



Neutral Citation Number: [2023] EWHC 2165 (KB)

Case No: KB-2023-001231

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

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

Date: 30/08/2023

Before:

MR JUSTICE MICHAEL GREEN

Between:

(1) GELA MIKADZE
(2) KHATER MASSAAD

Claimants

- and -

(1) DECHERT LLP
(2) JAMES BUCHANAN
(3) NICHOLAS DEL ROSSO
(4) VITAL MANAGEMENT SERVICES INC.
(a company incorporated in North Carolina)

Defendants

ALASTAIR TOMSON (instructed by **Stokoe Partnership Solicitors**) for the **Claimants**
ADRIAN WATERMAN KC, AIDAN WILLS and ZOE McCALLUM (instructed by
Rosenblatt) for the **Third and Fourth Defendants**

Hearing date: 31 July 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 30 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green:

Introduction

1. These are proceedings that have recently been issued in the King’s Bench Division but which I have been authorised to hear. They form part of a series of claims concerned with the alleged hacking of data by or on behalf of Ras Al Khaimah (“**RAK**”), an emirate of the United Arab Emirates, and I am the assigned judge to one of those claims in the Chancery Division. This application for permission to serve out has been heard by me in the course of considering a number of issues arising out of the mysterious receipt by the Claimants’ solicitors, “**Stokoe Partnership**”, of three “**Devices**”, including a grey Huawei laptop (the “**laptop**”) which was the property of the Third and Fourth Defendants (together the “**Del Rosso Parties**”).
2. By my earlier ruling on 31 July 2023, the laptop was ordered to be delivered up to the Del Rosso Parties’ solicitors on certain undertakings to make available the information on it pursuant to orders of the Court for disclosure. That Order was made in proceedings brought by the Del Rosso Parties against Stokoe Partnership issued on 30 June 2023 with claim no. KB-2023-002877. Those proceedings were issued as a result of my indication, given at a directions hearing on 23 June 2023, that the Del Rosso Parties needed to issue their own claim rather than relying on their application for delivery up in proceedings to which they were not parties.
3. At the same directions hearing, I directed that this service out application be heard by me and it was eventually heard late on 31 July 2023. This is my judgment on that application.
4. Despite having launched their own proceedings and also agreeing to accept service out of the jurisdiction of any application under CPR 31.17 for disclosure of information on the laptop, the Del Rosso Parties, who are based in the United States, have refused to accept service of these proceedings. So the Claimants, Mr Gela Mikadze, a Georgian national and currently Member of Parliament in Georgia and Dr Khater Massaad, a Swiss National and former Chief Executive Officer of various RAK entities including the RAK Investment Authority (“**RAKIA**”), have brought this application to serve the Del Rosso Parties out of the jurisdiction.
5. Before the laptop and the other two Devices, which were portable hard drives, were brought before the Court by Stokoe Partnership on 13 January 2023, there were the following related proceedings on foot, all of which made allegations, amongst others, as to the unlawful hacking campaign of RAK against the respective Claimants:
 - (1) The “**Azima Proceedings**” – these are the proceedings to which I am assigned. Following the remission by the Court of Appeal for retrial of Mr Azima’s hacking counterclaim, the proceedings are against RAKIA (although it is not participating and default judgment has recently been entered against it) and Mr Neil Gerrard, Dechert LLP (“**Dechert**”) and Mr James Buchanan, all of whom are actively defending the claim and there is to be an eight to ten week trial in May 2024.
 - (2) The “**Al Sadeq Proceedings**” – these proceedings are brought by Mr Karam Al Sadeq, who is currently imprisoned in RAK, but who complains that he has been wrongfully imprisoned and convicted in a political trial. Mr Al Sadeq was the

former General Counsel at RAKIA and he is suing Dechert and three former partners of Dechert - Mr Gerrard, Mr David Hughes and Ms Caroline Black - accusing them of committing serious wrongs against him in the course of their investigation into him on behalf of RAK. The allegations include involvement in his detention and interrogation without charge and being held in conditions amounting to torture and inhumane and degrading treatment and being forced to sign false confessions. Needless to say, the allegations against practising solicitors at the time are of the utmost seriousness.

