Neutral Citation Number: [2022] EWHC 2727 (Ch)

Case No: HC-2016-002798

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)

ON REMITTAL FROM THE COURT OF APPEAL – [2021] EWCA CIV 349
(LEWISON, ASPLIN AND MALES LJJ)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/11/2022

Before:

MR JUSTICE MICHAEL GREEN

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Between:

RAS AL KHAIMAH INVESTMENT AUTHORITY	**Claimant/ Defendant to Counterclaim**
- and –	
FARHAD AZIMA	**Defendant and Counterclaimant**
- and –	
(1) ~~STUART ROBERT PAGE~~ **(2) DAVID NEIL GERRARD** **(3) DECHERT LLP** **(4) JAMES EDWARD DENNISTON BUCHANAN**	**Additional Defendants to Counterclaim**

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Thomas Plewman KC, Frederick Wilmot-Smith and Sophie Bird (instructed by **Burlingtons Legal LLP)** for the **Counterclaimant**
Fionn Pilbrow KC (instructed by **Charles Fussell & Co LLP**) for the **Second Additional Defendant to the Counterclaim**
Roger Masefield KC, Laura Newton and Robert Harris (instructed by **Enyo Law LLP**) for the **Third Additional Defendant to the Counterclaim**
Anthony White KC and Ben Silverstone (instructed by **Kingsly Napley LLP**) for the **Fourth Additional Defendant to the Counterclaim**

Hearing dates: 17 and 18 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green:

INTRODUCTION

1. This is an application by Mr Farhad Azima, the Counterclaimant, for permission to bring an additional counterclaim against the original Claimant, Ras Al Khaimah Investment Authority (**RAKIA**), and to amend his statement of case in the form of a draft Re-Re-Re-Amended Counterclaim and Claim Against Additional Parties (the **draft RRRACC**). The application is made pursuant to CPR 20.4(2)(b) and CPR 17.1(2)(b).

2. RAKIA is the sovereign wealth fund of the Emirate of Ras Al Khaimah (**RAK**), part of the United Arab Emirates. Mr Azima is a US-based businessman, principally involved in the aviation industry, who had various dealings with RAKIA between 2007 and 2016. Since 2016, they have been engaged in litigation against each other. RAKIA sued Mr Azima for fraudulent misrepresentation and conspiracy; the former was in relation to a Settlement Agreement dated 2 March 2016 between RAKIA, Mr Azima and his company, HeavyLift International Airlines FZC (**HeavyLift**), whereby RAKIA paid $2.6 million to settle various claims (the **Settlement Agreement**); the latter in relation to payments to Mr Azima of $400,000 and $1,162,500 in 2011 and 2012 said to have been in respect of commission owed to Mr Azima for introducing RAKIA Georgia to three prospective purchasers of the Sheraton Metechi Palace Hotel in Tbilisi (the **Hotel**).

3. Mr Azima denied both claims and alleged by way of defence and counterclaim that his email accounts and data had been unlawfully hacked by RAKIA prior to the Settlement Agreement and the information so obtained by RAKIA was then used against him in RAKIA's claim. He argued that RAKIA's claim should be struck out for abuse of process or that the evidence should be excluded. RAKIA said that it was not responsible for the unlawful hacking and that it only discovered the hacked material when it was posted on the internet in August and September 2016.

4. The trial of RAKIA's claim was heard by Mr Andrew Lenon QC, sitting as a deputy Judge of the Chancery Division (the **deputy Judge**). He found in favour of RAKIA on its claims for fraudulent misrepresentation and conspiracy. He rejected Mr Azima's hacking defence and dismissed the counterclaim. His judgment is reported at [2020] EWHC 1327 (Ch) (the **First Judgment**).

5. Mr Azima was granted permission to appeal by Arnold LJ on certain terms as to payment in of the judgment sum. The Court of Appeal (Lewison, Asplin and Males LJJ) heard the appeal on 2 to 4 March 2021, and their joint judgment was delivered only a week later on 12 March 2021 (the **CA Judgment**). This is reported at [2021] EWCA Civ 349. It will be necessary to examine the CA Judgment in some detail. In short the Court of Appeal dismissed Mr Azima's appeal against RAKIA's claims but, based on new evidence in relation to RAKIA's responsibility for the hacking which the Court of Appeal admitted, it allowed the appeal on the counterclaim and remitted the counterclaim to be tried by a different judge of the Chancery Division. I am the assigned Judge to hear the remitted counterclaim and have now dealt with a number of applications in relation to it. The trial has recently been set down and is listed to commence in a 5-day window from 7 May 2024, with an estimated duration of between 8 and 10 weeks.

6. It was made clear in the CA Judgment and this was given effect in its Order dated 15 March 2022 (the **CA Order**) that whatever the outcome of the remitted counterclaim, the First Judgment and the factual findings on RAKIA's claim made by the deputy Judge "*must stand*". Accordingly when I come to hear the retrial of the counterclaim, I am not bound by the deputy Judge's factual findings on the hacking counterclaim but I cannot interfere with the findings made on RAKIA's substantive claim. I will however be able to vary the deputy Judge's orders in relation to interest and costs and consider whether damages should be ordered against RAKIA if found to be responsible for the hacking.

7. Mr Azima sought permission to appeal from the Supreme Court, it having been refused by the Court of Appeal. The principal basis for the application was that the Court of Appeal was wrong to have held, before the counterclaim had been retried, that the possible remedies available to Mr Azima did not include overturning RAKIA's judgment and/or having it struck out on the grounds of abuse of process. Some months after the application for permission had been lodged, Mr Azima sought to adduce further fresh evidence recently obtained that was said to show that RAKIA was responsible for the hacking and had concocted a false story as to its discovery of the hacked material, including perjured evidence, that was put to the deputy Judge at the trial.

8. On 28 April 2022, the Supreme Court refused permission to appeal "*because the application does not raise an arguable point of law*".

9. Now Mr Azima wishes to bring an additional counterclaim in which his cause of action is to have the First Judgment set aside on the grounds that it was procured by fraud. He has discovered yet more evidence which he says shows that a pervasive fraud was perpetrated on the Court at the original trial by or on behalf of RAKIA and that he therefore satisfies the test for permission, namely that there is a real prospect of establishing the conditions necessary to have the judgment set aside.

10. RAKIA is now no longer participating in these proceedings and has not appeared before me at this hearing. On 16 June 2022, it made an open offer to settle the counterclaim against it for $1 million plus costs, but this was rejected by Mr Azima. Then on 22 June 2022, RAKIA wrote to the Court to say that it had withdrawn its instructions to its solicitors, Stewarts Law LLP (**Stewarts**) , and that it did not intend to take any further part in the proceedings. Stewarts have come off the record for RAKIA but by my Order of 8 July 2022 a mechanism for serving RAKIA with documents was set out. So the entity against which the proposed new counterclaim is made does not appear to oppose Mr Azima being granted permission.

11. However the Additional Defendants do strongly oppose the application. On 16 July 2021 I gave permission to Mr Azima to join four Additional Defendants to the counterclaim. They are:

    (1) Mr Stuart Page, a private investigator, who has since admitted involvement in the hacking on behalf of RAKIA and that he gave false evidence at the original trial; he has settled with Mr Azima and has provided an affidavit that supports Mr Azima's case;
    (2) Mr Neil Gerrard, a retired solicitor and former partner of Dechert LLP; following an adverse judgment against him by Waksman J in the

Commercial Court in an unrelated case brought by *Eurasian Natural Resources Corporation* on 16 May 2022 ([2022] EWHC 1138 (Comm)), he is now separately represented by Charles Fussell & Co; Mr Fionn Pilbrow KC made submissions on his behalf at the hearing;

(3) Dechert LLP, represented by Mr Roger Masefield KC leading Ms Laura Newton and Mr Robert Harris, instructed by Enyo Law LLP; and

(4) Mr James Buchanan, who was employed by companies in RAK and was authorised to undertake certain activities on behalf of RAKIA; he is represented by Mr Antony White KC leading Mr Ben Silverstone, instructed by Kingsley Napley LLP.

12. Even though the proposed new counterclaim is not brought against them, the Additional Defendants have vigorously opposed the grant of permission, principally on the basis that this would effectively be Mr Azima's third attempt to overturn the First Judgment on the grounds of fraud and that this amounts to an abuse of process, both on the finality principle and as a collateral attack on the CA Judgment. They also say that my jurisdiction is limited to what the Court of Appeal has remitted to me and that the only route that Mr Azima can use, particularly given that he is seeking also to set aside the CA Order, is to go back to the Court of Appeal under CPR 52.30 to re-open the appeal. The Additional Defendants further submit that, in any event, Mr Azima does not have a real prospect of satisfying the materiality condition required to justify the setting aside of the First Judgment and CA Order on the grounds of fraud.

13. Mr Azima is represented by Mr Thomas Plewman KC leading Mr Frederick Wilmot-Smith and Ms Sophie Bird, instructed by Burlingtons Legal LLP. He seemed to be taking a point on the standing of the Additional Defendants to object but Mr Plewman KC confirmed at the hearing that he does not submit that they have no standing; rather he says that it is surprising that they are running these objections on behalf of RAKIA.

THE APPLICATION

14. As I have said, I have dealt with a number of applications and hearings and have delivered some judgments in these proceedings, most recently on 27 May 2022 when I considered applications for security for costs and issues for disclosure – [2022] EWHC 1295 (Ch). On 1 July 2022, I heard a CMC and by my Order dated 8 July 2022 made various directions including as to how this application should be dealt with and the future involvement of RAKIA in the light of its letter dated 22 June 2022.

15. The application for permission to bring the additional counterclaim was issued on 24 June 2022. That sought an order pursuant to CPR 20.4(2)(b) that Mr Azima be granted permission to bring an additional counterclaim against RAKIA to set aside the First Judgment on the basis that it was obtained by fraud. The application notice stated that "*substantial and critical evidence of the fraud*" had been obtained in June 2022 and it showed that "*RAKIA provided substantial false evidence in support of its case against Mr Azima during the First Trial, which was an operative cause of the Deputy Judge's findings in favour of RAKIA*." The application is supported by a 54-page nineteenth witness statement of Mr Dominic Holden, a partner of Burlingtons, Mr Azima's solicitors, dated 24 June 2022.

16. By paragraph 12 of my Order of 8 July 2022 I directed Mr Azima to provide RAKIA and the Additional Defendants with his draft RRRACC which should include both the proposed new counterclaim and "*any associated amendments proposed to the Hacking Counterclaim (in a format enabling the two types of amendment to be distinguished), by 29 July 2022.*"

17. Mr Azima did provide RAKIA and the Additional Defendants with his draft RRRACC on 29 July 2022. The Additional Defendants complain that the amendments could not be distinguished, contrary to my Order, and that it is not clear whether the draft RRRACC contains all of the amendments that Mr Azima will seek to make based on the new evidence. They also point to the fact that a letter before action has been sent to a further potential Additional Defendant, namely Mr David Hughes, who was a partner of Dechert at the material time, and whose joinder would obviously require further amendments to the RRRACC. While I see the force of these points, I do not think they affect the issues before me. Any further amendments and/or applications for joinder may have to be dealt with in due course and are essentially aspects of efficient case management. I should say that it was agreed by all the parties that I should only deal with the permission application to bring the proposed additional counterclaim, while the application in relation to the other amendments would be left to a further CMC after delivery of this judgment.

