Neutral Citation Number: [2023] EWHC 3273 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2023

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Claim No. QB-2020-002492

Between :

STOKOE PARTNERSHIP SOLICITORS	**Claimant / Applicant**
- and -	
~~(1) PATRICK GRAYSON~~ **~~(2) GRAYSON + CO LIMITED~~** **~~(3) STUART ROBERT PAGE~~** **~~(4) PAGE CORPORATE INVESTIGATIONS LIMITED~~** **(5) DECHERT LLP** **(6) DAVID NEIL GERRARD**	**Defendants**
(1) FRANZ WILD **(2) THE BUREAU OF INVESTIGATIVE JOURNALISM** **(3) TIMES MEDIA LIMITED**	**Respondents**

Claim No. QB-2020-000322

Between :

KARAM SALAH AL DIN AWNI AL SADEQ	**Claimant**
- and -	
(1) DECHERT LLP **(2) NEIL GERRARD** **(3) DAVID HUGHES** **(4) CAROLINE BLACK**	**Defendants**
(1) FRANZ WILD **(2) THE BUREAU OF INVESTIGATIVE JOURNALISM** **(3) TIMES MEDIA LIMITED**	**Third Party Respondents**

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- -

Sara Mansoori KC and **Guy Olliff-Cooper** (instructed by **Stokoe Partnership Solicitors**) for the **Claimants**
Ben Gallop (instructed by **RPC**) for the **Third Party Respondents**
The Defendants did not attend and were not represented.

Hearing date: 8 December 2023
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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 21 December 2023 at 10:30 am.

Mr Justice Murray:

1. I have before me two applications dated 21 December 2022, each for a non-party disclosure order against the third party respondents, Mr Franz Wild, the Bureau of Investigative Journalism, and Times Media Limited (formerly known as Times Newspapers Limited). Times Media Limited is the owner of the Sunday Times.

2. One application is made by Stokoe Partnership Solicitors ("SPS") in the context of its claim against Dechert LLP and Mr Neil Gerrard (Claim No. QB-2020-002492) ("the SPS Proceedings"). The other application is made by Mr Karam Al Sadeq in the context of his claim against Dechert LLP, Mr Gerrard, Mr David Hughes, and Ms Caroline Black (Claim No. QB-2020-000322) ("the Al Sadeq Proceedings"). These sets of proceedings are being case-managed together. The applications are in identical terms and seek a single order in favour of each applicant. For convenience of reference, therefore, I will refer to them collectively in this judgment as "the December Application".

Terms of the order sought under the December Application

3. The applicants seek an order under CPR r 31.17 that the respondents disclose to, and permit the applicants to inspect, documents within their possession, custody, or power that led the first respondent to conclude that:

    i) a private investigator hired by Dechert LLP to assist with its investigation, undertaken for Ras Al Khaimah ("RAK"), of Dr Khater Massaad instructed Mr Aditya Jain to hack three of Dr Massaad's email accounts in April 2015;

    ii) Mr Jain successfully hacked all three email accounts;

    iii) in April 2016 the same private investigator commissioned Mr Jain "to hack Mr Adrian Flook" [sic], a public relations adviser to Dr Massaad; and

    iv) Bell Pottinger, a public relations firm advising RAK, subsequently came into the possession of a confidential business proposal that Mr Flook had sent to Dr Massaad by email.

4. The reference in the draft order to the first respondent being "led to conclude" refers to the contents of an email sent on 6 October 2022 by the first respondent to Dr Khater Massaad, another client of SPS, in which the first respondent sets out a number of propositions, including propositions that are summarised by (i) to (iv) at [3] above. In that email, the first respondent invited Dr Massaad to comment on those and certain other propositions, in connection with a story that the first respondent and colleagues were preparing. The background to and context for this is discussed further below.

5. The applicants also seek an additional or alternative order that any documents relating to any of the above propositions that are contained in a specified .zip file should be disclosed and offered for inspection to the applicants. The specified .zip file is one referred to in an article dated 26 October 2022 headed "Legal battle draws hackers-for-hire and private investigators out of the woodwork", which was posted on the Intelligence Online website (intelligenceonline.com) ("the Intelligence Online Article").

6. The other issue that I am asked to decide is which party should bear the costs of applications made by SPS and Mr Al Sadeq on 14 October 2022, under which the applicants applied for an order under CPR r 31.17 that the respondents disclose to, and permit the applicants to inspect, documents within their possession, custody, or power that led the first respondent to conclude that "six days after Stokoe Partnership filed its lawsuit, an Indian hacker was instructed to hack British barrister and High Court judge Philip Marshall KC who was poised to become a legal adviser to your lawyers Stokoe Partnership in the case". The source of the quoted language, which appears in quotation marks in the draft order submitted by the applicants, is discussed further below.

7. As in the case of the December Application, the applications of 14 October 2022 are made in identical terms, one in the SPS Proceedings and one in the Al Sadeq Proceedings, and they seek a single order in favour of the applicants. For convenience of reference, therefore, I will refer to them collectively in this judgment as "the October Application".

8. After correspondence, as further described below, the October Application was withdrawn by the applicants, who submit that, for reasons I will summarise in due course, the respondents behaved unreasonably in responding to the October Application and therefore, under CPR r 46.1(3), the court should decline to make a costs order in favour of the respondents.

Evidence

9. The Application is supported by the 12th/16th witness statement dated 21 December 2022 of Mr Haralambos Tsiattalou, the Founding Partner of the first applicant, which firm represents the second applicant in the Al Sadeq Proceedings. In response to the Application and Mr Tsiattalou's evidence, the respondents have provided the 2nd witness statement dated 6 July 2023 of Mr George Arbuthnott, Deputy Insight Editor at the Sunday Times. In response to Mr Arbuthnott's witness statement, the applicants have provided the 15th/20th witness statement dated 20 July 2023 of Mr Tsiattalou. Relevant documents are exhibited to each of these witness statements.

Background to the underlying proceedings

10. I briefly summarise the background to the underlying proceedings, drawing on the succinct summary in the applicants' skeleton argument. These proceedings arise out of a dispute between the ruler of RAK, Sheikh Saud bin Saqr al Qasimi (the "Ruler"), and his former confidant, Dr Massaad. The Ruler and Dr Massaad were founding shareholders of RAK Ceramics, a global ceramics brand. In 2005, the Ruler appointed Dr Massaad as the chief executive officer (CEO) of the newly formed Ras Al Khaimah Investment Authority ("RAKIA"). In 2008, Mr Al Sadeq was appointed as a legal adviser to RAKIA. In 2010, he was promoted to Group Legal Director. In 2011, Dr Massaad made Mr Al Sadeq his Deputy CEO.