- (3) The “**Quzmar Proceedings**” – Mr Jihad Quzmar has also been imprisoned in RAK since 2014. He was a lawyer working for the Government of RAK as a legal advisor to the Ruler, Sheikh Saud Bin Saqr Al-Qasimi and he served as a judge and member of the Supreme Judicial Council of RAK. He too sues Dechert and Mr Gerrard and makes similar allegations of serious wrongdoing against him including his forcible abduction from his home and unlawful detention in conditions amounting to torture and inhuman and degrading treatment.
 - (4) The “**Stokoe Partnership Proceedings**” – Stokoe Partnership are the solicitors for all the Claimants, save Mr Azima, who are suing Dechert and/or Mr Gerrard, Mr Hughes and Ms Black and/or Mr Buchanan and/or the Del Rosso Parties. They have brought their own proceedings, originally against six Defendants but now against only two: Dechert and Mr Gerrard. The claim is for breach of confidence, unlawful means conspiracy and misuse of private information by allegedly instigating or instructing others, including the Del Rosso Parties, to hack into Stokoe Partnership’s confidential information concerning their clients in the other proceedings, and obtain their confidential banking information.
 - (5) The “**Mikadze Proceedings**” – in August 2022, Mr Mikadze issued proceedings, together with two English LLPs that he owns, against Dechert, Mr Gerrard, Mr Hughes and Mr Buchanan (the proceedings were only served in December 2022). The claims are concerned with alleged wrongful acts, including hacking of his personal data, that were orchestrated by the Defendants on behalf of RAK.
6. Once the Devices came to light and following a hearing before Murray J on 13 January 2023, a number of claims or applications were made in relation to the Devices and/or the information allegedly contained on them. Applications were made by Mr Azima and a Mr Cameron Findlay in the Stokoe Partnership Proceedings for disclosure of information on the laptop. And the Del Rosso Parties applied pursuant to the liberty to apply in Murray J’s order of 13 January 2023 for delivery up of the laptop and any copies of the information on it.
 7. The new claims that have been issued in relation to the laptop and Devices are:
 - (1) These proceedings – on 10 May 2023, the Claimants issued this claim against Mr Buchanan, Dechert and the Del Rosso Parties. The relief they seek is focused on the information that they suspect is contained on the Devices which they say is their confidential information that is on the Devices as a result of an unlawful hacking campaign in which the Defendants were involved. One of the hard drives contained backups of devices used by Mr Buchanan and this has now been delivered up to his solicitors on certain undertakings. The other hard drive is PIN locked and no one has been able to gain access to it. It is believed to contain

documents provided to Mr Del Rosso by Dechert in the course of his instruction by them.

- (2) The “**Buchanan Proceedings**” – on 31 March 2023 Mr Buchanan issued a CPR Part 8 claim against Stokoe Partnership for delivery up of his hard drive. The proceedings were started because Stokoe Partnership said that Mr Buchanan had used an inappropriate procedure and he needed to start his own proceedings.
- (3) The “**Del Rosso Proceedings**” – as indicated above, the Del Rosso Parties began their proceedings against Stokoe Partnership on 30 June 2023, following my indication at the directions hearing on 23 June 2023. The proceedings have effectively been resolved by my order made on 31 July 2023 requiring delivery up of the laptop on the undertakings of Rosenblatt, the Del Rosso Parties’ solicitors, in relation to the information contained thereon.