18. On 19 August 2022, and in accordance with my Order, the Additional Defendants indicated that they objected to the application and the amendments contained in the draft RRRACC. They gave their reasons for their objections in: a witness statement of Mr Edward Allen, a partner of Enyo Law on behalf of Dechert; a witness statement of Mr Charles Fussell, partner of Charles Fussell & Co on behalf of Mr Gerrard; and a letter from Kingsley Napley to Burlingtons dated 19 August 2022 on behalf of Mr Buchanan. RAKIA has not indicated whether it consents or objects.

19. On 9 September 2022, Mr Azima filed evidence in reply in the form of the twenty-second witness statement of Mr Holden. At paragraphs 57-58 of that witness statement, Mr Azima confirmed that he "*is content to withdraw paragraphs §§168A-168C of the draft RRRACC and not to seek the business losses in these proceedings*". Those paragraphs included a claim for damages in respect of losses that Mr Azima said he has suffered to his US property development projects. The Additional Defendants had objected to these paragraphs on the grounds that they offended against the reflective loss rule.

20. On 30 September 2022, Mr Azima filed a re-amended Application Notice to clarify that: (1) in addition to seeking permission to bring the new counterclaim pursuant to CPR 20, he also seeks permission to amend the existing hacking counterclaim pursuant to CPR 17; and (2) in addition to seeking to set aside the First Judgment, he is also seeking to set aside the CA Judgment and the CA Order.

SETTING ASIDE A JUDGMENT FOR FRAUD

(a) Elements of the cause of action

21. As Lord Sumption said in *Takhar v Gracefield Developments Limited* [2020] AC 450 (***Takhar***) at [60]: "*An action to set aside an earlier judgment for fraud is not a procedural application but a cause of action*". Mr Azima could have issued separate proceedings against RAKIA relying on this cause of action. There may have been difficult obstacles to overcome in terms of serving and establishing jurisdiction in relation to RAKIA, but assuming RAKIA was effectively joined to the proceedings, it would only be RAKIA that could challenge Mr Azima's right to bring the claim on the grounds of abuse of process. The Additional Defendants would have had no standing to take the points they are running in this application. But because Mr Azima is seeking to bring the claim within the existing proceedings, they clearly do have standing, particularly in relation to consequential case management issues that might arise if permission is granted.

22. It is sensible and practical to bring the claim within the existing proceedings where the core factual issues are the same. But it seems to me that the test for permission should be the same whether the claim is advanced in existing proceedings or new proceedings. There was no dispute that the test on the application for permission is whether the new counterclaim has a real prospect of success. The other considerations in CPR 20.9, which are essentially in relation to case management, were not relied upon by the Additional Defendants as reasons for refusing permission.

23. *Takhar* is now the leading authority in this field. The majority judgments were those of Lord Kerr JSC and Lord Sumption, with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin JJSC agreed. Lord Briggs and Lady Arden JJSC agreed in the result but delivered judgments that disagreed with some of the reasoning of the majority. The majority judgments expressly approved the summary of the principles governing applications to set aside judgments for fraud provided by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] 1 CLC 596 (***Highland***) at [106]:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed

> by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

24. Lord Sumption in [67] of *Takhar* described these as "*stringent conditions*" which were required to remove "*the risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud.*" In *Grant and Mumford* on *Civil Fraud* (2018) [38-003] the learned authors said:

> "Accordingly, the circumstances in which a properly obtained judgment will be set aside for fraud are narrow and the court is assiduous to ensure that such claims are not used to harass or as the vehicle for seeking to revisit adverse judgments. A court will be assiduous to strike out such claims at an early stage".

(See also Burton J's description of the test as being "*difficult to comply with, and must rarely be permitted*" in *Chodiev v Stein* [2015] EWHC 1428 (Comm).)

25. Lord Briggs at [68] graphically described the tension inherent in actions to set aside a judgment for fraud as:

> "…a bare-knuckle fight between two important and long-established principles of public policy. The first is fraud unravels all. The second is that there must come an end to litigation. I will call them the fraud principle and the finality principle."

26. The principles set out by Aikens LJ in *Highland* were an attempt to address that tension. Even though Aikens LJ referred to three principles, it is generally accepted that the third is really an elaboration of the second. The cause of action therefore has two relevant elements: the Fraud Condition and the Materiality Condition. Leech J in the recent case of *Tinkler v Esken Limited* [2022] EWHC 1375 (Ch) (***Tinkler***) referred to a third "*limb*" that "*there was new evidence before the Court (which was either not given or not disclosed in the earlier proceedings)*". That is not an issue in this case. The contentious issues in this case are around the requisite proof of the Materiality Condition and the fact that fraud had been raised at the original trial and dealt with by the Court of Appeal.

27. The Fraud Condition is relatively straightforward at this stage and I will deal later with the new evidence that has been discovered. None of the Additional Defendants argue that Mr Azima does not have a real prospect of satisfying the Fraud Condition which is that there was "*conscious and deliberate dishonesty*" on the part of RAKIA at the original trial. Insofar as the allegations of fraud are made against the Additional Defendants, they emphasised to me that they will be contesting those allegations if they are allowed to go forward but that they have not yet been required to put in their defences to them. It was therefore wrong to suggest, as Mr Plewman KC did, that they have not contested Mr Azima's factual assertions. They are only not contesting them for the purposes of this application.

28. They do, however, challenge whether Mr Azima has a real prospect of satisfying the Materiality Condition. In *Highland,* Aikens LJ said that the alleged fraudulent evidence, action, statement or concealment must have been "*an*", not "*the*", operative cause of the impugned decision. Aikens LJ then went on to put it another way: that the fresh evidence "*would have entirely changed the way in which the first court approached and came to its decision*" which seems to set quite a high bar.

29. The test for the Materiality Condition was not dealt with in *Takhar* which was principally concerned with whether the party was required to show that they could not, using reasonable diligence, have obtained the evidence of fraud that they now wished to rely on in applying to set the judgment aside. Prior to *Takhar*, there were cases that appeared to question whether Aikens LJ had set too high a test – see *Hamilton v Al Fayed* [2000] EWCA Civ 3012 at [34] (***Hamilton***) and *Salekipour v Parmar* [2017] EWCA Civ 2141 at [93]. But since *Takhar*, two first instance Judges have said that they are not different tests, but two ways of expressing the same test – see *Takhar v Gracefield Developments LLP* [2020] EWHC 2791 (Ch) (***Takhar 2***) at [59] – [60], a decision of Mr Steven Gasztowicz QC, sitting as a deputy Judge of the Chancery Division, in the trial following the Supreme Court's decision in *Takhar*; and *Tinkler* at [22] – [23].

30. I do not need to decide definitively what the test is and am content for the purposes of deciding whether Mr Azima has a real prospect of satisfying the Materiality Condition to accept that there is no real difference in practice between the two tests.

(b) Burden of proof

31. That leads to another issue between the parties as to the burden of proof. Mr Plewman KC submitted that while the burden is on Mr Azima to prove the Fraud Condition, the burden would shift to RAKIA to show that the Materiality Condition was not satisfied. For that surprising proposition, he relies on two matrimonial cases: the Supreme Court decision in *Sharland v Sharland* [2015] UKSC 60 at [33] (***Sharland***); and *C v O* [2021] EWFC 86, a decision of Mostyn J. Mr White KC submitted that these were concerned with special rules relating to non-disclosure in matrimonial ancillary proceedings and have no application to this sort of case. He also pointed out that Lord Hodge, Lord Sumption and Lord Briggs had all sat in both *Sharland* and *Takhar*, but the former was not cited or referred to in the latter. And in *Terry v BCS Corporate Acceptances Limited and ors* [2018] EWCA Civ 2422 at [77], Hamblen LJ (as he then was) said that *Sharland* was confined to matrimonial proceedings, and did not affect "*ordinary civil proceedings*".

32. Mr White KC also referred to other authorities which indicated that the burden of proving both Conditions was on the party seeking to set aside the judgment. Those cases were: *Hamilton* at [122]; *Dale v Banga* [2021] EWCA Civ 240 at [42] (***Dale v Banga***); and *Park v CNH Industrial Capital Europe Limited* [2021] EWCA Civ 1766 at [3].

33. In my view, the burden is on Mr Azima to establish both Conditions. It does not make sense to me that the burden should shift after the Fraud Condition is proved, particularly as the authorities emphasise how stringent the conditions must be in

relation to this cause of action because of the tension between the fraud and finality principles. I therefore reject Mr Plewman KC's submission that RAKIA's failure to establish that the Materiality Condition is not satisfied means that Mr Azima necessarily succeeds without further argument. Mr Azima must demonstrate that he has a real prospect of establishing both Conditions, and I deal with the respective arguments on the facts below.

(c) Where fraud was alleged at the original trial and on appeal

34. *Takhar* was a case where the allegation of fraud, that the defendants had forged the claimant's signature on a document, had not been raised at the original trial. The Supreme Court held that in those circumstances there was no requirement to show that the evidence of fraud could not, with reasonable diligence, have been obtained for the trial. Lord Kerr JSC and Lord Sumption considered *obiter* whether the position would be different had there been an allegation of fraud made at the trial. Lord Kerr JSC said at [55] that there were two qualifications to the general conclusion:

> "Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. Since that question does not arise in the present appeal, I do not express any final view on it. The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question."

Lord Sumption at [66] was of a similar view:

> "I would leave open the question whether the position as I have summarised it is any different where the fraud was raised in the earlier proceedings but unsuccessfully. My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material."

35. In this case, Mr Azima was alleging fraud against RAKIA as part of his claim that RAKIA was responsible for the hacking of his data and that its witnesses put forward a false story to cover up what it had actually done. There is no question of any deliberate decision not to investigate. Mr Azima relies on the extensive further evidence that he has now obtained to prove both RAKIA's responsibility for the hacking but also that it perpetrated, as Mr Plewman KC put it, "*a massive fraud on the court*". It appears that there is a discretion, in those circumstances, as to whether he should be allowed to proceed with such a case. To a very great extent, that will depend on the proper interpretation as to the findings in the First Judgment and the

CA Judgment and whether it would be an abuse of process to run what the Additional Defendants say is essentially the same case that Mr Azima has run before and which has been decided against him.

THE FIRST JUDGMENT

36. It is therefore important to turn to the First Judgment and then the CA Judgment. (Paragraph references in square brackets are, unless the context otherwise requires, to the First Judgment in this section and the CA Judgment in the next.)

37. As indicated above, RAKIA pursued claims in fraudulent misrepresentation and conspiracy against Mr Azima. There were two representations that RAKIA said it relied upon in entering into the Settlement Agreement:

    (1) A representation by Mr Azima that HeavyLift had invested certain sums into a joint venture with RAK Airways (the **Investment Representation**); and

    (2) A representation and warranty (as set out in clause 3.2 of the Settlement Agreement) that he had at all times acted in good faith and with the utmost professional integrity towards RAKIA, RAK Airways and other RAK government entities (the **Good Faith Representation)**.

38. The unlawful means conspiracy claim was in connection with the intended sale of the Hotel in 2011-2012 and the payments of commission to Mr Azima for introducing the buyers of it. RAKIA's case was that Mr Azima did not introduce the buyers and that the payments were made pursuant to a sham referral agreement.

39. Mr Azima defended the claims on their merits but also by arguing, as per his hacking counterclaim, that the claims "*should be struck out or dismissed on the ground that, in bringing the claims, RAKIA is relying on confidential emails that RAKIA obtained through its unlawful hacking of his email accounts*": [10].

40. At the start of the First Judgment, the deputy Judge dealt with the background facts and the general credibility of the witnesses that gave evidence. In relation to RAKIA's evidence, his findings were broadly as follows:

    (1) The Ruler of RAK, Sheikh Saud bin Saqr Al Qasimi (**Ruler)** provided a witness statement but did not attend for cross-examination. The deputy Judge said that he would not "*attach significant weight*" to the Ruler's witness statement as it was not tested by cross-examination [59], but that his evidence did carry some "*limited weight*": [174].