11. In 2012, Dr Massaad's relationship with the Ruler began to sour. According to Mr Al Sadeq, this was due to the influence of the Ruler's son, Sheikh Mohammed. In June 2012, Dr Massaad resigned his position as CEO of RAKIA. When it became apparent that the role of CEO, which Mr Al Sadeq had hoped to inherit, was going to be significantly reduced in scope, Mr Al Sadeq also resigned.

12. Following his departure from RAKIA, Dr Massaad founded a new ceramics business. According to Mr Al Sadeq, these actions caused the Ruler to turn against Dr Massaad, as he viewed the new business as a competitor to RAK Ceramics. The Ruler's animus towards Dr Massaad and the new ceramics business was strengthened by the fact that one of the investors in it was the Ruler's brother, Sheikh Faisal, whom the Ruler viewed as a political rival.

13. In 2013, the Ruler commenced an investigation into Dr Massaad and those perceived to be associated with him, including Mr Al Sadeq and a US businessman named Farhad Azima (the "Investigation"). The Ruler instructed Dechert LLP to advise and assist him in relation to the Investigation. Mr Gerrard was then a partner at Dechert LLP and was the lead partner in relation to the Investigation.

14. The applicants' position is that, as part of the Investigation, Dechert LLP and Mr Gerrard instructed various private investigators, namely, Mr Stuart Page, Mr Amit Forlit, and Mr Nicholas Del Rosso, to obtain information about Dr Massaad, Mr Al Sadeq, and other people and entities associated with them, such as their legal advisers, which included SPS and counsel instructed by SPS. The applicants allege that the private investigators used unlawful hacking as one means of obtaining information and that this was done either on the instruction, or at any rate with the approval, of Dechert LLP and Mr Gerrard (the "Hacking Campaign").

15. It is the applicants' case that on 4 September 2014 Mr Al Sadeq was kidnapped from his home in Dubai by RAK State Security and taken to RAK. There he was kept in solitary confinement for around 560 days, first at the General Headquarters of State Security in RAK and subsequently in a camp run by the Ruler's private militia. All of this took place without due process. Mr Al Sadeq was denied access to legal representation. During this time, Mr Al Sadeq was kept in unsanitary and inhumane conditions whilst being interrogated by Mr Gerrard and other agents of the Ruler in an effort to force him to provide false confessions implicating Dr Massaad. Mr Al Sadeq was ultimately convicted in what he maintains were unfair and politically motivated criminal proceedings. His position is that he was wrongfully convicted and is being unlawfully held in prison in RAK.

16. In late 2019, Mr Al Sadeq instructed SPS to assist him with proceedings against Dechert LLP and Mr Gerrard and others for their involvement in the events set out above. These are the Al Sadeq Proceedings, which were issued on 28 January 2020. Mr Al Sadeq seeks damages from Dechert LLP, Mr Gerrard, and two other former partners of Dechert LLP for the harm caused to him by their involvement in his detention and treatment in RAK, leading to his unlawful conviction.

17. The applicants' case is that once SPS was instructed in relation to what became the Al Sadeq Proceedings, the Hacking Campaign was extended to SPS. Mr Tsiattalou has set out in his 3rd/6th witness statement dated 9th November 2020 his evidence concerning the attempts to obtain SPS's confidential information via unlawful hacking.

18. On 29 January 2021, Mr Al Sadeq amended his Particulars of Claim to rely upon the actions against SPS in the context of his claim (further amendments were made on 19 November 2021 and 20 May 2022).

19. After initially bringing the SPS Proceedings against various private investigators and associated entities, on 19 September 2021 SPS extended its claim in those proceedings to add Dechert LLP and Mr Gerrard as defendants.

20. For their part, Dechert LLP and Mr Gerrard deny any involvement in the Hacking Campaign or that they have ever sought to obtain confidential or privileged material from SPS or sought to engage others to do so, whether by engaging the private investigators named by SPS and Mr Al Sadeq as carrying out the unlawful hacking constituting the Hacking Campaign or in any other way.

Background to the December Application

21. On 6 October 2022, Dr Massaad received an email from the first respondent that reads as follows:

> "I am a reporter with the Bureau of Investigative Journalism in London. I am also sending this email on behalf of the Sunday Times newspaper, with which we are collaborating on an article we plan to publish.
>
> We are preparing an article looking into the use of email hacking, not least in connection with UK court cases. This is clearly a matter of great public interest - hacking is a criminal offence in many countries, including the UK.
>
> We are committed to being both accurate and fair in our reporting. We are sharing our findings with you below, so that you can review and respond to them for the article. We kindly request that you tell us in writing where you believe we may be mistaken or lack relevant context for the facts. Should your account differ from ours, we request that you provide documentary evidence to support what you say.
>
> We intend to report that:
>
> - You are the former head of Ras al Khaimah's Investment Fund who fled Ras al Khaimah after falling out with the country's ruler over a business matter.
>
> - Ras al Khaimah had hired the law firm Dechert to investigate you. Dechert brought in a private investigator to assist with the case.
>
> - We have evidence that the investigator instructed Aditya Jain, who runs a computer hacking gang in India, to hack three of your email accounts in April 2015. Jain successfully hacked all three.
>
> - Six months later you were convicted in absentia by a Ras al Khaimah court of corruption and fraud - a charge you vehemently deny.

- In April 2016 the same investigator commissioned Jain to hack Adrian Flook, who was working as your public relations adviser.

- Later Ras al Khaimah's PR company Bell Pottinger allegedly came into possession of a confidential business proposal Flook had sent to you over email.

Questions

- Were you aware you have been hacked?

- Do you recall receiving phishing email in April 2015?

- What is your reaction to the above points?

As I have said above, we are keen to reflect your comments appropriately. In order to include your comments in the article, we will need your response by 4pm Friday 7 October. Kindly respond by email, copying in the email addresses above.

Regards,

Franz Wild"

22. Dr Massaad is also a client of SPS and has given the applicants permission to view and make use of this email in these proceedings. As is clear from this email, Mr Adrian Flook is one of Dr Massaad's associates. The applicants inferred from this email that the respondents were in possession of documents supporting the existence of the alleged Hacking Campaign, of which they were victims because of their proximity to Dr Massaad.

23. On 10 October 2022, Dr Massaad responded to Mr Wild, making a number of corrections and asking him to provide any evidence that he may have that Dr Massaad or Mr Flook were hacked. Mr Wild said that he would revert as soon as possible.