8. So the situation that currently exists in relation to the Devices is as follows:

- (1) The laptop has been delivered up to the Del Rosso Parties’ solicitors and anyone who wishes to make an application under CPR 31.17 in respect of information stored on the laptop is able to do so against the Del Rosso Parties and, if an order is made, Rosenblatt have undertaken to provide the disclosure so ordered.
- (2) Mr Buchanan’s hard drive has been delivered up to his solicitors, Kingsley Napley, on similar undertakings as to disclosure. Additionally Mr Buchanan is a party to the Azima Proceedings, as well as the Mikadze and these proceedings, and so will be under ordinary standard disclosure obligations in relation to those proceedings which will necessarily cover relevant documents on the hard drive.
- (3) The Del Rosso Parties/Dechert hard drive remains inaccessible because the PIN is unknown and there is a fear that all information could be deleted if too many attempts with the wrong PIN are made. The parties remain hopeful that they will eventually find a way of accessing the hard drive.

These Proceedings

9. With that context, it is important to look at what these proceedings are still concerned with. They were issued at a time when the Devices were all in the possession of Stokoe Partnership but subject to various claims and applications for delivery up. The Claimants wanted to ensure that, if their confidential, privileged and/or private information was on the Devices, it would be protected. They issued an application at the same time for an interim injunction to restrain the Defendants from using or disclosing any of the data, documents or information on the Devices without the consent of both Claimants. In the end, and because of the way the hearings before me progressed, that application was not pursued.
10. Mr Alastair Tomson, appearing on behalf of the Claimants, submitted that the claim is concerned with the Devices and it was designed in part to prevent delivery up. However it also deals with the consequences of delivery up, if that were to be ordered, as it was. Mr Tomson emphasised that it was not the physical laptop that he was interested in. Rather it is the information contained on the laptop that is believed to be

the Claimants' confidential, privileged and/or private information that the claim deals with.

11. The Particulars of Claim sets out the basis of the claims against all the Defendants. This is focused on the alleged hacking and other unlawful evidence gathering methods with which the Defendants were engaged on behalf of RAK. The Claimants refer to the RAK Projects Reports which they say contained their hacked material and that they were prepared on the instructions of, with input from and/or were circulated to each of the Defendants. In paragraph 33 of the Particulars of Claim, the Claimants make specific allegations as to the Del Rosso Parties' involvement in the hacking campaign, including: payments that were made to a hacking firm, CyberRoot; false evidence given by Mr Del Rosso at the first trial in the Azima Proceedings; and express reference to information provided by Vital Management Services Inc in a Project Beech report concerning Dr Massaad's bank accounts.
12. The Particulars of Claim then refers to the Devices and the likelihood that they contain the Claimants' confidential, privileged and/or private information, documents and personal data, which is collectively termed "**Relevant Property**". The relief sought, as pleaded in paragraphs 39 to 48, is predicated on the allegation that the Claimants' Relevant Property is or is likely to be on the Devices. Paragraph 40 seeks a declaration to such effect. Paragraph 41 seeks an order for a forensic examination of the Devices "*to enable the identification, disaggregation, protection and return of Relevant Property and the removal of the Claimants' personal data from the Devices.*"
13. The substantive claims are for breach of confidence, misuse of private information and unlawful processing of personal data under the GDPR and/or Data Protection Act 2018. Importantly this is related to the Relevant Property on the Devices, not the Devices themselves. The Claimants do allege that the delivery up of the Devices may be a further breach or unlawful act but Mr Tomson accepted that that could not be so if such delivery up was pursuant to a Court Order. The Claimants seek an injunction to prevent any more breaches of confidence or misuse of Relevant Property.
14. There is no present claim to damages. Mr Tomson accepted that I must decide the service out issue on the basis that no such claim presently exists. Indeed, in paragraph 48 of the Particulars of Claim the Claimants expressly reserve their rights to pursue claims for damages in respect of the hacking campaign in other proceedings, and it specifically refers to the Mikadze Proceedings.
15. Mr Adrian Waterman KC, leading Mr Aidan Wills and Ms Zoe McCallum on behalf of the Del Rosso Parties, submitted that the Claimants have not satisfied the serious issue to be tried test, particularly where the Devices have already been delivered up. I will deal with this below but say at this stage that it is a bold submission to make.