    (2) Mr Buchanan was "*a generally reliable witness*": [61].

    (3) Mr Gerrard was not a dishonest witness: [63].

    (4) Mr Page was an "*unsatisfactory and unreliable witness*": [64].

    (5) Mr del Rosso's evidence was "*uncontroversial*": [69].

(6) RAKIA had not engaged in deliberate document destruction: [77].

41. The deputy Judge dealt with the claims in relation to the Investment Representation in [78] to [159]:

(1) The deputy Judge held that the Investment Representation was made fraudulently on Mr Azima's behalf and with Mr Azima's knowledge. In reaching that conclusion, the Judge made a series of findings of dishonesty or other misconduct on the part of Mr Azima: see eg [71], [93], [96], [97], [105], [112], [113], [117]-[120], [128] and [138]-[145].

(2) The deputy Judge concluded that RAKIA had relied on the Investment Representation in deciding to enter into the Settlement Agreement, relying on the principle that "*[i]t is not necessary to prove that the misrepresentation was the sole or even predominant cause of the decision to enter the contract but it is necessary to show that misrepresentation contributed to the decision to contract*": [146]-[154].

42. As to the Good Faith Representation [160]-[246], the deputy Judge found that Mr Azima had engaged in several forms of wrongdoing in his dealings with RAKIA, as follows:

(1) Mr Azima falsely represented that he had introduced the potential purchasers of the Hotel to RAK Georgia. The main basis for the finding that he had not effected the introduction was a memorandum dated 1 March 2016 (the **Adams Memorandum**), written over four years after the events in question, in which Mr Ray Adams (Mr Azima's right hand man and witness) had recounted a trip he and Mr Azima had made to Georgia in 2011: "*We were informed that a group of businessmen from Dubai were already negotiating the purchase of the SMP [the Hotel] and were introduced to them*."

(2) Mr Azima created a false referral agreement between Mr Azima and RAKIA which purportedly entitled Mr Azima to 5% of the gross sale price of the Hotel plus 50% of any amount in excess of $50 million but which was in fact a sham intended to conceal misappropriation of funds by Mr Azima.

(3) Mr Azima paid a bribe of $500,000 to Dr Khater Massaad, RAKIA's former Chief Executive Officer, on 18 January 2012, the day on which Mr Azima received a payment of $1,162,500 from RAKIA to which he claimed to be entitled under the referral agreement.

(4) If (contrary to the deputy Judge's conclusion) the referral agreement was not a sham, Mr Azima wrongfully failed to disclose to RAKIA his intended interest in the Hotel (in breach of the referral agreement).

(5) Mr Azima oversaw the commissioning of and payment for a "*Security Assessment*" report, which included a recommendation by which the RAK Government and associated parties could be deceptively lured

into entering transactions with serious criminals and deliberately exposed to "*Scams, fraud and deceptive partnerships*".

(6) In the context of a proposed joint venture between RAKIA and Global Defence Services, a corporation of which Mr Azima was a major shareholder and director, Mr Azima made a false representation to RAKIA as to the value of the aircraft that would be acquired by the joint venture.

43. In light of these findings of misconduct by Mr Azima, the deputy Judge held that Mr Azima had not acted in good faith towards RAKIA and the Good Faith Representation was therefore found to be false. The deputy Judge held that RAKIA had relied on these misrepresentations, with his reasoning at [244] being that:

> "The evidence establishes that both Mr Buchanan and the Ruler relied on the Good Faith Representation. Whilst the Ruler and Mr Buchanan may have harboured suspicions about Mr Azima, it does not follow that they did not rely on the Good Faith Representation. The fact that a representee harboured suspicions regarding the honesty of a representor does not negate inducement (see *Zurich Insurance Co plc v Hayward* [2017] AC 142 at [18]-[20] (Lord Clarke) and [67]-[71] (Lord Toulson))."

44. As to the conspiracy claim, the deputy Judge considered that it was reasonably to be inferred from (a) the receipt by Dr Massaad of a bribe from the illicit payments purportedly made under the sham referral agreement and (b) the involvement of Mr Karam Al Sadeq (the former deputy CEO of RAKIA) in the retrospective drafting of the referral agreement, that Mr Azima had agreed at least with Dr Massaad and probably with Mr Al Sadeq that the illicit payments would be made. Mr Azima was therefore liable to RAKIA in unlawful means conspiracy: [247]-[250].

45. In relation to Mr Azima's hacking claim, the deputy Judge concluded that Mr Azima had not proved on the balance of probabilities that RAKIA was responsible for the hacking of his data. Even though he did not accept Mr Page's evidence as to how he allegedly discovered the hacked material, he held that Mr Gerrard and Mr Buchanan did not know about it until it was published online. He went on: "*More generally, I was not satisfied that there was sufficiently cogent evidence to establish a conspiracy between the RAKIA witnesses to advance a false case in these proceedings*." Mr Azima says that he now has much more evidence to show this, including an admission to that effect by Mr Page.

46. The deputy Judge, at the end of the First Judgment at [384], explained what he might have done had he found that RAKIA was responsible for the hacking:

> "If I had found that RAKIA had hacked Mr Azima's emails, I would not necessarily have excluded the illicitly obtained evidence as, without it, RAKIA would have been unable to prove its claims and Mr Azima would have been left with the benefit of his seriously fraudulent conduct. If, however, I had found that, as alleged by Mr Azima, not only had RAKIA

> hacked Mr Azima's emails and used them as the evidential basis of this case, but also that its witnesses had conspired to put forward a fabricated case concerning RAKIA's lack of involvement in the hacking, there would have been strong grounds to strike the proceedings out as an abuse of process, as envisaged in *Summers v Fairclough Homes Ltd.*"

47. In the CA Judgment at [49], the first sentence in the quote above was approved. However the second sentence was not referred to and it is relied upon by Mr Azima as showing the consequence of putting forward a fabricated case to the Court, which is what he says RAKIA did.

THE CA JUDGMENT

(a) Grounds of Appeal

48. Mr Azima was granted permission to appeal by Arnold LJ. Grounds 1 to 4 of his appeal concerned the deputy Judge's findings as to RAKIA's responsibility for the hacking. Then Ground 5 was a main plank of the appeal. It was in the following terms:

> "**Ground Five**: the Judge should have gone on to find that RAKIA was responsible for the hacking and that RAKIA's claims fell to be struck out as an abuse of the process and/or the evidence obtained through hacking excluded as inadmissible."

Mr Plewman KC maintained that this Ground was put forward on the somewhat limited bases of exclusion of evidence or striking out after trial in reliance on the authorities of *Jones v University of Warwick* [2003] EWCA Civ 151 and *Summers v Fairclough Homes Limited* [2012] UKSC 26, both of which were discussed in the CA Judgment. He submitted that the way Mr Azima puts his case now is that there was a far more pervasive fraud in relation to the original trial such that the First Judgment should be set aside.

49. Mr Azima also sought to adduce some new evidence in the Court of Appeal in support of his claim that RAKIA was responsible for the hacking. This was:

(1) Evidence of various alleged "*phishing*" emails sent to Mr Azima and those associated with him.

(2) Evidence obtained by a security consultant, Mr Jonas Rey, who had investigated the hacking for Mr Azima and had discovered the involvement of an Indian company called CyberRoot Risk Advisory Private Limited (**CyberRoot**) which had been paid $1 million by Vital Management Services Inc, Mr Del Rosso's company. Mr Del Rosso had been a witness for RAKIA at the original trial but had not mentioned CyberRoot. Mr Rey had spoken to a former employee of CyberRoot, Mr Vikash Pandey, who admitted that CyberRoot had hacked Mr Azima's data from June/July 2015, on the instructions of

> Mr Del Rosso and using infrastructure made available by another Indian company, BellTrox Info Tech Services (**BellTrox**).

50. This new evidence was the subject matter of Grounds 6(A) and (B) as follows:

> *"***Ground Six (A)**: In view of new evidence as to numerous phishing emails sent to Mr Azima and other persons associated with him and RAK-related matters, considered together with the other factors pointing to RAKIA's responsibility, RAKIA should be found responsible for the hacking and the consequences set out in Grounds Five and Six should follow.
>
> **Ground Six (B)**: In view of new evidence as to the activities of Mr Del Rosso and Vital Management Services Inc, and Cyber Root Risk Advisory Private Limited, considered together with the other factors pointing to RAKIA's responsibility, RAKIA should be found responsible for the hacking and the consequences set out in Grounds Five and Six should follow."

51. Mr Azima was also appealing the deputy Judge's findings on RAKIA's claim and sought to adduce new evidence in such respect in the form of a witness statement from Mr Pourya Nayebi on the issue of whether Mr Azima had introduced Mr Nayebi (and the other two potential purchasers) to the Hotel transaction. He added a new Ground 8(A) but the Court of Appeal did not admit this evidence. Mr Azima still persisted in his appeal against the findings in relation to RAKIA's claim, in particular as to whether RAKIA relied on the Investment and Good Faith Representations.

52. It is clear from the skeleton arguments filed in support of his appeal that, if the new evidence in relation to hacking was admitted, Mr Azima would be asking the Court of Appeal to do one of two things: either to accept that RAKIA was responsible for the hacking and to uphold the appeal including in relation to RAKIA's claims; or to remit the hacking issue to be retried with the consequential impact on RAKIA's claims, if RAKIA was found to be responsible for the hacking, to be left to the Judge hearing the remitted claim. In other words, Mr Azima wanted his hacking claim to be upheld and RAKIA's claims against him dismissed.

(b) Mr Azima's oral submissions before the Court of Appeal

53. The Additional Defendants all focused much attention on how Mr Azima's appeal was put orally by Mr Tim Lord KC on his behalf. There is no doubt that the case was put very high, with Mr Lord KC repeatedly alleging that RAKIA and its witnesses had fraudulently deceived the Court in their evidence at trial, and that the fraud practised by them, which he characterised as "*massive deception that it sought to practise on the court"*, was material to the findings of the Judge in upholding RAKIA's claims. Mr Lord KC alleged that "*the connection between the hacked material and the case advanced means that the whole claim is contaminated*", and that dishonesty on the part of RAKIA "*contaminates the whole trial process and therefore it contaminates the findings in this case in favour of RAKIA on its claims*".

54. Mr Lord KC referred a number of times to Mr Azima being entitled, by way of an alternative to the appeal, to bring proceedings to set aside the entirety of the First

Judgment (including RAKIA's claims) on the ground of fraud. For example, he submitted:

> "Given the nature of the further evidence that Mr Azima has now managed to find, he would be entitled to bring fresh proceedings in the High Court to set aside the judgment of Deputy Judge Lenon on the basis that RAKIA had procured that judgment by fraud, and there could be no answer really from RAKIA that it was an abuse, so there could be fresh proceedings to set aside the judgment. And not just the hacking judgment, but the judgment, because that would be the order that would be set aside. […] what Mr Azima has done, quite properly we say and as the court might well expect him to do, is to bring this further evidence before this court on this appeal so that this court is able to consider whether this evidence should be considered by way of a remission to the court within the existing proceedings that are on appeal, rather than having the inefficient and slow process of starting fresh process and that, far from Mr Azima being liable to be criticised for what he's done, as RAKIA do, he's actually done the right thing.
>
> Mr Azima had options here. He could have simply issued fresh proceedings, but, quite properly, given this pending appeal, he has deployed this further material on this appeal"

55. The context for these submissions was that the appeal had been launched before the new evidence had been obtained. When it had been obtained the issue was then whether it should be deployed in the existing appeal or whether fresh proceedings should be started to attempt to set aside the original judgment for fraud. Before the case of *Noble v Owens* [2010] EWCA Civ 224, it was thought that such an allegation should not be raised on appeal and fresh proceedings were required (see the commentary at CPR 52.21.3 which refers to *Flower v Lloyd* (1877) 6 ChD 287 and *Jonesco v Beard* [1930] AC 298). From 2010, the practice changed as explained by Asplin LJ in *Dale v Banga* which was delivered a week before the hearing of Mr Azima's appeal.