24. On 26 October 2022, the Intelligence Online Article was published. The article referred to the "hack-for-hire ecosystem" of which Mr Gerrard was alleged to have been part. Mr Gerrard was alleged to have instructed "several providers" including Mr Del Rosso and Mr Forlit. The article reported that "several British journalists are working on a .zip file of content that was sent to their inbox". The first respondent's email of 6 October 2022 to Dr Massaad had referred to "evidence" that Dr Massaad had been hacked. Given the similarities between the later Sunday Times articles and the information said to be on the .zip file in the Intelligence Online Article, the applicants consider that it can be inferred that this evidence included the .zip file, and that the "British journalists" referred to in the Intelligence Online article included the first respondent and/or others at the second respondent and/or at the Sunday Times.

25. On 4 November 2022, in the absence of a response from the first respondent to his email of 10 October 2022, Dr Massaad sent the first respondent an email asking again for any

evidence to support the assertion that Dr Massaad and Mr Flook were hacked. He also referred to the .zip file mentioned in the Intelligence Online Article.

26. On the same day, on behalf of Dr Massaad, SPS wrote to the second and third respondents asking them to respond to Dr Massaad's request for assistance. SPS said that they respected the confidentiality of sources and that any documents provided could be redacted for the purposes of source protection.

27. On 5 November 2022, the Sunday Times published a number of articles regarding what they described as the "Global Hack-for-Hire Industry". The articles described the hacking and linked it to an India-based computer hacking gang, alleging that some of the hackers' clients were private investigators used by major law firms with bases in the City of London. The "mastermind" of this hacking gang was said to be "31-year-old Aditya Jain", who was alleged to have run a network of computer hackers for a number of years. Among the private investigators named as clients of the hackers was Mr Del Rosso. The Sunday Times article stated that journalists had seen a leaked database from one of the main "hack-for-hire" gangs and had secretly filmed some of the Indian hackers talking openly about their hacking activity.

28. The information in these articles appeared to the applicants to tally with the propositions set out in the first respondent's email of 6 October 2022 to Dr Massaad, leading to an inference that the respondents had access to Mr Jain's leaked database, which might also form part of the .zip file referred to in the Intelligence Online Article. The evidence referred to by the first respondent in his email, which it was reasonable to infer might include the filming by undercover reporters of the hackers discussing their work, was likely to reveal the identity of the private investigator who had instructed the hacking of Dr Massaad and Mr Flook and to reveal the names of others targeted by Mr Jain, including potentially SPS and Mr Al Sadeq.

29. Following the failure of any of the respondents to provide any documents further to the requests of 4 November 2022, the applicants issued the December Application. In the December Application, in addition to the documents referred to at [3] above, the applicants had requested any documents that led the first respondent to conclude that (i) RAK had hired Dechert LLP to investigate Dr Massaad and (ii) Dechert LLP had hired a private investigator to assist with the case, as set out in the first respondent's email of 6 October 2022 to Dr Massaad.

30. On 8 February 2023, RPC, solicitors for the respondents, responded to the December Application as follows:

    i) The conclusions that RAK had hired Dechert LLP to investigate Dr Massaad and that Dechert LLP had hired a private investigator to assist with the case were based on publicly available court documents filed in proceedings between RAKIA and Mr Azima;

    ii) the respondents could not disclose any of the other documents sought by the applicants, even in partial or redacted form, without jeopardising the respondents' journalistic sources; and

iii) the respondents were not involved in the preparation of the Intelligence Online Article and so did not know what the .zip file was and could not say what documents it contained.

31. On 24 March 2023, SPS responded to RPC confirming that the applicants did not require the respondents to provide copies of the publicly available documents referred to at [30(i)] above. In relation to the other documents sought (which I have described at [3] above), SPS asked that RPC identify the form of the documents so that SPS could understand why it was not possible to disclose the documents even in partial or redacted form without jeopardising a source. SPS also offered to pay reasonable costs of transcribing and redacting any documents in the form of audio or video footage.

32. On 22 June 2023, I gave directions in respect of the December Application.

33. On 6 July 2023, the respondents filed Mr Arbuthnott's 2nd witness statement dated 6 July 2023, in which he gave the following evidence:

i) the respondents did not hold material showing whether the instructions to Mr Jain to hack three accounts of Dr Massaad or to hack Mr Flook were connected to Dechert LLP or Mr Gerrard;

ii) to the extent that the respondents held the other material sought:

a) the material could not be provided without compromising the identity of a confidential source or sources and, for the same reason, he could not confirm or deny whether there was one or more sources;

b) the material could not be provided even in partial or redacted form without jeopardising a confidential source or sources; and

c) he could not further explain the foregoing conclusions meaningfully without reference to information about the material that would, itself, be likely to lead to the identification of the source or sources; and

iii) in relation to the additional or alternative order (referred to at [5] above) relating to the .zip file referred to in the Intelligence Online Article, neither he nor any of his colleagues at the Sunday Times or at the second respondent were involved in that article, and therefore none of them knew what the .zip file was or what it contained.

34. The applicants response to this evidence is set out in Mr Tsiattalou's 15th/20th witness statement dated 20 July 2023.

Law relevant to the December Application

35. There is no material dispute as to the law relevant to the determination of the December Application. The differences between the parties lie in matters of emphasis and in application of the relevant legal principles.

36. Section 34(2) of the Senior Courts Act 1981 gives the court power, in relation to an issue arising in a claim, to order a third party to proceedings to disclose documents in the third party's possession, custody, or power and to produce such documents to an

applicant or the applicant's legal advisers, such power to be exercised "in such circumstances as may be specified in the rules".

37. Further to this power, CPR r 31.17(3) provides that the court may make an order for disclosure of documents or classes of documents by a third party to proceedings where the following requirements are satisfied:

    i) the documents sought "are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings" (the "Relevance Requirement"); and

    ii) "disclosure is necessary in order to dispose fairly of the claim or to save costs" ("the Necessity Requirement").

