



Neutral Citation Number: [2021] EWCA Civ 349

Case No: A3/2020/1271

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE,**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**Mr Andrew Lenon QC (sitting as a Deputy Judge of the High Court)**  
**Business List (ChD), [2020] EWHC 1327 (Ch) and [2020] EWHC 1686 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12<sup>th</sup> March 2021

**Before:**

**LORD JUSTICE LEWISON**  
**LADY JUSTICE ASPLIN**  
and  
**LORD JUSTICE MALES**

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**Between:**

**RAS AL KHAIMAH INVESTMENT AUTHORITY**  
**- and -**  
**FARHAD AZIMA**

**Respondent**

**Appellant**

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**HUGH TOMLINSON QC AND EDWARD CRAVEN** (instructed by **Stewarts Law**) for  
the **Respondent**

**TIM LORD QC, THOMAS PLEWMAN QC AND HUGO LEITH** (instructed by  
**Burlingtons**) for the **Appellant**

Hearing dates : 2<sup>nd</sup> – 4<sup>th</sup> March 2021  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 12<sup>th</sup> March 2021.**

## **Lord Justice Lewison, Lady Justice Asplin and Lord Justice Males:**

### **Introduction**

1. RAKIA is the state investment entity of the Emirate of Ras Al Khaimah (“RAK”), one of the emirates making up the United Arab Emirates. Mr Azima is a businessman who had dealt with it in the past. He is based in the USA. RAKIA launched proceedings against Mr Azima accusing him of fraudulent misrepresentation and conspiracy. We begin by giving a thumbnail sketch of the shape of the trial.
2. Mr Azima had been involved in the aviation industry for many years and was a friend of RAKIA’s former chief executive officer, Dr Massaad. In 2007, RAKIA and HeavyLift International Airlines FZC (‘HeavyLift’), a company then owned and controlled by Mr Azima, had set up a pilot training academy in RAK as a joint venture. It was not a success and ceased operations in 2010, giving rise to a claim for compensation by HeavyLift. RAKIA also had a Georgian subsidiary which owned a hotel in Tbilisi which it wished to sell. Mr Azima received two payments of \$400,000 and \$1,162,500 in October 2011 and January 2012 which he said were commission under a referral agreement for introducing potential buyers of the hotel. On the day that he received the latter payment, he had made a payment of \$500,000 to Dr Massaad. RAKIA alleged that the referral agreement was a sham and that the payment to Dr Massaad was a bribe. In 2012 RAKIA began investigating the activities of Dr Massaad. He left the UAE and was subsequently convicted in his absence of offences of fraud, bribery and embezzlement. RAKIA alleged that Dr Massaad and Mr Azima had been involved in a plan to organise a media and public relations campaign intended to damage RAKIA’s reputation. In 2016 Mr Azima and HeavyLift entered into a settlement agreement with RAKIA in respect of their claims in connection with the pilot training academy joint venture. Pursuant to the settlement agreement RAKIA paid Mr Azima the sum of \$2.6 million. Clause 3.1 of the settlement agreement provided that it was “in full and final settlement of all claims, in any jurisdiction, whether or not presently known to them or to the law that [Mr Azima] or [HeavyLift] or any of its owners [had or might] have against [RAKIA] ... or any other RAK entity”. Under clause 3.2 Mr Azima and HeavyLift warranted and confirmed that they had “at all times acted in good faith and with the utmost professional integrity and [would] continue in the future to act in good faith and with the utmost professional integrity towards [RAKIA] ... and any other RAK entity.” The same clause also stated that the payment made to HeavyLift pursuant to the settlement agreement was made in reliance on that express warranty and confirmation. The agreement provided for English law and jurisdiction.
3. RAKIA alleged that Mr Azima had induced it to enter into the settlement agreement by fraudulently misrepresenting that HeavyLift had invested \$2.6 million in the training academy joint venture. RAKIA also alleged that clause 3.2 of that agreement was a representation by Mr Azima of his good faith which he knew to be false and which had induced the settlement agreement. Thirdly, RAKIA claimed \$1,562,500 by way of damages for an unlawful means conspiracy arising in connection with the intended sale of the hotel in Georgia. Mr Azima denied making the alleged representations, denied fraud and denied any reliance by RAKIA on the representations. He contended that the litigation was politically motivated, and part of RAKIA’s campaign to recover alleged losses of \$2 billion from Dr Massaad.