56. There was a discussion as to whether, if the new evidence was admitted, the fraud allegation should be remitted to be tried within the same proceedings or whether Mr Azima should pursue the allegation in a new claim. Mr Lord KC firmly favoured the remittal and this was relied on strongly by the Additional Defendants who submitted that Mr Azima had thereby made an election and decided not to pursue a fresh claim to set aside the First Judgment on the grounds of fraud. However, it must be understood that Mr Lord KC's submissions were all predicated on the whole claim, including RAKIA's claims, being remitted for a retrial, or at least it being open to the retrial Judge to set aside RAKIA's claims if the fraud was proved. His submissions were not directed at the situation where only the hacking counterclaim would be remitted together with a direction that RAKIA's claims could not, under any circumstances, be disturbed.

(c) The CA Judgment

57. It is important to look at the CA Judgment in some detail.

58. Mr Lord KC's position, as outlined in the paragraph above, was recorded at the start of the CA Judgment. He was asking the Court of Appeal to find, as a matter of fact, based on the new evidence, that RAKIA had hacked Mr Azima's email accounts, with the consequence that "*the action should be struck out as an abuse of process*" by the Court of Appeal. In the alternative, Mr Azima was asking the Court of Appeal for a remittal of the whole proceedings:

> "In the alternative it is argued that the issue whether RAKIA was responsible for the hacking should be remitted for a retrial; and since the judge's decision that Mr Azima had not proved his hacking allegation was fundamental to at least some of his conclusions on RAKIA's substantive claims, they, too, should be remitted for a retrial." [8]

59. After setting out the factual background and a summary of the deputy Judge's findings, the Court of Appeal explained the approach it was going to adopt to considering the issues on the appeal. At [39], it explained that it was taking the issues in a different order to that in which they were advanced. The first issue was: "*whether, if RAKIA was responsible for the hacking, the evidence obtained through hacking ought to have been excluded; or its claims should have been (or should now be) struck out*." So before even considering the new evidence, the Court of Appeal was deciding whether it could impact on RAKIA's claims.

60. In order to do so, it had to make certain assumptions adverse to RAKIA as to what that evidence might show. The Additional Defendants rely heavily on those assumptions and the conclusions of the CA Judgment in this respect. At [40], the CA Judgment stated:

> "We will assume, for present purposes, (a) that RAKIA's case would have failed but for the existence of documents obtained as a result of the unlawful hacking of Mr Azima's computer; (b) that RAKIA was responsible for that unlawful hacking; and (c) that at least some of RAKIA's witnesses gave dishonest evidence about how RAKIA came into possession of the hacked material" (emphasis added).

61. The CA Judgment then discussed the two strands of Mr Azima's argument on this aspect, namely: whether the evidence should have been excluded (based on Jones v University of Warwick); or whether RAKIA's claims should have been struck out (based on Summers v Fairclough Homes Limited). The Court of Appeal held that, even if the factual assumptions in [40] were established, it would not be appropriate to exclude the unlawfully obtained evidence or to strike out RAKIA's claims. It said that "*any unlawful conduct by RAKIA in obtaining the emails was not central to its underlying claims against Mr Azima*": [60]. In [61] it only referred to Mr Page's and Mr Halabi's evidence and said that even if they had "*told lies, they were collateral or lacked centrality in this sense: because they did not go to the merits of RAKIA's underlying claims.*" Mr Plewman KC submitted that this showed the limited nature of

the assumptions made by the Court of Appeal and it was not considering a wider conspiracy, involving Mr Buchanan and Mr Gerrard, both of whom did give evidence on the underlying claims.

62. The CA Judgment referred to the strong policy reasons for not striking out RAKIA's claims in these circumstances. At [62], the CA Judgment stated:

> "Three other points are worthy of note. First, as we have said, the hacked materials ought to have been disclosed by Mr Azima anyway (except to the extent that they were legitimately covered by legal professional privilege). Second, to strike out RAKIA's claim would leave Mr Azima with the benefit of his fraud. That element of public policy in civil cases is at least as strong, if not stronger, than disapproval of the means by which relevant evidence is gathered. Third, there are other ways in which the court may express its disapproval of the conduct of a party found to have procured relevant evidence by unlawful means: notably by penalties in costs or, perhaps, the refusal of interest on damages awarded."

And at [63] it concluded:

> "In our judgment, even if the judge had found that RAKIA had been involved in the hacking of Mr Azima's email accounts, it would have been wholly disproportionate to have struck out its claim, thereby leaving Mr Azima with the benefit of his frauds."

63. The CA Judgment went on to reject Mr Azima's challenges to the deputy Judge's reasoning in upholding RAKIA's claims, including disallowing the admission of the proposed new evidence from Mr Nayebi. It concluded that "*the attacks on the judge's findings of fact in relation to RAKIA's claims fail; and that even if RAKIA was responsible for the hacking those claims should not be struck out or dismissed*": [122]. This was reiterated at [128] where the Court of Appeal stated that "*irrespective of the outcome of the counter claim the judgment in RAKIA's favour on its claims must stand*".

64. By this stage of the CA Judgment, the Court of Appeal had already decided that RAKIA's claims against Mr Azima would stand whatever the outcome on the hacking allegations. It then went on to consider those allegations and what should happen to them.

65. In [130] to [134], the Court of Appeal looked at the proposed new evidence and decided that it could not resolve the factual dispute and the hacking counterclaim would need to be retried. It therefore admitted the fresh evidence but remitted the counterclaim to be retried by a different Judge.

66. Before doing so, the CA Judgment considered that there were "*two alternatives*" open to a litigant who alleges that a "*judgment was procured by fraud*", namely that "*the litigant alleging fraud may bring a separate action to set aside the judgment*" or "*the court may direct a trial of the fraud issue within the existing action*": [135]. The Court

of Appeal then went on to consider *Takhar* and *Dale v Banga* in the context of deciding between the alternative routes for determining whether RAKIA was responsible for the hacking.

67. I have to say that I am a little confused about the reference in [135] to a judgment that "*was procured by fraud*" and the possibility of a fresh action to set it aside. The Court of Appeal had already decided that the judgment in favour of RAKIA on its claims against Mr Azima would not be set aside under any circumstances and whatever the outcome of the hacking counterclaim. So it could not be that judgment that Mr Azima might be allowed to apply to set aside. Mr Plewman KC submitted that it was the dismissal of the counterclaim that the Court of Appeal contemplated being set aside on the grounds of fraud. But that strikes me as a very odd way of going about things and not a sensible alternative to a retrial of the counterclaim. Mr Masefield KC submitted that this was a reference to the judgment on RAKIA's claims but that would be inconsistent with the Court of Appeal having already found that that judgment could not be set aside.

68. The CA Judgment continued to consider Mr Lord KC's primary submission that the Court of Appeal should itself decide that RAKIA was responsible for the hacking. At [141], the Court of Appeal declined to do so and then considered how that issue should be dealt with.

69. Then the alternatives referred to at [135] were repeated at [142] again suggesting that there could either be a remittal of "*the issue of fraud*" or Mr Azima could "*begin a fresh action*". The Court of Appeal said that Mr Lord KC argued for remittal; whereas Mr Hugh Tomlinson KC for RAKIA argued for a fresh action. However, from what I have seen of the argument, Mr Lord KC was arguing for a remittal of the whole matter including RAKIA's claims and he was not asked what he would prefer if it was only the hacking counterclaim that was going to be remitted and RAKIA's judgment on its claims would remain undisturbed.

70. The Court of Appeal was only "*narrowly persuaded*" to remit the counterclaim rather than leaving Mr Azima to begin a fresh action. It recognised the difficulty of remitting back to the deputy Judge, so specified that it should be to another Judge. It then added: "*[r]emission in the current action also has the benefit that RAKIA's judgment against Mr Azima on its own claims will stay in place, irrespective of the outcome of the counterclaim*": [145], which suggests that, if this was a benefit of remittal, a fresh action could have interfered with RAKIA's judgment against Mr Azima.

71. Finally, in [146] the Court of Appeal specified the scope of the remitted matters: "*that neither the parties nor the judge who hears the remitted issues will be bound by any of the findings of fact made by the judge on the hacking claim. But his findings of fact on RAKIA's substantive claims stand.*"

72. The CA Order consequential on the CA Judgment, relevantly provided:

> "2. The appeal on ground 6 is allowed and paragraph 8 of the High Court Order is set aside.
> 3. The Appellant's counterclaim is remitted to the Chancery Division of the High Court to be tried by a judge nominated by the Chancellor of the High Court.

4. In respect of ground 5, it is declared that even if it is established on the counterclaim that the Respondent was responsible for the hacking and dissemination of the Appellant's data:
    a. the evidence obtained as a result of the hacking should not be excluded; and
    b. the Respondent's claims against the Appellant should not be struck out.
5. Save as set out herein:
    a. No further order is made as to Grounds 1-4;
    b. Ground 5 is otherwise dismissed;
    c. No further order is made as to Grounds 6A and 6B.
6. The appeal under grounds 7, 8 and 9 is dismissed.[…]

…

12. In the event that the Respondent succeeds in his counterclaim:
    a. paragraph 1(b) of the High Court Order is set aside and the question of any interest on the damages awarded to the Respondent shall be in the discretion of the Nominated Judge…
    b. paragraphs 3-7 of the High Court Order are set aside and the question of the costs of the Respondent's claim against the Appellant (including any interest on costs and any interim payment) shall be in the discretion of the Nominated Judge…" (emphasis added)

APPLICATION TO THE SUPREME COURT

73. Mr Azima filed his application for permission to appeal to the Supreme Court on 8 April 2021. Under the proposed Grounds of Appeal, Mr Azima stated that the "*central focus*" of an appeal to the Supreme Court would be that *"…despite remitting the hacking issue for retrial, the CA pre-emptively determined that even if RAKIA was responsible for the hacking and had systematically deceived the court, the possible remedies were confined to the counterclaim and a re-assessment of interest and costs*" and that "*regardless of how serious RAKIA's wrongdoing and deceit may be shown to have been: […] (3) RAKIA's wrongdoing will not impact its claims, even though they depended in key respects on the credibility of its account"*. Accordingly the issues in the prospective appeal included:

> "(1) Whether the remedy of striking out a claim for abuse of process or excluding evidence relied on by the Claimant, can be or should have been excluded before that serious wrongdoing and dishonesty have been fully investigated"; and
>
> (4) Whether not only the counterclaim but also some or all of RAKIA's claims and all of the defences to them ought to have been remitted".

74. This was therefore a point of law that Mr Azima said the Court of Appeal had got wrong. It should not have provided for such a narrow remission of the counterclaim. Mr Azima said that the Court of Appeal should not have rejected the remedy of strike out for abuse of process before the extent of the findings on the retrial were known. He said:

> "54. …if Mr Azima had only obtained the new evidence after the appeal, he could have applied to have the judgment set

> aside as procured by fraud. If RAKIA's case rested upon a fabricated and dishonest foundation, that relief would have been appropriate –*Takhar v Gracefield Developments Ltd* [2019] 2 WLR 984, at [46]. Mr Azima properly raised the new evidence on appeal once it became available. It is wrong in principle for the CA's decision to exclude that possibility before investigating the dishonesty."