38. The exercise of this power is subject to the following principles derived from case law:

    i) orders under CPR r 31.17 are the "exception rather than the rule", as disclosure will not be routinely ordered but rather only where the relevant test is met: *Frankson v Home Office* [2003] EWCA Civ 655, [2003] 1 WLR 1952 (CA) at [10];

    ii) the applicant does not have to show that a document sought satisfies the Relevance Requirement on the balance of probabilities but rather simply that it "may well" satisfy that requirement: *Three Rivers District Council v The Governor and Company of the Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210 (CA) at [29], [32], and [33];

    iii) where an applicant seeks a class of documents, every document falling within the class must satisfy the test under CPR 31.17(3), however a document may satisfy that test if it provides context for other more obviously relevant documents even if, in isolation, it might not satisfy the test: *American Home Products Corporation v Novartis Pharmaceuticals UK Ltd (No 2)* [2001] FSR 41 (CA) at [34]; *Three Rivers (No 4)* at [37]-[38];

    iv) the Necessity Requirement is "largely, but not wholly, to follow relevance", with the court required to consider whether the applicant has or can obtain "similar documentation or information from other sources": *Andrew v News Group Newspapers Ltd* [2011] EWHC 734 (Ch) at [73];

    v) in relation to the Necessity Requirement, it is important to bear in mind that:

        a) necessity is a flexible concept, the precise scope of which falls to be determined in light of the facts of the particular case: *Sarayiah v Royal and Sun Alliance* [2018] EWHC 3437 (Ch) at [36]; and

        b) the burden is on the applicant to establish the relevant necessity such that the court will not make an order if there is insufficient evidence from which it can evaluate the necessity of disclosure for the fair disposal of the claim: *The Commissioner of Police of the Metropolis v Times Newspapers Limited* [2011] EWHC 1566 (QB) at [29]-[30];

vi) the order should make clear what documents the respondent has to disclose without reference to the issues in the case, which the third party should not have to understand in order to comply with the order: *Constantin Medien AG v Ecclestone* [2013] EWHC 2674 (Ch) at [67]); and

vii) even if the test under CPR r 31.17(3) is satisfied, the court retains a discretion whether to make an order, in exercising which the court will consider any relevant competing public interests and, if necessary, strike an appropriate balance: *Frankson* at [13].

39. The Relevance Requirement "cannot be circumvented by an order which puts upon the non-party the task of identifying those documents within a composite class which do, and those which do not, meet the condition": *Three Rivers (No 4)* at [36]. In that sense, a third party respondent to an order under CPR r 31.17 cannot be required to exercise judgment as to relevance in order to comply with the order. Subject to that, and bearing in mind that the respondent is not required to understand the issues in the case in order to comply, "there is not necessarily a problem with the disclosing party having to exercise some judgment in complying with the order": *Bugsby Property LLC v LGIM Commercial Lending Ltd* [2021] EWHC 1054 (Comm) at [22].

40. In relation to the court's exercise of discretion and the consideration of relevant competing public interests, I note that in *Frankson* at [13], the competing public interests identified were:

i) "the public interest of maintaining the confidentiality of those who make statements to the police in the course of a criminal investigation"; and

ii) "the public interest of ensuring that as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result".

41. The latter of these two is one that is likely to arise whenever an application under CPR 31.17(a) is considered. It arises in this case.

42. Another public interest that arises in this case is the protection of journalistic sources. The right to source protection is recognised as an essential element of freedom of the press: *Goodwin v United Kingdom* (1996) 22 EHRR 123 at [39], where the European Court of Human Rights held that a "measure" (in that case, a court order) that requires a journalist to reveal their sources "cannot be compatible with the European Convention on Human Rights [ECHR] unless it is justified by an overriding requirement in the public interest". This passage was cited with approval by the House of Lords in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 at [38].

43. The protection of journalistic sources is achieved in our jurisdiction by a combination of section 10 of the Contempt of Court Act 1981 and the application of Article 10 of the ECHR via sections 6 and 12 of the Human Rights Act 1998.

44. Section 10 of the Contempt of Court Act 1981 provides that:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of

> information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

45. Section 10 of the Contempt of Court Act 1981 must be interpreted in compliance with Article 10 of the ECHR, which provides that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to ... receive and impart information and ideas without interference by public authority ... .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

46. If the issue arises whether the court should or may order a journalist to disclose information, the burden is on the journalist to establish that there is a "reasonable chance" or "serious risk" of compromising the source of the information: *Vardy v Rooney* [2022] EWHC 1209(QB) at [16]-[17].

47. As a matter of common sense, a material risk of compromising a journalist's source of information may, in many cases, be eliminated by redaction. In *R (Dyer) v West Yorkshire (Western Area) Assistant Coroner* [2020] EWCA Civ 1375, [2021] 1 WLR 1233 (CA) at [6], the Court of Appeal referred to a coroner's order that CCTV footage be redacted as to audio (so that the names of the interviewees could not be heard) and video (by pixelation of the faces of the interviewees).

48. The respondents in their submissions have also drawn the court's attention to the moral obligation of a journalist to protect confidential sources of information as reflected, for example, in clause 14 of the *Editors' Code of Practice* (January 2021) published by the Independent Press Standards Organisation. The *Editors' Code of Practice* is a relevant privacy code to which the court must have regard by virtue of section 12(4)(b) of the Human Rights Act 1998.

49. As to the balancing of the competing public interests that I have identified in this case, I have regard to the principles set out by the Court of Appeal in *Various Claimants v MGN Ltd* [2019] EWCA Civ 350 at [18]-[23], where Floyd LJ drew together the relevant principles by reference to *Goodwin v UK* and various authorities from this jurisdiction.

50. Finally, Article 10 of the ECHR is engaged if the order sought might reveal material provided by a source even if there is no risk of identification of the source: *Richard v British Broadcasting Corporation* [2017] EWHC 1291 (Ch), [2017] EMLR 22 at [42]-[48]. However, in conducting the necessary balancing exercise in order to determine whether to make the disclosure order sought, the court must bear in mind that the general Article 10 rights of the respondent do not have "anything like the great weight given to the non-disclosure of identity" of a source: *Richard v BBC* at [51]-[52].

Submissions for the applicants on the December Application

51. Ms Sara Mansoori KC for the applicants submitted that there is no doubt, having regard to the first respondent's email of 6 October 2022 and the articles in the Sunday Times to which I have already referred, that the respondents are in possession of documents falling within the scope of the December Application. These appear to be from the leaked secret database but may also be from secret filming of some of the hackers. These documents satisfy the Relevance Requirement.

52. Ms Mansoori noted that it is part of the claimants' pleaded cases in both the SPS Proceedings and the Al Sadeq Proceedings that Mr Del Rosso has been involved in commissioning unlawful hacking in order to obtain confidential information regarding Mr Al Sadeq, because of his association with Dr Massaad, and regarding his case. The applicants do not know the identity of the private investigator referred to in the third and fifth bullet points of the first respondent's email of 6 October 2022, but having regard to the Sunday Times articles it may be Mr Del Rosso.