Legal principles of service out

16. There was no real dispute on the legal principles to be applied to service out applications, which have become well-established following the Privy Council's decision in *Altimo Holdings and Investments Limited v Kyrgyz Mobile Telephones Limited* [2011] UKPC 7; [2012] 1 WLR 1804. The principles were recently

summarised in *Abu Dhabi Commercial Bank PJSC v Shetty & Ors* [2022] EWHC 529 (Comm), per HHJ Pelling KC sitting as Deputy High Court Judge:

“14. ... In summary if the claimant is to obtain permission to serve proceedings on a defendant out of the jurisdiction, it must establish:

i) As against each foreign defendant concerned, that there is a serious issue to be tried on the merits applying the summary judgment test - that is whether there is a real as opposed to a fanciful prospect of success;

ii) A good arguable case including a plausible evidential case that the claim against each foreign defendant passes through one of the gateways identified in paragraph 3.1 of Practice Direction 6B; and

iii) In all the circumstances the *forum conveniens* for the determination of the litigation is clearly and distinctly England and that therefore the court ought to exercise its discretion so as to permit service out of the jurisdiction. At this stage of the enquiry, “... *the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice ...*”

17. It is common ground that England is the *forum conveniens* for the trial of this claim and that therefore the third limb of the test is satisfied. The Del Rosso Parties challenge the first two limbs and say there is no serious issue to be tried on the merits of the claim and there is not a good arguable case for any of the Gateways in PD 6B para. 3.1 that the Claimants rely on in their application.
18. On serious issue to be tried, which is accepted to be the same test as on summary judgment, namely whether there is more than a fanciful prospect of success, Mr Waterman KC referred to the Supreme Court’s decision in *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 1 WLR 1294, and Lord Hamblen’s statement that the Court’s “*analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success*”. While a defendant may adduce his own evidence on this question to answer the Particulars of Claim or any other evidence relied upon by the claimant, Lord Hamblen continued in [22] to say: “*Save in cases where allegations of fact are demonstrably untrue or unsupported, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.*”
19. The good arguable case requirement for the Gateways is clearly a higher test than serious issue. Lord Sumption clarified in *Brownlie v Four Seasons* [2017] UKSC 80; [2018] 1 WLR 192 at [7] what is required:

“...What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material

available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it”

This was further explained by the Court of Appeal in *Kaefer Aisalamentos v AMS Drilling Mexico* [2019] EWCA Civ 10; [2019] 1 WLR 3514 at [73] to [80].