75. Before the Supreme Court made its decision, Mr Azima filed two applications, on 10 January 2022 and 3 February 2022, for permission to rely on fresh evidence, in the form of affidavits from Mr Page sworn on 7 January 2022 and from Mr Majdi Halabi sworn on 2 February 2022. Both Mr Page and Mr Halabi had given evidence at the original trial about the alleged innocent discovery of the hacked material. In their new affidavits they admitted that the evidence they had given had been false and had been deliberately concocted together with Mr Buchanan, Mr Gerrard and another partner at Dechert, Mr David Hughes. Mr Page also admitted that RAKIA was responsible for the hacking of Mr Azima's data. In the application, Mr Azima said that this evidence showed that RAKIA had provided false testimony at the trial and had procured the judgment by fraud. It went on to say that: "*It should also be noted that where new evidence shows that an earlier judgment had been obtained by fraud, this would provide a basis for a fresh action to set aside that judgment, or the appellate court may direct that trial of the fraud issue is remitted*".

76. Despite the new evidence and the points raised in the application, the Supreme Court Order dated 28 April 2022 (Lord Reed, Lord Sales and Lord Stephens JJSC) refused permission to appeal on the basis that the application did not raise an arguable point of law.

77. Mr Plewman KC said that not much could be read into the Supreme Court's refusal of permission and I am inclined to agree. There are no reasons given. All we do know is that the Supreme Court decided that there was no arguable point of law. That must be a reference to the main ground of appeal as to the appropriateness of the CA Order remitting the counterclaim but not allowing any interference with RAKIA's judgment on its claims. The extent to which the Supreme Court took into account the new evidence is impossible to tell but it was clearly not prepared to countenance any appeal on factual issues.

THE NEW EVIDENCE

78. Mr Azima had obtained certain new evidence as to RAKIA's responsibility for the hacking after the original trial and this was admitted into evidence by the Court of Appeal. This was the phishing emails and the evidence from Mr Rey. After the CA Judgment and several months after the application for permission to appeal to the Supreme Court had been made, Mr Azima had the affidavits of Mr Page and Mr Halabi in which they admitted that their evidence at the trial had been dishonestly fabricated and alleged that this had been orchestrated by Mr Gerrard, Mr Buchanan and Mr Hughes.

79. During the course of a hearing before me on 15 and 17 March 2022, I asked whether Mr Page had ever raised invoices for his work to RAKIA. After instructions, Mr Tomlinson KC said that "*there are no invoices from Mr Page to RAKIA. The documents have been previously searched and none have been found*". However, following inquiries made of Mr Page's solicitors, a whole series of invoices from a company of Mr Page's called PGME JLT addressed to RAKIA between February 2015 and February 2019 have been disclosed. The invoices had a false narrative of the work done – they stated that the work was "*conducting feasibility study to identify potential to provide management services in the African Subcontinent establishing Freezones*". Mr Azima says that this was to mask the real activity that was taking place which was the illegal hacking of Mr Azima's data. RAKIA has not disputed that these invoices were received and paid; nor has it denied that they contained a false narrative. The invoices were not disclosed during the original trial and they should have been.

80. The work that Mr Page principally did for RAKIA in this respect was to compile what were called Project Update Reports for submission to the Ruler, Mr Buchanan and Mr Gerrard (on occasion). At the trial, RAKIA disclosed a heavily redacted Project Update Report from March 2015. Mr Azima asked for the redactions to be removed but this was resisted on the basis that the redactions concerned irrelevant and confidential material. This was referred to in the First Judgment and the deputy Judge also said that Mr Page and Mr Buchanan had given evidence that all the other Project Update Reports had been routinely destroyed pursuant to a "*protocol*". The redacted copy was still the only Project Update Report before the Court of Appeal.

81. Following a further application by Mr Azima in May 2022, Dechert disclosed the full unredacted March Project Update Report. Mr Azima says that it should never have been redacted in the first place because there was relevant material redacted including in particular information about Dr Massaad and his company Star Industrial Holdings Limited. He has never received a response from RAKIA or its former solicitors, Stewarts, as to why the redactions were made.

82. In the course of June 2022, Mr Azima obtained very many more Project Update Reports and associated materials. These were provided by Mr Page's assistant who had saved some of the Reports. In order to ensure that third-party privilege was not breached, the Reports were provided to an independent barrister to review prior to their disclosure to Mr Azima. Having followed that process, there are now a large number of Reports from 2015 and 2016. They are said to relate to "*Project Beech*" which seems to be the code name for RAKIA's investigations into Dr Massaad and his associates including Mr Azima.

83. Mr Azima says that a review of the Project Update Reports shows that RAKIA had access to the hacked material, including privileged and confidential emails, from well before it was published online and before the Settlement Agreement was entered into. This shows conclusively, he says, that RAKIA's case on hacking has been thoroughly dishonest throughout and that the deputy Judge and the Court of Appeal have been seriously deceived. It was the discovery and review of the Project Update Reports that led to the application for permission to make the additional counterclaim on 24 June 2022. Mr Azima says that they were deliberately withheld from the original trial in order to allow the false and dishonest evidence to be given by RAKIA's witnesses.

84. Mr Plewman KC took me through some of the Project Update Reports. They contained highly confidential financial and banking information about Mr Azima and his wife and emails sent by or to Mr Azima that could only have been illegally obtained. Mr Masefield KC submitted that Mr Page had referred in his affidavit to the fact that the Project Update Reports had contained extracts from what he assumed had been hacked material and so the actual provision of the Reports themselves does not actually shift the dial very much. However, it is striking to see Mr Page's general allegations in his affidavit confirmed in contemporaneous documentary form, which may be difficult for RAKIA to dispute. It would potentially be easier to dismiss Mr Page's evidence as lacking credibility if it was not supported by the actual underlying documents.

85. In reliance on the recently available Project Update Reports Mr Azima has pleaded them fully in the draft RRRACC, in particular in Schedule B which sets out the alleged contradictions between RAKIA's case at trial and what the new evidence shows. These allegations were summarised by Mr Plewman KC as RAKIA, through the actions of the Ruler, Mr Buchanan and Mr Gerrard, being shown to have:

(1) procured the hacking of Mr Azima's documents as part of its investigations;

(2) arranged for the materials stolen from Mr Azima to be placed online in order to provide an innocent explanation for how it came across the data;

(3) created a false documentary trail to support the "*innocent discovery*" story;

(4) dishonestly destroyed, withheld and/or failed to identify the documentary evidence revealing the scale of RAKIA's unlawful investigations of Mr Azima;

(5) provided false witness evidence through the Ruler's witness statement;

(6) suborned the perjurious testimony of Mr Page, Mr Halabi, Mr Buchanan and Mr Gerrard in order to conceal the hacking, support the innocent discovery story, and conceal the fraud from the Court; and

(7) withheld disclosure concerning the Hotel transaction, and dishonestly concealed (in its evidence and otherwise) information regarding that transaction and RAKIA's knowledge of it.

86. I have to assume for the purposes of this application that Mr Azima has at least a real prospect of establishing this on the facts. That would clearly constitute "conscious and deliberate dishonesty" sufficient to satisfy the Fraud Condition and the Additional Defendants do not suggest otherwise.

87. However I do now turn to the reasons why the Additional Defendants say that permission should be refused.

JURISDICTION

88. The Additional Defendants submitted that I do not have jurisdiction to allow the additional counterclaim to be brought. They say that the terms of the CA Order limit my jurisdiction to the matters expressly remitted to be tried and I have no power to extend my own authority to something which the Court of Appeal held should not be disturbed.

89. Mr Masefield KC referred to the CA Judgment's clear findings that the judgment in RAKIA's favour on its claims against Mr Azima must stand regardless of the outcome of the retrial of the hacking counterclaim and that my role as the assigned Judge is limited to the specific issues in relation to hacking that were remitted ([128], [145], [146] of CA Judgment). The CA Order declared in paragraph 4 that the outcome of the remitted counterclaim should not impact on RAKIA's claims against Mr Azima and his appeals against those claims were dismissed (paragraphs 7 to 9 of the CA Order). He submitted that the only way for Mr Azima to challenge this would be to apply to the Court of Appeal to reopen the CA Order under CPR 52.30.

90. Mr Masefield KC cited *Zuckerman* on *Civil Procedure: Principles of Practice* (4th Ed.) at [25.267]:

> "The lower court is functus officio once it has delivered it [sic] decision. Consequently, it has no power to reconsider its decision unless ordered to do so by the appeal court. Care must therefore be taken when making a referral to identify the matters that the lower court may or should reconsider."

91. Mr White KC made some brief submissions on jurisdiction and referred to an arbitration case in which the Court of Appeal had remitted one issue back to the arbitrators and Steyn J (as he then was) held that the arbitrators could only consider the one issue that had been remitted to them and nothing else: *Interbulk Limited v Aiden Shipping Co Limited (The Vimeira) (No 3)* [1986] 2 Lloyd's Rep 75. Mr White KC said that this was an *a fortiori* case because the Court of Appeal specifically directed that the judgment obtained by RAKIA against Mr Azima should not be remitted or otherwise interfered with.

92. Mr Plewman KC responded to these points principally on the basis that the High Court's jurisdiction to hear applications to set aside judgments or orders procured by fraud cannot be ousted. The High Court has an inherent jurisdiction to hear such applications – see *Salekipour* at [70] – and Mr Azima could have started separate proceedings in the High Court which could then have been consolidated with the remitted counterclaim. Therefore the scope of the matters remitted by the Court of Appeal cannot deprive the High Court of jurisdiction to hear such a claim.

93. Mr Masefield KC submitted that this was not a good answer to the lack of jurisdiction for two reasons: (a) Mr Azima has not issued a fresh claim to set aside the judgment and he cannot rely on a procedure that he has not adopted; and (b) in any event, Mr Azima is not free now to issue a fresh claim because he chose not to pursue that course in the Court of Appeal, arguing strongly for the case to be remitted to the High Court.

94. I do not think that this adequately answers Mr Plewman KC's argument. As I have said above, the test for whether permission should be given must be the same whether

the claim is brought by fresh proceedings (where permission may not be required but there may be an application to strike out on the grounds of abuse of process) or within the existing proceedings. And the only reason why Mr Azima might not be able now to pursue a fresh claim is if the Additional Defendants are correct on their abuse of process argument. I consider that the main substantive issue is in relation to abuse of process which I discuss below.

95. If a fresh claim could have been brought, then I do not think I am limited by the CA Order in deciding whether to consolidate it for sound case management reasons with the remitted counterclaim. There are essentially the same factual issues to be determined and it makes sense, from both the parties' and the Court's perspectives, for them to be tried together. I have already allowed the Additional Defendants to be joined to the counterclaim and permitted substantial amendments to the pleadings, which shows that my jurisdiction has not been limited to the counterclaim remitted by the Court of Appeal. Mr Masefield KC said that the Court of Appeal anticipated that there would be amendments to the pleadings and did not consider any additional parties (so it did not expressly rule that out). However the Court of Appeal did expressly rule out any interference in RAKIA's judgment against Mr Azima which it had upheld.

96. I do not think that the Court of Appeal could have considered that it was removing, in all circumstances, the High Court's jurisdiction to hear an application to set aside the judgment on the grounds of fraud. If the most damning evidence of fraud emerged, say a clear confession by Mr Buchanan that they had all deliberately lied to the Court at the original trial and they knew that the Settlement Agreement was a trap, it would be very odd if the High Court was debarred from hearing an application based on such evidence.

