct that there is to be no costs set-off.

#### *Payment on account*

41. It is appropriate to start with what CPR 44.2(8) provides in respect of the ordering of payments on accounts of costs:

“Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”

The starting point for consideration of the application for such a payment is, therefore, that there will be such an order, unless there is a good reason to the contrary.

42. Whether or not there should be a payment on account at all is something which was liable to be affected by issues raised on Mr Innes' submissions which I have considered, and rejected, above. Subject thereto, Mr Innes has not advanced a reason as to why there is some other good reason to refrain from ordering such a payment, but he does submit that the sum sought on behalf of Koza Altin, at £150,000, just over 50 per cent of the total costs identified in Koza Altin's costs schedules, is too much. He says that the starting point has traditionally been 40 per cent following the well-known decision of Jacob J, as he then was, in *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138. I cannot accept that such an approach represents current practice. I prefer what is regarded generally as the most authoritative current guidance on this topic which was given by Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), and for the reasons given by him:

"21. In *Hospira UK Ltd v Genentech Inc* [2014] EWHC 1688, Birss J held that it was clear:

"that the principles applicable to the assessment of a payment on account are and remain since they were first set out by Jacob J as he then was in the *Mars v Teknowledge* case. The task of the court is to ensure that it finds the irreducible minimum, which would be recovered".

In *Rovi Solutions Corporation v Virgin Media Limited* [2014] EWHC 2449, Mann J took into account the test in *Mars UK* and regarded an irreducible minimum as the test. In *Teva UK v Leo Pharma* [2014] EWHC 3522, Birss J strove to find "a *fair irreducible minimum*" and said that it would be useful for the figure to be "*not too much below*" the likely level of a detailed assessment.

22. I do not, with respect, agree with the formulation by Birss J of the task of the court in *Hospira*. It is clear that the question, at any rate now, is what is a "reasonable *sum on account of costs*". It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that "irreducible *minimum*" is the test. That would be to introduce a criterion (a) for which the rules do not provide' (b) which is not the same as the criterion for which they do provide; and (c) which has potential drawbacks of its own, not least because it begs the question whether it means those costs which could not realistically be challenged as to item or amount or some more generous test. On one approach it admits of every objection to costs, which cannot be treated as fanciful.

23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an

estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”

43. Mr Innes relied again on his submission as to disallowance of some costs in relation to Mr Plowman’s 11<sup>th</sup> witness statement. I reject that submission for reasons given above. Next, he objected that costs in excess of £24,884 claimed in respect of the fees of Turkish lawyers, for liaising with English lawyers, and attending the hearing, are “questionable” as to recovery on a detailed assessment. Then he challenged the time claimed for four fee earners in attending the hearing, indicative, he suggested, of an unreasonable and disproportionate approach to running up costs. After submitting that costs should be restricted to 70 per cent (a course that I have rejected above), his figure for a payment on account, based upon the 40 per cent adopted in *Mars* is £82,914.

44. At first blush a figure for costs of almost £300,000 does seem a very high one for an application which was heard over two days, even with leading counsel on both sides. But this was not an ordinary two-day application. As consideration of the Main Judgment demonstrates, it raised a number of very complicated issues, both legally and factually, as became apparent to me at the outset when I considered the written opening submissions, and began the significant reading that was required for the proper hearing of the case. It was only because of the commendable lucidity with which counsel on both sides made their respective submissions, and their restraint in focusing upon what really mattered, that it proved possible to conclude the hearing in the two days that it took. The preparation for the hearing, and the volume of material that was properly required for the Application to be considered, and the analysis of that material and the authorities, on any view would have taken a very

considerable amount of time. Just to look at the duration of the hearing would not, in these circumstances, be anything like a sure guide to the level of costs that were incurred.

45. If I adopt the suggestion advanced for Koza Altin that a sum now awarded should be based upon just over 50 per cent of what is shown in Koza Altin's costs schedules, that necessarily builds in a very good margin for significant reduction in the level of costs that might ultimately be awarded. In my judgment what is sought represents a restrained approach, and results in a figure of £150,000 which I consider to be a reasonable sum allowing for errors in estimation. I therefore make an order for a payment on account in that sum.

*Stay of execution pending appeal*

46. Mr Innes invites me to order that any costs order in favour of Koza Altin should be stayed as to assessment or payment. This is justified, he submits, because of the strength of the grounds for an appeal, the better preservation of the *status quo* pending determination of the appeal, evidence relied upon at the hearing of the Application as to the attempts by Turkey to "extinguish" the Arbitration, and the interests of justice.

47. As explained above, I have not seen the grounds of appeal, or any submissions in support of them, but I am content, having heard the Application, to assume that they are not fanciful. Even in present circumstances, given that it appears from everything that I have been told that the permission to appeal process was set in motion with the Court of Appeal some weeks ago, I cannot imagine that there will be more than a modest delay before that Court comes to decide the outcome of that application. I am therefore prepared to direct that there should be a stay of execution on assessment and payment of costs until such time as the application for permission to appeal is determined, whether by the Court of Appeal's decision thereupon or otherwise. If the Court of Appeal grants permission to appeal, then it can extend time appropriately as it sees fit.

*Summary*

48. As to the matters consequential upon the Main Judgment, I direct as follows:

- (i) Koza Altin is to recover its costs on the standard basis, to be assessed in default of agreement.
- (ii) Such costs are to be paid by Mr Ipek alone.
- (iii) There is to be no set-off of costs orders in the manner for which the Claimants have contended, or at all.
- (iv) The amount of costs to be paid on account to Koza Altin by Mr Ipek is £150,000.
- (v) Execution in respect of the assessment or payment of costs, including the sum to be paid on account, shall be stayed until such time as the Claimants' application for permission to appeal is determined, whether by the Court of Appeal's decision thereupon or otherwise.

49. Counsel should agree a draft order to reflect the terms of this judgment, and submit it to me for approval no later than one working day before the date set for handing down this judgment.

50. I am grateful to all counsel for their helpful written submissions.