53. It is plainly the case, Ms Mansoori submitted, that the respondents have documents that "may well" support the respective cases of the applicants. The evidence that a private investigator was instructed by Dechert LLP to hack three of Dr Massaad's email accounts and also Mr Flook's private information, and apparently did so successfully in each case (in the latter case, having regard to Bell Pottinger's acquisition of a confidential business proposal sent by Mr Flook to Dr Massaad), is plainly relevant to the SPS Proceedings and the Al Sadeq Proceedings as they each concern the Hacking Campaign, given the links between Dr Massaad and Mr Al Sadeq.

54. As to the Necessity Requirement, Ms Mansoori submitted that it is necessary to order the disclosure sought to serve the strong public interest in trying the applicants' claims on the basis of <u>all</u> the relevant material so to reach a fair and just result. This is especially so given the seriousness of the allegations made against the defendants in each of the relevant proceedings. Documentary evidence that Mr Del Rosso has, despite his denials, been involved in hacking, in particular of Dr Massaad and Mr Flook, would address a key disputed issue in the relevant proceedings and would save time and costs of resolving it.

55. Ms Mansoori submitted that if the relevant material is in the database referred to in the Sunday Times articles, then the applicants are not aware of anyone else in possession of it apart, presumably, from Mr Jain, who is not resident in England and Wales. The database could only be obtained from him, if at all, via the cumbersome, time-consuming, and uncertain letter of request procedure. If the relevant material is the undercover footage, this, again, is not material to which the applicants have access by any other means. It follows from all this that the Necessity Requirement is satisfied.

56. Ms Mansoori rejected the respondents' criticisms of the draft order that the applicants had submitted with the December Application, the terms of which I have discussed at [3]-[5] above. She rejected the suggestion that the terms of the draft order are not clear. The first respondent would have no difficulty, she submitted, in determining the documents that led him to reach the conclusions set out in bullet points in his email of 6 October 2022 to Dr Massaad. As to the .zip file referred to at [5] above, it would be obvious to the respondents, having regard to the Intelligence Online Article, whether they have a .zip file corresponding to that description. A comparison of the Intelligence Online Article with the Sunday Times articles strongly suggests a close correspondence between the information on which each of the articles was based. The respondents will need to exercise a degree of judgment, perhaps, to determine whether any .zip file in their possession is the same as that referred to in the Intelligence Online Article. This, however, is not a problem, as noted in *Bugsby* at [22]. The respondents do not need, and are not being asked, to familiarise themselves with the issues in the SPS Proceedings and the Al Sadeq Proceedings.

57. In relation to the court's exercise of discretion, Ms Mansoori emphasised that the respondents are not being asked to reveal their sources or to provide any documents where, applying the test in Vardy, there is a "reasonable chance" or "serious risk" that by doing so they will reveal a source. The applicants do not say that this is a case in which disclosure of a source is "necessary in the interests of justice or national security or for the prevention of disorder or crime". A suggestion to the contrary in Mr Tsiattalou's 12th/16th witness statement is withdrawn. The applicants are perfectly content for the database and any other documents to be appropriately redacted and/or to have their metadata wiped and/or for the undercover footage to be edited (for example, by drop-out or masking of relevant portions of the audio and/or pixelation of images) in order to protect the respondents' sources, and the applicants are prepared to pay the reasonable costs of these measures.

58. Ms Mansoori submitted that the respondents' position that it is not possible to disclose any documents, even redacted as proposed, or to explain why it is not possible to do so is totally unsatisfactory both as a matter of law and fact.

59. As a matter of law, Ms Mansoori submitted, it cannot be right that a journalist can discharge the burden required to engage section 10 of the Contempt of Court Act 1981 (*Vardy* at [17]) simply by saying the burden is met. If it were otherwise, there might as well be no burden at all.

60. As a matter of fact, Ms Mansoori submitted, the respondents' position is not credible. The respondents have, for example, already disclosed the existence of one document that appears to fall within the scope of the order sought by the December Application, namely, Mr Jain's database (as documents from the database itself have not been disclosed, but details about what the database contains have been set out in the Sunday Times articles). It must be possible to provide so much of the database as relates to Dr Massaad or Mr Flook without giving away who provided the database to the respondents. This could be done by wiping the metadata and then redacting everything save for the relevant entries or even printing the relevant parts of the database and manually cutting away everything but the relevant entities.

61. In relation to other documents, Ms Mansoori submitted, it is impossible to understand how either of the following, both of which have been refused by the respondents, would risk revealing a source, namely:

    i) giving an explanation as to why the documents cannot be disclosed without revealing a source; or

    ii) disclosing the form or type of documents involved (such as emails, audio, or video footage).

62. For the foregoing reasons, Ms Mansoori submitted, the court was invited to make the order sought by the applicants or, at the very least, to direct that the respondents file further evidence explaining why it is not possible for them to comply with such an order without jeopardising their journalistic sources, with liberty to restore if the applicants are not satisfied with the explanation.

Submissions for the respondents on the December Application

63. Mr Ben Gallop for the respondents criticised the December Application as "almost entirely speculative". He submitted that the applicants have "no idea" what they are asking for, having defined a class of documents by reference to the "subjective state of mind" of the first respondent and an electronic folder of documents (the .zip file) in the possession of another group of journalists (those involved in the Intelligence Online Article) who are not before the court.

64. Mr Gallop submitted that, as to the .zip file, it was impossible for the respondents to comply as they do not know what documents are in it, as per Mr Arbuthnott's 2nd witness statement at paragraph 16. Mr Gallop also criticised the draft order put forward by the applicants as too broad to satisfy the Relevance Requirement and therefore falling foul of the principle that the respondents should not have to understand the issues in the case in order to comply with the order.

65. Mr Gallop further submitted that, against the foregoing background, the applicants were not able to satisfy the Necessity Requirement, given how ill-defined is the class of documents sought. He also noted that the respondents do not hold material that shows whether the instructions to the private investigator to hack Dr Massaad's email accounts or to hack Mr Flook are connected to Dechert LLP or Mr Gerrard.

66. Mr Gallop developed these submissions by reference to specific parts of Mr Tsiattalou's evidence, in essence submitting that the applicants' case on the Relevance Requirement at its highest is that the documents sought would amount to similar fact evidence. He submitted that it was unclear what real value this would have in a case involving such serious allegations against the defendants. He further submitted that the lack of an evident connection of the material held by the respondents to Dechert LLP or Mr Gerrard means that it cannot be said that it is likely that the material would demonstrate the defendants' ability and/or propensity unlawfully to access private and confidential information or to conspire with others to do so.