97. As to whether Mr Azima should have used the procedure under CPR 52.30 and applied back to the Court of Appeal, Mr Plewman KC referred to *Flower v Lloyd* and *Jonesco v Beard* (both cited above) as showing that the correct procedure in these circumstances is to start fresh proceedings. This is based more on the fact, which was recognised in the CA Judgment, of the difficulties of an appeal court trying contested issues of fact, particularly where there are allegations of fraud – see also *Jaffray v Society of Lloyd's* [2008] 1 WLR 75 (***Jaffray***).

98. This is further demonstrated by *Kuwait Airways Corp v Iraqi Airways Co (No. 8)* [2001] 1 WLR 429 where the House of Lords dismissed a petition to reopen the appeal and directed the appellant to issue a fresh claim. That fresh claim was heard by David Steel J in *Kuwait Airways Corp v Iraqi Airways Co (No. 11)* [2003] EWHC 31 (Comm) and he set aside the House of Lords' earlier decision and order. So it is clear that if the fraud is established and both Conditions are met, the High Court can set aside orders of the Court of Appeal or Supreme Court.

99. The jurisdiction to reopen appeals under CPR 52.30 is only available in exceptional circumstances, where it is necessary to do so "*in order to avoid real injustice*" and where "*there is no alternative effective remedy*". Mr Azima says that he wishes to pursue the more appropriate remedy of applying to set aside the First Judgment and CA Order for fraud and that accordingly there is no jurisdiction in CPR 52.30 to apply to reopen the appeal.

100. Mr Plewman KC referred to the End Note in *R (Wingfield) v Canterbury City Council* [2020] EWCA Civ 1588 (***Wingfield***) which cited *Jaffray* for the proposition that there is doubt as to whether CPR 52.30 is available in cases of fraud which could be used as the basis for a fresh action and so not the only available remedy. Mr White KC however submitted that in [59] and [61(3)] of *Wingfield* the Court of Appeal indicated that the paradigm case for the use of CPR 52.30 was a case of "*fraud or bias or where the judge read the wrong papers*" and if that is the paradigm case it cannot be ruled out by the availability of alternative relief. But I do not think that the Court of Appeal was there considering whether a separate claim could be brought to set aside the order as having been procured by fraud. There seems to be more of a focus on what the judge may have done to render the outcome an injustice.

101. In my view, there is jurisdiction, in the pure sense, to give Mr Azima permission to bring the additional counterclaim to set aside the First Judgment and CA Order for fraud. The High Court has not been deprived of jurisdiction to hear such a claim and it does constitute an alternative effective remedy so as to rule out an application to the Court of Appeal under CPR 52.30. The main and critical question is whether the bringing of that additional counterclaim would be an abuse of the Court's process.

ABUSE OF PROCESS

(a) Introduction

102. The Additional Defendants submitted that the proposed additional counterclaim would be an abuse of process in that Mr Azima is seeking to re-litigate matters that have already been considered and decided against him by the Court of Appeal and possibly the Supreme Court; alternatively that it would constitute a collateral attack on the CA Judgment. In short, they contend that this would be Mr Azima's second or third bite of the cherry and the finality principle should prevent him from doing so.

103. While it is true to say that the Court is itself concerned to protect its processes from abuse and in particular the wasteful and disproportionate use of its resources, the finality principle is primarily focused on a party not being vexed endlessly by the same opponent on the same issues. In this case the relevant party is RAKIA but it has chosen not to appear or take any further part in these proceedings and it is not seeking to make the argument that the additional counterclaim would be an abuse. The Additional Defendants have taken up that mantle because they would obviously prefer not to have to deal with the additional counterclaim even though it will not really add to the evidential burden at the trial. Mr Masefield KC suggested that they may face an application in the future to be added as parties to the additional counterclaim and to face extra damages claims in relation to the recovery of the judgment sum awarded to RAKIA. However, I think there is little chance of that because the judgment sum has been paid into a secure account and can be returned to Mr Azima if he were to succeed in getting the First Judgment set aside.

104. I do think that some account has to be taken of the fact that it is the Additional Defendants, who are not parties to the proposed additional claim but who are the only ones opposing the grant of permission on the grounds of abuse of process. The oft-

quoted passage from Lord Bingham's judgment in *Johnson v Gore Wood* [2002] 2 AC 1 (HL) at p.31 advocated a broad merits-based approach to abuse of process:

> "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."

105. Adopting that approach, the Additional Defendants are not and have not been sued in respect of this matter and they have to deal with the factual issues that arise anyway on the existing hacking counterclaim which has been remitted by the Court of Appeal. They can still say that because of the findings in the CA Judgment the Court should be astute to prevent its processes from being abused, and I will examine whether that is so, but if the impact on the Additional Defendants is limited, I think that is also a relevant factor that goes into the broad merits-based approach.

(b) Re-litigation

106. The Additional Defendants say that Mr Azima is seeking to run essentially the same case in the proposed additional counterclaim to that which he ran in the Court of Appeal. In the Court of Appeal he was arguing that, based on the new evidence then obtained (the phishing emails and Mr Rey's evidence), the Court of Appeal should find RAKIA responsible for the hacking and because that would necessarily have involved its witnesses giving dishonest evidence at the original trial, the whole trial process was "*contaminated*", including RAKIA's claims against Mr Azima. On the basis of Ground 5 of the appeal, Mr Azima was asking the Court of Appeal to strike out RAKIA's claim or to exclude its evidence because the evidence had been obtained illegally. Alternatively, Mr Azima was asking that everything be retried, including RAKIA's claims and Mr Azima's hacking counterclaim so that the new Judge would be able to come to their own conclusions based on their own findings on the evidence and unbound by anything in the First Judgment. It is an important part of the Additional Defendants' case that Mr Azima had elected before the Court of Appeal to pursue his appeal and a remission to the High Court rather than bringing a fresh claim to set aside the First Judgment.

107. Mr Plewman KC disputed that the same issues were before the Court of Appeal. He submitted that the Court of Appeal was only considering the narrow issue raised by Ground 5, namely whether RAKIA's claim should be struck out or its evidence excluded on the *Summers v Fairclough Homes Ltd* and *Jones v University of Warwick* principles. The issue for the Court of Appeal was whether the deputy Judge was "*wrong*" whereas the issue in his proposed additional counterclaim is whether RAKIA's fraud was an operative cause of the deputy Judge's decision. Furthermore the fact that fraud had been raised before is no bar to bringing a claim to set aside the First Judgment if based on new evidence – see *Takhar* at [55] and [66]. And Mr Plewman KC said that there was substantial new evidence showing that there was pervasive dishonesty in RAKIA's pursuit of its claims against Mr Azima.

108. The Additional Defendants relied heavily on *Koshy v DEG-Deutsche Investitions-Und Entwicklungsgesellschaft mbh and anor* [2006] EWHC 17 (Ch), Rimer J (as he then was) (***Koshy***), and in the Court of Appeal at [2008] EWCA Civ 27 (***Koshy CA***). This was long-running litigation between the same parties, leading to a number of reported judgments. At the outset of the litigation there was a substantial costs order made by Harman J against Mr Koshy on 20 March 1998 in relation to Mr Koshy's failed application to discharge a freezing order. He did not appeal the order at the time but on 11 March 2002 was granted leave to appeal out of time on terms that he could only rely on two paragraphs of Rimer J's earlier judgment on the substantive issues. That appeal was ultimately dismissed. Then Mr Koshy tried to set off the costs ordered by Harman J against his liability to another party, but that failed. His third attempt to set aside the Harman J costs Order was to issue a fresh claim on 9 February 2005 to set aside the costs order on the grounds that it was procured by fraud. The defendants applied to strike out the claim mainly on the grounds of abuse of process and in particular because of an election made in the Court of Appeal to pursue the appeal rather than start fresh proceedings to set aside the order.

109. In *Koshy*, Rimer J struck out the new claim as an abuse of process because Mr Koshy had made an election to pursue the appeal and he should not be allowed to achieve the same outcome by using the different procedural route that he had previously decided against. At [66], Rimer J said:

> "The Court of Appeal's view was that the just disposal of the issue that Mr Koshy's appeal had raised was either (i) the pursuit of the appeal, or (ii) a first instance trial of the factual questions it raised. But it was plainly of the view that both options should not be open to Mr Koshy and it gave him a choice as to which he wanted to pursue. If he chose the former, and failed, he was to understand that he could not re-open the matter in any other way, including (in my judgment) by a claim such as his new claim. Mr Koshy chose to pursue the appeal and must therefore be taken to have accepted that the price of doing so was the abandonment of all alternative procedural routes in the event of failure. He was therefore agreeing that he would not take any other procedural routes, and the Court of Appeal heard his appeal on that basis. In my view, in those circumstances the issue by Mr Koshy of his new 2005 claim was and is an abuse of the process of the court, since he was thereby taking a course which the Court of Appeal had made plain was not to be open to him and which he had agreed he would not take. I propose, therefore, to make an order striking the 2005 claim out".

110. The Court of Appeal in *Koshy CA* upheld Rimer J's decision, although it considered that he had not taken into account all the factors that he should have done as part of the "broad, merits-based judgment", in particular factors in Mr Koshy's favour such as the public interest in investigating claims that the court had been misled. However, Arden LJ (as she then was) gave the only judgment and she made clear that Mr Koshy had had a fair opportunity to pursue his case on the merits. At [33] – [34] she held:

> "33. If Mr Koshy's allegations in the new action have substance, they clearly raise an important matter. Firstly, he alleges that a High Court judge was misled on a basic point that led the court into making an order for costs. In other words, he makes allegations about the integrity of the justice system and there cannot be any doubt but that it is of the utmost importance that the administration of justice should not be undermined by misinformation provided by one party …
>
> 34. On the other hand, the issue is not now simply whether the allegations in the new action have substance but whether Mr Koshy has already had ample opportunity to have those allegations made the subject of judicial determination. Even though the allegations which Mr Koshy raises are of such seriousness and importance, nonetheless the justice system is not bound to provide more than one opportunity to run these issues. That is because the courts have to strike a fair balance between the interests of Mr Koshy on the one hand and of the other parties and the general interest on the other hand. That fair balance in my judgment is struck once Mr Koshy has had one effective opportunity to put his case."

111. Arden LJ went further still on the finality of litigation, holding that, even if Mr Koshy had not in fact had an opportunity to pursue an appeal on the merits, it was nonetheless an abuse of process to start a fresh action. After going through the factors in Mr Koshy's favour, she concluded at [58] and [59]:

> "58. …More fundamentally, Mr Koshy has already had at least one opportunity to have his claim fully ventilated in a court of law. He chose to have an adjudication of his claim on a limited basis … Mr Koshy had been alerted to the potential difficulties in his appeal… There is a well-recognised public interest in the finality of litigation …
> 59. …For the reasons given, I would hold that it was an abuse of process for Mr Koshy to commence the new action and to seek to have another opportunity to bring a claim to have the order of Harman J as to costs set aside. In my judgment, the factors mentioned in the preceding paragraph, and in particular the factor that Mr Koshy has already had the opportunity to have an adjudication of the issues in the new action, which he rejected despite the clear warnings given by this court, outweigh the factors which weigh in his favour."

112. Mr Plewman KC submitted that *Koshy* was very different on the facts in particular as to whether there had been an explicit election to pursue one course over another and as to the new evidence available to the party seeking to bring the claim to set aside for fraud. Rimer J in [81] and [82] of *Koshy* had made it clear that Mr Koshy did not have any fresh evidence and he just wanted to re-run issues at a new trial that he could have run in the first trial based on the evidence available to him then. (This was confirmed by Arden LJ at [15] of *Koshy CA*.)