4. In addition, he contended that the claims should be dismissed or struck out on the basis that in bringing the claims, RAKIA had relied upon confidential emails which it had obtained by its unlawful hacking of his email accounts. Mr Azima counterclaimed in relation to the hacking. He advanced his counterclaim under a number of legal heads: an actionable breach of the Data Protection Act 1998; a breach of statutory duty under the Computer Misuse Act 1990; breach of US Federal Law; breach of confidence; misuse of private information; invasion of privacy; and conspiracy to injure by unlawful means. His pleaded losses included the cost of purchase of new devices; loss of business consequent upon the publication of the material on-line; and damage to his reputation. The counterclaim was stayed pending determination of RAKIA's claims against Mr Azima.
5. Following a four-week trial Mr Andrew Lenon QC, sitting as a deputy judge of the Chancery Division, found that Mr Azima:
  - i) Had induced RAKIA to enter into the settlement agreement by means of a fraudulent misrepresentation;
  - ii) Had manufactured a sham referral agreement intended to conceal his dishonest misappropriation of funds;
  - iii) Had been guilty of bribery by making payments to Dr Massaad;
  - iv) Had falsely represented that he had acted in good faith vis-à-vis RAKIA;
  - v) Had engaged in an unlawful means conspiracy in connection with the intended sale of the hotel in Tbilisi, Georgia;
  - vi) Had not proved his hacking allegation and dismissed the counterclaim.

His judgment is at [2020] EWHC 1327 (Ch).

### **The shape of this appeal**

6. RAKIA's case at trial was based in large part on confidential e-mails and other material that had been obtained through the hacking of Mr Azima's email accounts. It was common ground that hacking had taken place. Mr Azima contended that RAKIA was responsible for or involved in the hacking; in consequence of which the evidence obtained through hacking should be excluded; and its claim should be struck out (even after trial). RAKIA, on the other hand, maintained that it had come across the material innocently on the internet where it had been placed by anonymous hackers. The judge rejected RAKIA's account of how it had come by this material; but nevertheless held that Mr Azima had not proved his allegation on the balance of probabilities. The counterclaim therefore failed.
7. On this appeal Mr Azima raises a number of grounds. The main focus of those grounds (Grounds 1 to 4) is an attack on the judge's findings in relation to the responsibility for the hacking. There is barely any quarrel with the judge's substantive findings in relation to the underlying factual basis of RAKIA's underlying claims. Ground 5 asserts that if the judge had found that RAKIA was responsible for the hacking, he ought to have struck out the claim as an abuse of process. In consequence Ground 6 asserts that the counterclaim was wrongly dismissed. Grounds 7 to 9 (as

originally formulated) make further criticisms of the judge's findings of fact in relation to the underlying claims.

8. In support of his appeal Mr Azima also applies for permission to adduce fresh evidence. These applications are the subject of grounds 6A, 6B and 8A. This new evidence when taken with the evidence before the judge is said to be sufficient to prove that RAKIA obtained Mr Azima's personal data by hacking his email accounts and that the information, which had been obtained by unlawful means, was used as the basis for RAKIA's claims against him. This court should make that finding of fact. The consequence of that, once more, is that the action should be struck out as an abuse of process. In the alternative it is argued that the issue whether RAKIA was responsible for the hacking should be remitted for a retrial; and since the judge's decision that Mr Azima had not proved his hacking allegation was fundamental to at least some of his conclusions on RAKIA's substantive claims, they, too, should be remitted for a retrial.