67. Mr Gallop submitted that given the speculative and shifting basis for the applicants' case on the Relevance Requirement, they cannot satisfy the Necessity Requirement. Even if the latter were satisfied, he submitted, the court should exercise its discretion

to refuse to make the order on the basis that the order proposed would be a disproportionate interference with the respondents' Article 10 rights as it seeks disclosure of unpublished information provided by a confidential source (see [50] above). Taking Mr Tsiattalou's evidence at its highest, the applicants lack a sufficiently compelling case to justify overriding the Article 10 rights of the respondents. As such, if the court were to make the order now sought by the applicants, the order would constitute a disproportionate interference with those Article 10 rights.

68. *A fortiori*, Mr Gallop submitted, the December Application should be rejected where it is clear that section 10 of the Contempt of Court Act 1981 applies to defeat it. Mr Arbuthnott, a senior and experienced journalist on behalf of two well-respected media organisations, has given clear evidence that the respondents would risk jeopardising the identity of the respondents' source or sources if they were (i) to give a meaningful explanation as to why the information cannot be given on a redacted basis or (ii) to say in what form the information exists. Mr Arbuthnott confirmed in his evidence that these views were reached after careful consideration. The counterarguments put forward by the applicants are argumentative and speculative. The court has no reason to reject Mr Arbuthnott's evidence on this point.

69. Mr Gallop submitted that the court should therefore accept that evidence, should hold that section 10 of the Contempt of Court Act 1981 is engaged and that none of the exceptions to that section apply, and should therefore refuse the December Application.

Decision on the December Application

70. I am not persuaded by Mr Gallop's submissions on the Relevance Requirement and the Necessity Requirement. It is clear that the respondents hold (or, at any rate, at one time had access to) information on the basis of which the propositions in the bullet points set out in the first respondent's email of 6 October 2022 were based. This, in fact, is not denied by the respondents. I am satisfied on Mr Tsiattalou's evidence, having regard to the pleadings in the SPS Proceedings and the Al Sadeq Proceedings that these documents satisfy the Relevance Requirement. The documents sought concern a private investigator instructed by Dechert LLP, referred to in the first respondent's email of 6 October 2022. That indicates a sufficient link between (i) the propositions (and underlying information) in the first respondent's email and (ii) the SPS Proceedings and the Al Sadeq Proceedings. I have no doubt that the respondents are in possession of documents that "may well" support the respective cases of the applicants in relation to the Hacking Campaign.

71. Mr Gallop's submissions on the Necessity Requirement are parasitic on his submissions on the Relevance Requirement, which I have rejected. I have no hesitation in concluding that the Necessity Requirement is satisfied in this case. It is difficult to see where else the applicants can get the information they are seeking from the respondents. Disclosure of the information is, in my view, necessary for the fair disposal of the claim and/or will save costs by helping to resolve issues relating to the Hacking Campaign. In relation to the costs point, I accept that the order sought, if made, would save costs relative to the costly and slow letter of request procedure that would be involved in trying to obtain the database directly from Mr Jain in India, the likely outcome of which at this stage is necessarily uncertain.

72. During the hearing, Mr Gallop suggested that heavily redacted documents, if it were possible to provide them, could not be of much probative value to the applicants. That is too sweeping a generalisation. It would depend on what the documents, as redacted, established and how they were used as part of the applicants' case. It is necessarily the case at this stage that neither the applicants nor the court knows what documents there are or what those documents would show in redacted form. Nonetheless, one can fairly infer from the propositions set out in the first respondent's email of 6 October 2022 that if the redacted documents provide evidence for those propositions, then there is a clear link to the SPS Proceedings and the Al Sadeq Proceedings and the documents "may well" support the respective cases of the applicants, for the reasons I have already given.

73. As to the drafting of the proposed order sought by the applicants, I am satisfied that it is sufficiently clearly drafted that the respondents would be able to comply with the draft order without having to be familiar with the issues in the SPS Proceedings or the Al Sadeq Proceedings. Some degree of judgment would need to be exercised to interpret the words "led Mr Franz Wild to conclude", but that is not necessarily a problem (*Bugsby Property* at [22]). I am satisfied that applying common sense and approaching the order in good faith the respondents would have little difficulty identifying documents that supported the quite clear bullet point propositions in the first respondent's email of 6 October 2023.

74. As to the reference to the .zip file in the draft order, it appears from Mr Arbuthnott's evidence that the .zip file is not recognised by the respondents. That, therefore, is the end of that matter. The inclusion or exclusion of that wording at this stage would not affect the respondents' ability to comply with the order in relation to the words "led Mr Franz Wild to conclude". Accordingly, I am satisfied that the draft order now sought is in proper form to give effect to the disclosure sought by the applicants in the December Application.

75. This brings me, however, to the nub of the matter, namely, the application of section 10 of the Contempt of Court Act 1981. Ms Mansoori submitted that the respondents have failed to discharge the burden on them to establish that there is a "reasonable chance" or "serious risk" of compromising the source or sources of the information on which the propositions in the first respondent's email of 6 October 2022 are based. It is not sufficient, she submitted, simply to assert the burden is met, without any explanation as to how or why that is the case. The lack of such an explanation makes the respondents' position not credible.

76. I see no reason, however, to reject the evidence of Mr Arbuthnott that the information cannot be given even in redacted form without risking revealing the source or sources of that information. Mr Arbuthnott has not given an explanation as to <u>why</u> that is the case, and the respondents rely on his assertion that even giving an explanation gives rise to a "reasonable chance" or "serious risk" of compromising the source or sources of the information sought. The applicants assert that this position is not credible, and therefore should be rejected by the court.

77. In common with the applicants, the court is in a difficult position, knowing nothing about the relevant documents. I do not, however, find it inherently incredible that the respondents are not able to explain why the form of the documents cannot be disclosed or why redactions will not eliminate the risk of disclosure of the source or sources. A document may exist in a unique form, accessible only to a few persons who would be

easily identified by someone whose interests might be harmed by the disclosure (for example, fellow conspirators). The form of the document may be such that the risk of disclosure cannot be cured by redaction. I am confident that Mr Arbuthnott, as a senior and experienced journalist, is fully aware of how redactions may be carried out. In the absence of any evidence to contradict Mr Arbuthnott's evidence that he, together with relevant colleagues, have carefully considered these matters, I do not feel able to reject that evidence on the basis that it is inherently incredible. To the contrary, I find it credible, for the reason I have given.