113. I think that the new evidence is a distinguishing feature to this case which is clearly based on the new evidence obtained since the CA Judgment, principally Mr Page's

and Mr Halabi's affidavits, the Page invoices and the recently discovered Project Update Reports. This is significant new evidence, never considered before, and could be used to support an allegation of pervasive dishonesty practised on this Court by or on behalf of RAKIA.

114. But I also question whether the election point is properly levelled at Mr Azima. As explained above, Mr Lord KC's submissions to the Court of Appeal in relation to using the evidence to pursue the appeal or to start a fresh action were made during a discussion as to the appropriate procedural route for considering whether the whole of the First Judgment should stand or not. In other words, the contemplated fresh action was to set aside the First Judgment on the grounds that it had been procured by fraud. That included RAKIA's claims against Mr Azima. The discussion centred around Asplin LJ's judgment delivered the previous week in *Dale v Banga* which discussed the various options in this situation.

115. The issue in *Dale v Banga* was "*what the appeal court should do when fresh evidence is adduced after a trial which allegedly shows that the judgment below was obtained by fraud, the conduct relied upon being that of a witness and of a party to the action which took place after the events in issue, and is unrelated to the issues which were before the court*": [1]. At [39] to [41], Asplin LJ explained the new practice after *Noble v Owens*:

> "39. It is clear, therefore, that where an allegation of fraud is involved, there are two courses which may be adopted. The dissatisfied party may bring a new action to set aside the judgment already obtained on the basis that it was obtained by fraud: *Flower v Lloyd* [1877] 6 Ch D 297; *Hip Foong Hong v H Neotia & Company* [1918] QC 888; and *Jonesco v Beard* [1930] AC 298. Such a route was adopted in the *Royal Bank of Scotland* case and in the *Takhar* case. In such circumstances, the successful party retains the benefit of the judgment unless it is set aside and can seek to strike out the claim to set it aside as an abuse of the court's process.
>
> 40. In *Salekipour v Parmar* [2017] EWCA Civ 2141, [2018] QB 833, the Court of Appeal expressed a preference for this approach but did not decide the issue. The same preference was expressed by the Court of Appeal in *Daniel Terry v BCS Corporate Acceptances Limited, BCS Offshore Funding Limited, John Taylor* [2018] EWCA Civ 2442 at [38], although, once again, it was unnecessary to decide the point.
>
> 41. The second and alternative route, which is the one adopted here, is to appeal the original order, alleging that the judgment upon which it is based was obtained by fraud. A retrial will be ordered where the fraud is admitted or incontrovertible. Where, as in this case, it is neither admitted nor incontrovertible, a "*Noble v Owens* order" is sought by which the issue of fraud is remitted to the court below and decided within the same proceedings."

116. Again this is about setting the whole of the original judgment aside for fraud. That was the context for Mr Lord KC's submissions to the Court of Appeal. There was no

discussion as to whether he would prefer a limited remission of just the hacking counterclaim or to be able to start a fresh action to set the First Judgment aside.

117. That is the cause of my confusion about the discussion at [135] to [146] of the CA Judgment. The Court of Appeal had already decided that RAKIA's judgment against Mr Azima would stand even if "*RAKIA was responsible for the hacking*": [122]. It then had to consider what to do with the hacking counterclaim – see [129]. It referred to the fresh evidence and then *Takhar* and *Dale v Banga*. It concluded that it would not be able to decide the factual question as to whether RAKIA was responsible for the hacking. The question was then posed whether it "*should remit the issue of fraud to the High Court within the existing proceedings; or leave Mr Azima to begin a fresh action*."

118. I have referred above to it being unclear what that "*fresh action*" would be for and whether it would include setting aside the First Judgment in full. It is important to understand that because the Court of Appeal said that Mr Lord KC argued for remission of "*the issue of fraud*" whereas Mr Tomlinson KC wanted Mr Azima to start a fresh action. From my reading of the transcripts, that question was not actually put to and addressed by both Counsel. Both were arguing for one option rather than the other on the assumption that they included RAKIA's claims against Mr Azima. Mr Lord KC much preferred remission in those circumstances because RAKIA would not be able to raise objections to the jurisdiction of the Court. But the Court of Appeal transposed those arguments into the question that it was then considering as to how best to deal with the new evidence but solely in relation to the hacking counterclaim.

119. The Court of Appeal was only "*narrowly persuaded*" to go down the remission route. That means it was nearly persuaded that Mr Azima should have been allowed to begin a fresh action to set aside the judgment, although query whether that meant the whole of the First Judgment. But the Court of Appeal was absolutely clear that "*RAKIA's substantive claims stand*" whatever the findings on the remitted counterclaim.

120. What this means is that I do not accept that an election of the sort that was made by Mr Koshy was made by Mr Azima in the Court of Appeal. He did decide to pursue his appeal and he took it all the way to seeking permission from the Supreme Court. If he had no new evidence than was before the Court of Appeal, then he might have been in difficulties in arguing that he had not chosen how procedurally that evidence should be dealt with. But he made no unequivocal election that whatever new evidence might emerge in the future he would not seek to deploy it in a fresh action to set aside the First Judgment for fraud, assuming he could satisfy both the Fraud and Materiality Conditions.

121. The Additional Defendants also place heavy reliance on [40] of the CA Judgment where the Court of Appeal set out the factual assumptions it was making in Mr Azima's favour for the purposes of considering whether RAKIA's claims would in those circumstances have been struck out. They assert that Mr Azima's new evidence would only demonstrate that which the Court of Appeal assumed in his favour and so it could not have led to a different conclusion by the Court of Appeal.

122. However care needs to be taken in this respect to see what the Court of Appeal was assuming and whether that could be said to include the new evidence as to RAKIA's responsibility for the hacking and alleged perjury at the original trial. CA Judgment

[40] is set out above: (b) was that "*RAKIA was responsible for that unlawful hacking*"; and (c) "*that at least some of RAKIA's witnesses gave dishonest evidence about how RAKIA came into possession of the hacked material*".

123. The assumptions set out at [40] of the CA Judgment do not, in my view, capture the scale and implications of the new evidence and what Mr Azima alleges it demonstrates. I do not think that the Court of Appeal could have had in contemplation there being evidence of an alleged "*perjury school*" taking place in a Swiss hotel shortly before the start of the original trial or the discovery of all the Project Update Reports that RAKIA had said had all been destroyed, save for the March 2015 one. The Court of Appeal was not assuming satisfaction of the Fraud Condition: "*conscious and deliberate dishonesty*"; rather it was merely assuming "*at least some of RAKIA's witnesses gave dishonest evidence*" and only in relation to the collateral issue of hacking. CA Judgment [61] refers to "*lies*" that Mr Page and Mr Halabi may have told, suggesting that the Court of Appeal was not assuming that RAKIA's most important witnesses, Mr Buchanan, Mr Gerrard and the Ruler, were giving dishonest evidence. And in its conclusions in this respect, the evidential assumption seems even weaker: "*even if the judge had found that RAKIA had been involved in the hacking of Mr Azima's email accounts*" [63]; "*even if RAKIA was responsible for the hacking*" [122]; and "*if the judge had found that RAKIA had been responsible for the hacking…*"[129]. There is no reference there to wholesale dishonesty by all of RAKIA's witnesses, potentially affecting their credibility on other issues.

124. Mr Plewman KC submitted that the assumptions were made by the Court of Appeal only for the purpose of considering whether to exclude RAKIA's evidence or to strike out its claims against Mr Azima. In other words, they were only to deal with what Mr Plewman KC said was his somewhat narrow Ground 5 of the appeal. However I think that this falls into the trap, as highlighted by Mr White KC, of relying on form over substance. Whether Mr Azima was seeking to have the judgment against him overturned by strike-out or the exclusion of evidence or to set it aside on the grounds of fraud should not affect the issues that I now have to decide.

125. Having said that, in my judgment, the proposed additional counterclaim would not amount to abusive re-litigation of issues and evidence that have been determined on the merits in the CA Judgment, or in the refusal of the Supreme Court to grant permission to appeal. Mr Azima made no unequivocal election that would preclude him from bringing a fresh action based on significant new evidence. Nor did the Court of Appeal contemplate that, whatever evidence may later emerge that might establish that a substantial fraud was perpetrated on the Court, Mr Azima should be debarred from bringing that evidence before the Court to try to prove that the First Judgment was procured by fraud.

(c) Collateral Attack

126. The Additional Defendants also rely on the collateral attack basis of abuse of process, the principles of which were articulated by the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. They say that the proposed additional counterclaim would be a collateral attack on the CA Judgment and Order and also on the Supreme Court's refusal of permission to appeal. This was not pressed

hard by Mr Masefield KC and it does seem to me that it adds little to the arguments that were run on re-litigation abuse, and my findings in such respect are similarly applicable.

127. Mr Masefield KC did point to the public policy reasons relied upon in the CA Judgment for not disturbing RAKIA's judgment against Mr Azima. These were:

(1) The hacked documents "*ought to have been disclosed by Mr Azima anyway*" [62]; and they "*ought to have been available to RAKIA by the time of trial*" [47]; and

(2) The hacked documents "*revealed serious fraud on the part of Mr Azima which would have been a very serious bar to the grant of equitable relief in his favour*" [47]; and therefore "*to strike out RAKIA's claim would leave Mr Azima with the benefits of his fraud*" [62].

128. Mr Masefield KC said that those public policy reasons continue to apply notwithstanding the new evidence upon which Mr Azima seeks to rely. The Court of Appeal said that there were other ways for the Court to express its disapproval of a party using unlawful means to obtain evidence, such as in respect of interest and costs. The CA Order specifically provided in paragraph 12 that the only remedy available to the retrial Judge in respect of the judgment in RAKIA's favour that still stands would be in respect of interest and costs. However the Court of Appeal was careful to limit that to where the party has obtained "*evidence by unlawful means*" [62], leaving open perhaps the possible consequences if there was a more wide-reaching fraud established by new evidence.

129. It also seems to me that some care was taken in limiting the wording of the CA Order. Under paragraph 4, the declaration about the consequences of succeeding on the counterclaim was not put in those terms. Instead it referred to it being established that RAKIA "*was responsible for the hacking and dissemination of [Mr Azima's] data…*" suggesting that it was not precluding a more pervasive fraud being proved which may have different consequences.

130. I do not think that the collateral attack argument takes the matter beyond the points made above in relation to re-litigation and finality. In [117] of the CA Judgment, the Court of Appeal said, in a very different context, that it places "*considerable weight on the principle of finality*" and that was why it was not prepared to admit Mr Nayebi's evidence on the unlawful conspiracy claim. But where the new evidence has not been tried and tested on its merits and where it potentially could lead to a finding that the Court was seriously deceived by coordinated perjured evidence, I do not see that the Court of Appeal was ruling out the possibility that Mr Azima could on that basis seek to set aside the First Judgment on the grounds of fraud. Indeed I do not think it would be right for it to do so when it has no idea what sort of new evidence might emerge.

131. Of course this is all dependent on the new evidence being significant enough to found such an action and I deal below with that point on the Materiality Condition. But assuming that it is, and adopting Lord Bingham's "*broad, merits-based judgment*" approach, it seems to me that in this case the "*fraud unravels all*" principle outweighs the finality principle, and it would not be an abuse of process for Mr Azima to bring

either a fresh action or an additional counterclaim to set aside the First Judgment, the CA Judgment and their respective Orders.

THE MATERIALITY CONDITION

132. That leaves me to deal with the challenge of the Additional Defendants, principally through Mr White KC, to whether Mr Azima has a real prospect of establishing the Materiality Condition. I have already decided that the burden is on Mr Azima in respect of both Conditions and there is no dispute that at this stage he gets past the threshold on the Fraud Condition. I emphasise that I am not making any findings as to the strength of the new evidence or whether Mr Azima is likely to be able to prove his allegations of fraud. I merely assume, for the purposes of considering this application and the low threshold test of real prospect of success, that those allegations can be established.