Submission to the jurisdiction

20. Mr Tomson argued that, by analogy with the cases that establish that a party who issues a claim in this jurisdiction is taken to submit to the jurisdiction in respect of any counterclaim, including a counterclaim that the Court may not otherwise have exercised jurisdiction over, the Del Rosso Parties have effectively submitted to the jurisdiction by issuing the Del Rosso Proceedings. As it happens, the Del Rosso Proceedings were only issued after the application for service out was made. And the Del Rosso Parties accepted during the course of the hearing that they would submit to the jurisdiction in respect of any applications against them in respect of disclosure of information from the laptop. As a result, Mr Tomson said that the Del Rosso Parties have actually submitted to the jurisdiction and the Court should simply declare that to be so. He relied on: *Dicey, Morris & Collins on The Conflict of Laws* (16th Ed) at 11-064; *Union Bank of the Middle East Ltd v Clapham* (Court of Appeal, 1 January 1981) per Lord Denning MR; and *Derby & Co Ltd v Larsson* [1976] 1 WLR 202 (HL).
21. Mr Waterman KC agreed that where a party brings a claim within the jurisdiction they are likely to be taken to have submitted to the jurisdiction for the purposes of counterclaims and related claims. He said that, as *Dicey, Morris & Collins* makes clear, this is so that there can be justice as between the parties. The Court still retains a discretion as to whether to order service out and it should not do so, even where a party has already submitted to the jurisdiction in other proceedings, where there is no serious issue to be tried because it then avoids the need for a later strike out or summary judgment application. In other words, Mr Waterman KC was saying that the Claimants in any event need to at least satisfy the serious issue to be tried test. That makes sense to me.
22. Mr Waterman KC did also submit that the Del Rosso Parties were effectively forced to submit to the jurisdiction by issuing proceedings against Stokoe Partnership because, as he put it, they had unlawfully retained the laptop and taken copies of the information contained on it. He also said that the subject matter of the two claims is not the same, as the Del Rosso Proceedings are concerned with the laptop since July 2022 whereas these proceedings are concerned with the alleged hacking campaign between 2015 and 2017. However, as Mr Tomson pointed out, both proceedings are concerned with the information that is contained on the laptop. In my view, both proceedings are clearly related in terms of subject matter, even though they have different parties. These proceedings would not have been started had the laptop not come into the possession of Stokoe Partnership, the Claimants’ solicitors.
23. As to whether the Del Rosso Parties have actually submitted to the jurisdiction, I prefer to deal with the application as it is before me, namely one for permission to serve out. But if I am satisfied on both disputed elements, it seems to me that my discretion will then inevitably be exercised in favour of the Claimants because that

would achieve justice as between the parties in the light of the Del Rosso Parties' earlier and proposed submissions to the jurisdiction in relation to their own claim and any future applications for third party disclosure of information on the laptop.

Serious Issue to be tried

24. Mr Tomson submitted that the Particulars of Claim plead a serious issue to be tried and any attempt to argue otherwise would be "*risible*". The core allegation made against all the Defendants is that they were involved in unlawfully obtaining confidential, privileged and/or private information belonging to the Claimants. The laptop is therefore likely to contain the fruits of that unlawful hacking campaign.
25. Mr Tomson did also seek to rely on further evidence that has come to light as to the Del Rosso Parties' alleged involvement in the hacking campaign. This was derived from Dechert's disclosure in the Azima Proceedings which was exhibited to the 25th witness statement of Mr Azima's solicitor, Mr Dominic Holden, filed in the Azima Proceedings. This witness statement was served shortly before the hearing on 21 July 2023 and was the subject of much objection by Mr Waterman KC. It led to the adjournment of some of the applications to the 31 July 2023 hearing and Mr Del Rosso attempted to answer some of the allegations contained therein in his further witness statement. Nevertheless Mr Waterman KC maintained his objection to any reliance being placed on Mr Holden's 25th witness statement, in particular by other parties in other proceedings. He said Mr Tomson should not be entitled to rely on that witness statement in support of his application to serve out.
26. I agree with Mr Waterman KC that it would be unfair to his clients if reliance could be placed on Mr Holden's 25th witness statement and the exhibits thereto on this application. I will not therefore refer to any such material. The Claimants can only rely on their Particulars of Claim and the evidence in support, namely the witness statement of their solicitor, Mr Haralambos Tsiattalou dated 10 May 2023. The Del Rosso Parties filed a witness statement in answer dated 7 July 2023 from their solicitor, Mr Ian Bean. (I should add that the Del Rosso Parties took a technical point on the Statement of Truth attached to the original Particulars of Claim; this has now been amended to the correct form and the Particulars of Claim can properly stand as evidence in support of the application.)
27. The Del Rosso Parties' main complaint about the Particulars of Claim is that the facts pleaded are entirely inferential and are nothing more than speculation and conjecture. Mr Waterman KC pointed to the fact that there is only one reference in all the Project Reports to the Del Rosso Parties and that must be wholly insufficient to be able to infer intimate involvement with the hacking campaign.
28. I do not think that is a fair criticism of the Claimants' case. The claims are based on a clandestine hacking campaign which constitutes an unlawful conspiracy where the information in relation to the extent of individual involvement is, by its very nature, very difficult to be precise on and further material keeps emerging as the various proceedings progress. It is not wild speculation or conjecture as to the Del Rosso Parties' involvement; the Claimants plead legitimate inferences that can be made from the facts that are known and the surrounding circumstances.