### **The factual background in more detail**

9. Mr Azima was involved in numerous actual and proposed commercial joint ventures with RAKIA and other entities connected with RAK between 2007 and 2016. He met Dr Massaad, (RAKIA's chief executive officer between 2005 and 2012) in or around 2006 or 2007. Dr Massaad introduced him to the Ruler of RAK, Sheikh Saud, and to the management of RAK Airways. This led to the creation of a joint venture in relation to the RAK pilot training academy of which Mr Azima and Dr Massaad were the directors. It ceased operation in 2010.
10. Further, in 2011, RAKIA decided to sell a luxury hotel in Tbilisi, Georgia owned by its Georgian subsidiary, Ras Al Khaimah Investment Authority Georgia LLC. Mr Azima received two payments in connection with an attempt to sell the hotel. They were of \$400,000 and \$1,162,500; received on 25 October 2011 and 18 January 2012 respectively. He contended that he was entitled to those payments under a referral agreement with RAKIA as commission for introducing three Iranians who were potential purchasers for the hotel. On the same day as Mr Azima received the second payment, he transferred \$500,000 to Dr Massaad. He contended that the payment was in return for a share in an aircraft owned by Dr Massaad. It was RAKIA's case that the referral agreement was a sham: Mr Azima did not introduce potential purchasers for the hotel, the two payments he received were misappropriations and the sum he paid to Dr Massaad was a bribe.
11. RAKIA claimed that in or around late 2012, it discovered that Dr Massaad had perpetrated systematic and wide-ranging frauds against RAKIA and other RAK entities. Subsequent investigations were said to have revealed that between 2005 and 2012 Dr Massaad and his associates engaged in an unlawful conspiracy to misappropriate monies and assets, causing losses exceeding \$2 billion. Dr Massaad left the UAE in the same year and was subsequently tried and convicted in absentia of a variety of fraud, bribery and embezzlement offences.
12. In late 2014 and 2015, consultants acting for Dr Massaad began to organise a media campaign designed to damage the reputation of RAK, RAKIA and other RAK entities. RAKIA alleged that Mr Azima played a leading role in the campaign and intended to spread false stories about human rights violations in RAK. This alleged

episode was also relied upon as giving rise to further wrongful conduct on the part of Mr Azima, contrary to the good faith clause and representation.

13. The Ruler feared a plot between Dr Massaad and a member of his family aimed at destabilising his regime, and in January 2015, engaged a Mr Stuart Page, a private investigator. In March 2015, Mr Page produced or commissioned a report on Dr Massaad's activities, entitled "RAK Project Update", which was mainly concerned with Dr Massaad but also indicated that Mr Azima was working with Dr Massaad, managing a team of advisers in the US engaged to spread allegations about human rights issues in RAK. In April 2015, the Ruler told Mr Jamie Buchanan (the chief executive officer of an entity connected to RAKIA) that he wanted him to "target" Mr Azima, and issued an instruction to another assistant to "go after" him in July 2015.
14. For the remainder of 2015 and much of 2016, Mr Azima was engaged in discussions and correspondence with RAK and RAKIA regarding three separate matters:
  - i) He was in correspondence with RAK Airways regarding compensation for the failed pilot training academy joint venture. He had initially sent a letter claiming compensation in 2013, but had not pursued the matter further until one of his representatives sent another letter on 6 July 2015. In the ensuing correspondence, it was represented that Mr Azima's company HeavyLift had invested \$2.6 million in the joint venture, including over \$1.7m on a flight simulator. The parties eventually entered into the Settlement Agreement under which RAKIA paid Mr Azima \$2.6 million.
  - ii) In late 2015 and early 2016 Mr Azima and RAKIA were involved in discussions about the second potential joint venture, between RAKIA and another of Mr Azima's companies, Global Defence Services Corporation, for the provision of aerial intelligence, surveillance and reconnaissance services. Ultimately, this did not proceed.
  - iii) Throughout this period, RAKIA pursued Dr Massaad for the return of assets he was said to have misappropriated. From October 2015, Mr Azima acted as Dr Massaad's representative in a series of settlement meetings with the Ruler's representatives, in particular, with Mr Jamie Buchanan, and the Ruler's lawyers at Dechert LLP (including Mr Neil Gerrard, a partner of that firm). These discussions took an acrimonious turn at a meeting on 16 July 2016, at which Mr Azima said that Mr Gerrard indicated that unless Dr Massaad agreed a settlement, RAKIA would pursue him and Mr Azima would be "collateral damage". The settlement negotiations went no further.
15. On 29 December 2015, a document called the "View from the Window" was drawn up. It referred to Mr Azima as "having orchestrated, if not fully participated in numerous fraudulent activities" and to "companies being set up with Iranian nationals". Mr Azima contended that this showed that by this stage, RAKIA had obtained access to his emails.
16. The dispute between RAKIA and Dr Massaad was not resolved. RAKIA admitted creating websites attacking Dr Massaad a few days after the final July 2016 meeting. Shortly after those sites were created, in early August 2016, blogging websites began appearing denigrating Mr Azima as a "fraud" and a "scammer" and linking to