78. By providing the evidence of Mr Arbuthnott on these points, the respondents have discharged the burden referred to in *Vardy* at [17]. This is not mere assertion that the burden is met. It is evidence, from a credible source, not contradicted directly or inferentially by any other evidence, that:

    i) there is a serious risk of disclosure of a journalistic source or sources, even if the relevant information is provided in redacted form;

    ii) an explanation as to why that is the case cannot be given without a serious risk of disclosure of a journalistic source or sources; and

    iii) it cannot even be said in what form the relevant information currently subsists without a serious risk of disclosure of a journalistic source or sources.

79. I sympathise with the difficulties that the applicants face in obtaining evidence in relation to the Hacking Campaign. Were it not for section 10 of the Contempt of Court Act 1981, I would make the order now sought by the applicants, because I would conclude that the applicants' rights to a fair trial of their claims in the SPS Proceedings and the Al Sadeq Proceedings in relation to the Hacking Campaign outweigh the Article 10 rights of the respondents in the counterfactual scenario where section 10 did not apply. Section 10 does, however, apply in this case. The applicants have expressly disclaimed any reliance on any exception to the application of section 10. I have no discretion to make the order despite the application of section 10.

80. Accordingly, for the reasons I have given, I refuse the December Application.

The costs of the October Application

81. I turn now to the costs of the October Application.

82. CPR r 46.1 sets out the general rule governing costs of applications for disclosure against innocent third parties. CPR r 46.1(2) sets out the normal rule that the applicant pays the third party's costs of the application and of compliance with any order made on the application. CPR r 46.1(3) provides, however, that a different order may be made, having regard to all the circumstances, including the extent to which it was reasonable for the third party to oppose the application.

83. In *Gorbachev v Guriev* [2023] EWCA Civ 327, [2023] 1 WLR 2457 (CA) at [27], the Court of Appeal summarised the principles that apply to applications for disclosure under CPR r 46.1. The key point is that if it is reasonable for the third party to resist disclosure and the third party does not take an unreasonable course in doing so, then the normal rule applies. The October Application is premised on the applicants'

assertion that the respondents did not take a reasonable course in resisting the October Application, for the reasons discussed below.

84. The background to the October Application is disputed. What follows is my summary of the applicants' case on the background, noting, where relevant, the principal aspects contested by the respondents.

85. On 6 October 2022 the first respondent sent an email to Mr Arthur Maltin, a public relations adviser to Mr Al Sadeq. He said that he was a journalist with the second respondent and collaborating with the Sunday Times on an article on email hacking in connection with UK court cases. As he had done in his email of the same date to Dr Massaad, the first respondent set out a series of propositions in bullet points and asked for Mr Al Sadeq's comments. The bullet point propositions were as follows:

> "
>
> - You are a former executive in the Ras Al Khaimah investment authority who has been incarcerated in the emirate for six years on what you say are politically trumped up fraud charges. You have been held hooded and shackled in darkened prison cells.
>
> - In January 2020, your solicitors brought a legal action against three lawyers at Decherts who had worked for Ras al Khaimah: ex-partners Neil Gerrard and David Hughes, and current partner Caroline Black. They were accused of interrogating you at a time when you were being held in solitary confinement without charge and without access to legal representation. Your wife complained that Gerrard had threatened to have her thrown in jail for 25 years if she didn't do as he said.
>
> - Six days after Stokoe Partnership filed its lawsuit, an Indian hacker was instructed to hack British barrister and High Court judge Philip Marshall KC who was poised to become a legal adviser to your lawyers Stokoe Partnership in the case."

86. The second bullet point refers to the Al Sadeq Proceedings in which SPS were (and are) representing Mr Al Sadeq. At the time the email was sent, SPS had been considering instructing Philip Marshall KC, who is referred to in the third bullet point, but they were doing so in relation to the SPS Proceedings, rather than the Al Sadeq Proceedings. The proceedings are closely linked. SPS were considering instructing Mr Marshall in October 2020. The third bullet point indicates that an Indian hacker was instructed to hack Mr Marshall six days after the Al Sadeq Proceedings were filed. Those proceedings were filed on 28 January 2020, so the hacking instruction would have been on or about 3 February 2020, if the third bullet point is correct.

87. Despite the discrepancies as to the proceedings and the timing, the first respondent's email caused the applicants to become concerned that Mr Marshall had been targeted due to his potential instruction in relation to the SPS Proceedings. In particular, SPS was concerned that the information that SPS had been considering instructing him could

have been revealed by a hack of SPS's own system. Evidence indicating that this concern was justified would be highly supportive of the claims in the SPS Proceedings and the Al Sadeq Proceedings in relation to the Hacking Campaign.

88. On 7 October 2022 SPS emailed the first respondent, asking him to reveal how he had discovered the information set out in his bullet points and specifically asking him to provide the documents that led him to the conclusion summarised in the third bullet point.

89. After an exchange of messages with the first respondent, on 14 October 2022 RPC on behalf of the first and second respondents replied that they had no evidence that the hack of Mr Marshall was successful and that they were not in possession of any documents relating to SPS or Mr Marshall. On the same day SPS responded saying that this misunderstood their position. Information that SPS had been considering instructing Mr Marshall could only have come from SPS's own IT systems, which had been subject to a malicious cyber-attack just days after SPS had discussions with Mr Marshall. No further information was received from the respondents in response to this message.

90. The respondents say that the applicants' account of the background to this point omits the following information. In an effort to "head off" the October Application, someone acting on behalf of the third respondent spoke with Mr Marshall and invited him to speak with SPS to clarify his involvement. He apparently did this before Mr Tsiattalou prepared his 9th/13th witness statement. I note that Mr Tsiattalou in paragraph 7 of his 10th /14th witness statement states that he does not recall Mr Marshall telling him or any of his colleagues at SPS that he had volunteered to a Sunday Times journalist that he was being considered for instruction by SPS.

91. In mid-October 2020, the applicants considered the matter urgent as they had been given permission to amend their statements of case and wished to rely on any relevant documents that the first respondent might be able to provide before their deadline of 24 October 2022. For this reason, the October Application was issued, supported by the 9th/13th witness statement dated 14 October 2022 of Mr Tsiattalou. That witness statement reflected the clarifications that SPS had sent to RPC by email on 14 October 2022. It further explained that Mr Marshall was contacted on 29 October 2020 and participated in a Zoom conference on 2 November 2020, but he was not ultimately instructed.

92. On 17 October 2022, the third respondent informed SPS that the information that Mr Marshall was in contention to be instructed by SPS did not come from any document but from Mr Marshall himself.