29. The Del Rosso Parties also suggest that the Claimants appear to have abandoned reliance on past wrongs and that these pleas should be struck out. I do not understand why they think this has been abandoned and Mr Tomson confirmed that the Claimants continue to rely on past events to support the inference that the laptop and the other Devices contain or are likely to contain their confidential, privileged and/or private information. Indeed the evidence as to the conduct of the hacking campaign is integral to the Particulars of Claim as a whole.
30. Mr Waterman KC submitted that the relief sought is confused in that if the laptop is delivered up to the Del Rosso Parties' solicitors, as it has been, it cannot be unlawful for them to hold the laptop which includes the information on it. However, I do not think it is confused and the Claimants are entitled to seek to protect their information and data that is, they say, unlawfully held on the laptop.
31. Some further points were made about the adequacy of the pleading, including whether it complied with PD 53B and whether the Claimants are relying on information being "property" as a matter of law. Mr Tomson has confirmed that they do not rely on the information as "property" as such for the purposes of their causes of action. Furthermore the claims under the GDPR and Data Protection Act 1998 are properly limited to processing of data in the UK.
32. In short, I do not accept that the criticisms made of the Particulars of Claim and/or the formulation of the causes of action have any real substance. They certainly do not get anywhere near establishing that the Claimants have only a fanciful prospect of succeeding on the claim. Accordingly I consider that the Claimants have shown that there is a serious issue to be tried.

The Gateways

33. Pursuant to paragraph 3.1 of PD 6B, the Claimants rely on Gateways 3, 9, 11 and 21. They have to show, as stated above, that they have a good arguable case with a plausible evidential basis for the application of at least one of the jurisdictional Gateways set out in paragraph 3.1. The principal one that Mr Tomson focused on was Gateway 3.

Gateway 3

34. Gateway 3 is in the following terms:

“(3) A claim is made against a person (“the defendant”) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and

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- (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
 - (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.”

35. As Mr Tomson submitted, the relevant question to be considered in relation to this Gateway is whether, if the Del Rosso Parties had been in England & Wales, it would have been appropriate to bring the claim against them as part of the claim against the

remaining Defendants, which in turn depends on whether the claims against the Defendants are closely bound up, share a common thread, or depend on one investigation: See *The CPR White Book commentary* at 6HJ.8; *Carvill America Inc & Anor v Camperdown UK Ltd* [2005] EWCA Civ 645; [2005] 1 CLC 845 at [48] to [49]; and *Altimo Holdings and Investments Limited v Kyrgyz Mobile Telephones Limited* [2011] UKPC 7; [2012] 1 WLR 1804 at [87].