133. The overarching point that is made on behalf of Mr Azima is that if all of RAKIA's witnesses conspired together to give perjured evidence and to mislead the Court that would be bound to have affected their credibility generally including in relation to their evidence on RAKIA's fraudulent misrepresentation and conspiracy claims against Mr Azima. If that evidence had been available at the original trial it would have had a material effect and would at least have been "*an operative cause*".

134. In *Takhar 2*, Steven Gasztowicz QC referred to the "*melting pot of the evidence*" in relation to the Materiality Condition at [56]:

> "If the relevant evidence (here the forged document) was something in the melting pot of the evidence before the court, whether relating directly to relevant facts or to relevant issues of credit, with all that is in the melting pot taken into account by it in coming to a judgment, whether or not one part is highlighted more than another, it will be "an" operative cause."

135. Mr White KC criticised the notion of the "*melting pot of evidence*" and referred to the greater stringency that should be applied to the Materiality Condition where it is said to undermine the trial judge's general assessment as to a witness's credibility – this was the "*high hurdle*" that Burton J referred to in *Chodiev v Stein* at [23] and [45]. However in this case the alleged dishonest evidence was not purely as to credit; it was at the very least highly relevant to the hacking counterclaim. And I would respectfully endorse Leech J's dicta in *Tinkler* at [26]:

> "there will be cases in which the new evidence is so fundamental to the credibility of the witness that it will be material even though it is not directly relevant to the substantive issues. For example, if a solicitor gives evidence that she is a solicitor and holds a valid practising certificate but conceals from the Court that she has been struck off for mortgage fraud, I would consider evidence of the striking off to be material. Likewise, where two witnesses conspire together to

> mislead the Court, I would consider evidence of the conspiracy to be material."

136. The deputy Judge seems to have agreed with that last sentence at [384] of the First Judgment, indicating that such new evidence would have had an operative effect:

> "If, however, I had found that, as alleged by Mr Azima, not only had RAKIA hacked Mr Azima's emails and used them as the evidential basis of this case, but also that its witnesses had conspired to put forward a fabricated case concerning RAKIA's lack of involvement in the hacking, there would have been strong grounds to strike the proceedings out as an abuse of process, as envisaged in Summers v Fairclough Homes Ltd."

137. Mr Plewman KC explained the particular respects in which the lack of credibility of RAKIA's witnesses as a result of the new evidence of their alleged fraud would have impacted on the deputy Judge's findings on RAKIA's claims.

138. In relation to the claims based on the Good Faith Representation:

(1) RAKIA's case was that Mr Buchanan had relied on Mr Azima's representation, and that the Ruler in turn had relied on Mr Buchanan's recommendation. Mr Buchanan had insisted in both his written and oral evidence that he had not believed that Mr Azima had engaged in any fraud or wrongdoing until the hacked data was released on the internet in August/September 2016, and that at the time of concluding the Settlement Agreement he was unaware of any evidence of wrongdoing. The deputy Judge found Mr Buchanan a generally reliable witness and that RAKIA had relied on the Good Faith Representation: [243.4] and [244].

(2) The deputy Judge also relied upon the Ruler's evidence that a purpose of the Settlement Agreement was "*to obtain assurance from [Mr Azima] that he had acted in good faith towards RAKIA and RAK more generally*": [245].

(3) Mr Plewman KC submitted that the new evidence shows that RAKIA did not believe the Good Faith Representation and in fact believed Mr Azima had been engaged in persistent wrongdoing and fraud. Furthermore, if Mr Buchanan's and the Ruler's credibility was wrongly assessed in the light of the new evidence, the deputy Judge could not have found that RAKIA had relied on Mr Azima's representation.

(4) Further Mr Azima had contended that RAKIA did not rely upon the Good Faith Representation but included the good faith clause in the Settlement Agreement to "*trap*" him, so as to generate leverage over him in the wider battle between RAK and Dr Massaad - Mr Buchanan had said to the Ruler that the good faith clause was "*the key clause in this agreement bearing in mind your wider objectives*": [311.3]. Although the deputy Judge found that there was some support for Mr Azima's submission, he ultimately rejected it for two reasons: he thought it was "*inherently unlikely*" that RAKIA would have paid Mr Azima $2.6 million to enter into the Settlement Agreement if it had been hacking his emails by that stage: [312]; and he relied upon the evidence of Mr

Buchanan and Mr Gerrard: [316]. The latter is covered by the credibility point. And the former could be undermined by the fresh evidence which Mr Plewman KC said makes plain that RAKIA was doing the very thing the deputy Judge held was "*inherently unlikely*": they were already engaging in hacking and had the hacked material but, nevertheless, entered into the Settlement Agreement.

139. In respect of the Investment Representation, Mr Plewman KC submitted as follows:

(1) RAKIA's case was that it believed it had an obligation to compensate Mr Azima and HeavyLift for contributions to the joint venture, but that it had no information about the extent of the contribution. It therefore submitted that its entry into the Settlement Agreement was induced by HeavyLift's financial statements, which suggested that HeavyLift had spent a total of approximately $2.6 million on its contribution to the Training Academy joint venture. The deputy Judge accepted that case on the basis of Mr Buchanan's evidence: [150] and an inference on the Ruler's position: [151]. That is therefore affected by the general credibility point.

(2) Mr Plewman KC submitted that the new evidence also shows that RAKIA could not have relied upon the Investment Representation, because it:

(a) Suggests RAKIA did not believe it had any obligation to compensate HeavyLift;

(b) Shows that RAKIA's own investigators told RAKIA that information was being withheld from RAKIA in its negotiations over HeavyLift's claim: see the "Project Beech – Update Report" dated 17 August 2015; and

(c) Demonstrates that RAKIA was already aware of at least some of the very documents which it submitted at trial showed the Investment Representation to be false.

140. Mr Plewman KC submitted that RAKIA's alleged fraud also undermined the rejection of Mr Azima's and Mr Adams' evidence in relation to the misrepresentation claims. He said that the new evidence shows that Mr Azima and Mr Adams were giving accurate evidence about critical contested issues.

141. As to the unlawful conspiracy claim, Mr Plewman KC said that:

(1) The foundation of the claim was RAKIA's allegation that Mr Azima did not introduce the potential buyers of the Hotel to RAKIA Georgia. If he did introduce them, the payment of a commission would be both logical and commercially sound.

(2) Mr Azima's evidence was that the Ruler knew and approved of the payment of commission and RAKIA provided no documentary evidence as to how the transaction unfolded, claiming it had no documents.

(3) The deputy Judge ultimately concluded that Mr Azima had not introduced the buyers on the basis of the Adams Memorandum which had been prepared

more than four years after the events in question: [176]. He rejected Mr Adams' and Mr Azima's evidence that the reference to being introduced to the buyers during the negotiations was a mistake: [176]-[177] and (by implication) accepted the Ruler's evidence that he had not approved the commission: [181]. In consequence he concluded that the referral agreement was a sham: [181.3] and [181.6]; which in turn was a material basis for the further finding that a payment by Mr Azima to Dr Massaad was a bribe (an inference drawn from the absence of any entitlement by Mr Azima to payment): [186].

(4) The general credibility argument applies and means that no reliance could be placed on the Ruler's denial that he knew and approved of the payment and the deputy Judge would have been bound to accept Mr Azima's case.

142. On the basis of the above, it is difficult to see how it could be argued that Mr Azima has no real prospect of satisfying the Materiality Condition, assuming that he can prove the pervasive fraud on the Court that he alleges. It would be open to the Additional Defendants to challenge the materiality of the new evidence at trial, but at this stage they would have to show that his case is fanciful and could not succeed.

143. Mr White KC attempted to do so by reference in particular to the assumptions in Mr Azima's favour made by the Court of Appeal in [40] of the CA Judgment. He said that Mr Azima must show that the new evidence goes well beyond the assumptions that the Court of Appeal made otherwise Mr Azima cannot submit that it would have impacted the conclusions in the CA Judgment.

144. Mr White KC referred to the way Mr Azima proposed pleading the fresh evidence in the draft RRRACC, in particular Schedule B, and framed his submissions around five categories of allegedly fraudulent evidence which Mr Azima relies upon to justify setting aside the First Judgment and the CA Judgment. Those categories were as follows:

(1) evidence that the witness lacked knowledge of the hacking of, and/or illegal access to, Mr Azima's data;

(2) evidence that the witness lacked knowledge of wrongdoing by Mr Azima prior to September 2016;

(3) evidence as to RAKIA's objectives in entering into the Settlement Agreement with Mr Azima/the denial that the Settlement Agreement was a "*trap*";

(4) evidence denying that investigations were conducted into Mr Azima, and/or that Mr Azima was considered one of Dr Massaad's "*associates*", prior to September 2016; and

(5) evidence as to RAKIA's lack of knowledge, and/or RAKIA's concealment of evidence, that Mr Azima had introduced the purchasers of the Hotel.

145. Mr White KC's submission, as I understand it, was that categories (1), (2) and (4) are all implicitly covered by the assumptions in [40] of the CA Judgment and therefore were taken into account by the Court of Appeal in concluding that they could not affect RAKIA's judgment against Mr Azima. As to category (3), Mr White KC said

that there was simply no evidence in the new material that this was RAKIA's objective. And category (5) could not impact the First Judgment or the CA Judgment because the main reason for the decision on the conspiracy claim was that a "*bribe*" was paid by Mr Azima to Dr Massaad.

146. I repeat what I said in [123] above as to whether the assumptions made by the Court of Appeal really do capture the full extent of Mr Azima's allegations of "*pervasive dishonesty"* in respect of RAKIA's evidence at the original trial. Mr Azima makes direct allegations about Mr Buchanan's, Mr Gerrard's and the Ruler's participation in that dishonesty and conspiracy to deceive the Court and the effect on their credibility generally. The Court of Appeal assumed only that "*at least some of RAKIA's witnesses gave dishonest evidence*" and, at [61], perhaps indicated that this was limited to Mr Page and Mr Halabi and only to "*lies*" given on the collateral issue of hacking, not on RAKIA's substantive claims. I cannot be sure that the Court of Appeal was assuming that there was "*pervasive dishonesty*" amongst all of RAKIA's witnesses, including those whose evidence was relied on by the deputy Judge in coming to his decision on RAKIA's claims against Mr Azima.

147. Accordingly I do not think it is right to frame considerations of the Materiality Condition around the assumptions made by the Court of Appeal. I have to decide whether Mr Azima has a real prospect of showing that the alleged fraud and conspiracy between RAKIA's main witnesses to mislead the Court is material. In my view he has plainly crossed that low threshold.

CONCLUSION

148. For the reasons set out above, I reject the Additional Defendants' arguments on jurisdiction and abuse of process and consider that Mr Azima has a real prospect of succeeding in his proposed new additional counterclaim to set aside the First Judgment, the CA Judgment and their respective Orders on the ground that they have been procured by fraud. Accordingly I grant permission to Mr Azima under CPR 20.4(2)(b) to bring the additional counterclaim against RAKIA.

149. As noted above, it was agreed that Mr Azima's application under CPR 17.1(2)(b) to make amendments to his existing counterclaim would be held over to be dealt with after delivery of this judgment. If those amendments cannot be agreed a further hearing will have to be arranged. Similarly there are other consequential matters, such as directions as to the timing of disclosure and other events, as well as costs which will have to be dealt with at some point and I leave it to the parties to arrange a hearing should that be necessary.