93. The applicants did not consider that this response changed the basis for the October Application. It did not explain what the "lawsuit" in the third bullet point of the first respondent's initial email was or correct the assumption in Mr Tsiattalou's witness statement that the third bullet point referred to the Al Sadeq Proceedings.

94. In light of the third respondent's clarification of the source of the information in the third bullet point, SPS served the 10th/14th witness statement of Mr Tsiattalou limiting the October Application to documents and information that led the first respondent to conclude that "six days after Stokoe Partnership filed its lawsuit, an Indian hacker was

instructed to hack British barrister and High Court judge Philip Marshall KC", omitting the remainder of the third bullet point.

95. The respondents consider that this "refinement" of the October Application shifted the focus of the application from how the respondents knew that Mr Marshall was "poised" to be instructed by SPS to how they knew he had been targeted by a hacker. In relation to the latter question, it was not possible to provide any documents or information without endangering the identity of a source or sources. They also argue that the October Application was speculative (and a "fishing expedition"), given that the applicants could have no basis for assuming that Mr Marshall had been targeted for reasons relevant to the SPS Proceedings or the Al Sadeq Proceedings. In an email dated 26 October 2022, RPC, by now acting for all three respondents, confirmed that the material sought by the applicants could not be disclosed, even in redacted form, for reasons of source confidentiality.

96. There followed further correspondence and exchange of evidence in relation to the October Application. I have already referred to Mr Tsiattalou's witness statements in support of the October Application. The respondents provided a witness statement dated 24 November 2022 of Mr Arbuthnott.

97. Each party has accused the other party of shifting position during the course of this correspondence and exchange of evidence. The applicants challenged the respondents' reliance on source confidentiality to oppose the October Application for substantially the same reasons that they challenged the respondents' reliance on source confidentiality to oppose the December Application.

98. On 23 January 2023, RPC wrote to SPS to confirm when Mr Marshall had been considered by SPS for instruction. SPS responded that he was first considered in the week commencing 25 October 2020.

99. On 8 February 2023, RPC wrote to SPS to say the "the information they hold shows that the instruction to hack Philip Marshall KC was given on a date no later than 8 September 2020". From this information, the applicants concluded that Mr Marshall could not have been targeted as a result of his later consideration by SPS in relation to the SPS Proceedings, which in turn meant that his targeting did not necessarily support the inference that SPS had been hacked. Accordingly, SPS agreed to withdraw the October Application.

100. For the applicants, the essential point arising from this background is that the October Application was issued on the premise that Mr Marshall was targeted by hackers because of his potential involvement in the Al Sadeq Proceedings, which, Ms Mansoori submits, was consistent with the impression given by the first respondent's email.

101. Ms Mansoori submitted that the respondents would have been well aware of this premise from the correspondence and the evidence supporting the October Application. Yet, they were in possession of material indicating that the instruction to hack Mr Marshall was made "no later than 8 September 2020". This was clearly not confidential information given their belated disclosure of it. Had they disclosed this information at the outset of their exchanges, the October Application would have been unnecessary. Their failure to do so led to considerable costs being incurred by both sides during a period of four months. The respondent's failure to disclose this

information was unreasonable and unnecessarily increased the costs, meaning that under CPR r 46.1(3) the court should decline to award the respondents their costs.

102. Mr Gallop submitted that the October Application was speculative, brought on an inaccurate premise, and doomed to fail given section 10 of the Contempt of Court Act 1981. The respondents' opposition to the October Application was reasonable, and their conduct in opposing it was reasonable. There is, therefore, no reason for the court not to make the usual order for costs in their favour.

103. Mr Gallop submitted that this position is reinforced by a number of points. The October Application was rushed, without allowing a reasonable time for the respondents to reply in correspondence. Mr Tsiattalou omitted reference from his 9th/13th witness statement to a conversation that he accepts he had with Mr Marshall before the October Application was issued. It was always clear that the respondents could not provide the material sought without exposing their source(s), and therefore the October Application was doomed to failure. The applicants unreasonably persisted in the October Application even after it was clear to them that Mr Marshall was the source of the information that SPS had considered instructing him. The applicants' approach in relation to the October Application was disproportionate and heavy-handed.

104. As to the point that the respondents were late in providing the information that the instruction to hack Mr Marshall was made no later than 8 September 2020, which resulted in the October Application being finally withdrawn, Mr Gallop submitted that it must be borne in mind that the respondents were forced to address a shifting and speculative case, the true target of which changed when it was pointed out to the applicants that Mr Marshall was the source of the information that SPS had considered instructing him. Mr Gallop also relied on the fact that the respondents do not have detailed knowledge of the SPS Proceedings and the Al Sadeq Proceedings and therefore the significance for those proceedings of the timing of the instruction to hack Mr Marshall was not immediately obvious to the applicants.

105. Having considered these submissions in light of the October Application, the witness statements provided by each party, and the correspondence to which I have referred, I do not consider that the applicants have conducted the October Application in a manner that is heavy-handed or disproportionate. They had reasonable grounds for inferring from the first respondent's email to Mr Maltin that the respondents had documents or other information that was potentially relevant to the SPS Proceedings and the Al Sadeq Proceedings as they relate to the Hacking Campaign. Looking at the second and third bullet points in the first respondent's email, it is a natural inference that the "lawsuit" referred to in the third bullet point is the Al Sadeq Proceedings. Although, on a strict reading of the bullet points, the timing of the instruction to the hacker would be early February 2020 and SPS did not, apparently, consider instructing Mr Marshall until October 2020, it is not unreasonable for SPS to have considered that the first respondent's bullet point was correct as to the hacking instruction but wrong as to timing. I also accept the submission for the applicants that the timing of the October Application was driven by the timetable of their permission to amend their statements of case in the SPS Proceedings and Al Sadeq Proceedings, and therefore it is not fair to characterise the October Application as having been unduly "rushed".

106. On the other hand, I also consider that the respondents' opposition to the October Application was reasonable, including their reliance on section 10 of the Contempt of

Court Act 1981 to resist the October Application. It is not surprising that at times the parties were somewhat at cross-purposes in their correspondence between October 2022 and February 2023. It is not surprising that the respondents might not fully have appreciated the significance for the applicants of the information that the instruction to hack Mr Marshall was made no later than 8 September 2020.

107. Given my conclusion that both parties acted reasonably, albeit at times at cross-purposes, in, on the one hand, vigorously pursuing and, on the other hand, robustly opposing the October Application, there is no reason to displace the normal rule as to costs in relation to the October Application.