36. All the claims asserted in the Particulars of Claim arise out of the investigation into, inter alios, the Claimants and which involved participation in the alleged hacking campaign. The Claimants plead, and there is evidence to support this, that all the Defendants were involved in or in some way mixed up with the investigation and the hacking for substantial financial rewards.
37. The Del Rosso Parties have suggested that because there are different Devices in respect of Mr Buchanan, Dechert and themselves, there is no sufficient connection between the claims against each of the Defendants. I do not think that the fact that different Devices were applicable to different Defendants undermines the Claimants' core case which is that all of the claims they assert arise out of the same hacking campaign of the Claimants' confidential, privileged and/or private information, in respect of which each of the Defendants played significant and interconnected roles. The Devices are merely potential repositories of the results of that campaign and investigation.
38. Mr Waterman KC submitted that reliance on Gateway 3 is fatally undermined by the stays that have now been agreed in these proceedings against Dechert and Mr Buchanan. Mr Tomson responded to this by saying that the only reason there is a stay on the claim against Dechert is because the PIN on the relevant hard drive is not known and access cannot be obtained to it at the moment. It is however hoped that access can be obtained, either by finding the PIN (possibly on the laptop) or in some other way. Even if access is not obtained, Mr Tomson submitted that it is very likely that at some point the stay will be lifted as it will be necessary to examine the documentation provided by Dechert to the Del Rosso Parties irrespective of whether such documentation is actually found on the hard drive. Essentially Mr Tomson was saying that it was only a pragmatic short term stay that was agreed to await to see if the laptop could help in providing the PIN for the hard drive. The proceedings will in some form or another continue against Dechert.
39. As against Mr Buchanan, it is right to say that the claim has been stayed but there is liberty to restore the claim and the Claimants may well want to do so once they have a better understanding of what is on the hard drive now with Mr Buchanan's solicitors, whether as a result of disclosure in other proceedings or through a forensic examination ordered in these proceedings. In other words, the Claimants are keeping their options open in relation to both Mr Buchanan and Dechert.
40. In my view, the Claimants have established a good arguable case that they satisfy the requirements of Gateway 3. Given the nature of the claim which is based on the same underlying allegations of conducting an unlawful hacking and investigation of the Claimants' confidential, privileged and/or private information, the Del Rosso Parties would have been proper parties to these proceedings had they been within the jurisdiction. The fact that proceedings are currently stayed against the other Defendants does not detract from the Gateway being passed through, particularly

where there is every intention of the proceedings being restored against those other Defendants.

41. Accordingly I find that the Claimants are entitled to rely on Gateway 3.

The other Gateways

42. In the light of my finding on Gateway 3, I do not need to consider the other Gateways relied upon by the Claimants. I should say that I was not convinced that the Claimants would have succeeded in establishing a good arguable case on the other Gateways for the following short reasons:

- (1) Gateways 9 and 21 (tort claims and breach of confidence or misuse of private information claims) really in this case depend on damages having been sustained, or being in the future sustained, within the jurisdiction. The Del Rosso Parties say that there is no evidence that the Claimants, who are both outside the jurisdiction, have sustained damage within the jurisdiction. Furthermore now that the laptop has been delivered up pursuant to a court order and is in the hands of the Del Rosso Parties' solicitors, any future tort or breach of confidence could only be committed by the solicitors, not the Del Rosso Parties. Mr Tomson's answers to these points were that the Gateways apply to future breaches and this could still happen. In my view that is insufficient to establish a good arguable case.
- (2) As to Gateway 11 (property within the jurisdiction), there was a debate between the parties as to whether confidential information can be considered to be "property" for this purpose. It was accepted that information is not property as a matter of general law. It seems to me that no clear picture emerges from the authorities, save that Tugendhat J has said that this is a "*question of law of some difficulty*" – *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB); [2014] 1 WLR 4155 at [140] – and more recently Arnold LJ rejected a submission that confidential information is intangible property – *Celgard LLC v Shenzhen Senior Technology Material Co Ltd* [2020] EWCA Civ 1293; [2021] FSR 1, at [58]. Accordingly it would have taken some persuading for me to accept that the Claimants had a good arguable case on Gateway 11.

Conclusion

43. In any event, I have found that there is a serious issue to be tried and that the claim comes within Gateway 3. As I said above, there is no dispute that England is the *forum conveniens* for this action. In the light of the Del Rosso Parties' submissions to this jurisdiction in relation to the Del Rosso Proceedings and their willingness to submit for the purpose of applications for third party disclosure under CPR 31.17, I will exercise my discretion in favour of making an order in the Claimants' favour for service out of the jurisdiction on the Del Rosso Parties.
44. I would hope that an order can be agreed between the parties reflecting my judgment set out above. If there are any consequential disputes, then I suggest that they be dealt with on paper in due course.