websites containing Mr Azima's confidential emails which appeared on the internet at around the same time. A second tranche of Mr Azima's data appeared online at the end of August, and a third around 8 September 2016.

17. On the same date as RAKIA launched these proceedings in England, Mr Azima brought proceedings against RAKIA in the US District Court for the District of Columbia alleging that RAKIA was responsible for hacking his email accounts. RAKIA challenged the claim on jurisdictional grounds, and following an appeal, the claim was dismissed on that ground. On 18 July 2018, Mr Azima amended his defence to these proceedings, alleging that RAKIA was responsible for hacking his data and its publication online. On 8 August 2019, HHJ Kramer gave Mr Azima permission to add a counterclaim for damages and other relief arising out of the alleged hacking (but stayed that counterclaim pending final judgment on RAKIA's claim).

### **The hacking of the emails**

18. The judge's assessment of Mr Azima's assertion that RAKIA was responsible for the hacking was lengthy and detailed. It occupies some 47 pages of the judge's judgment, from [251] to [384]. We do not reproduce it all; but summarise key features.
19. A 'phishing' email is an email that seeks to trick the recipient into clicking on a hyperlink taking the user to a webpage that the criminal controls, or into downloading malicious software. A 'spear-phishing' email is a more targeted and sophisticated form of a 'phishing' email which indicates that the sender has purposely targeted the deception at that individual (as shown by the fact that the email has been constructed to include material pertinent to the recipient, or otherwise to be of more interest to them). The fact that the spear-phishing email contains material of particular interest to the targeted recipient makes it more likely to be effective in that the recipient is more likely to open the deceptive email and any further links it may contain.

### **Mr Azima's case on hacking**

20. At [255] the judge set out Mr Azima's pleaded case about the hacking of his emails which he summarised in the following paragraph of his judgment:
  - i) RAKIA "targeted" him in the context of its dispute with Dr Massaad. Mr Azima relied in particular on internal emails sent in April and July 2015.
  - ii) His data were accessed as a result of his opening "phishing emails" on or around 14 October 2015.
  - iii) In July 2016 Mr Gerrard threatened that Mr Azima would be made "collateral damage" if Dr Massaad would not agree a settlement. A settlement was not agreed.
  - iv) RAKIA engaged investigators and public relations consultants (including Bell Pottinger) to make inquiries into Mr Azima and disseminate information about him. The consultants engaged by RAKIA created two websites containing publicly available information about Dr Massaad's perfidy which went live just

a short while before Mr Azima's hacked documents were published on the internet.

- v) RAKIA's expert in the US was not able to obtain access to the majority of the material hacked from Mr Azima and was therefore unable to replicate the process by which RAKIA claims to have accessed the material. Following that complaint further links appeared.
- vi) The materials which have been made available do not contain documents damaging to RAK's reputation.

21. During the course of the trial the judge permitted Mr Azima to expand upon his pleaded case and to make the following additional allegations:

- i) RAKIA's motivation for pursuing Mr Azima was to seek "retribution for his refusal to join RAKIA's side" in its dispute with Dr Massaad and to "punish him for his involvement in investigating human rights abuses in RAK".
- ii) By March 2015 the Ruler had come to believe that Dr Massaad was working to destabilise his regime. The Project Update (which did not feature anywhere in the statements of case) led the Ruler to believe that Mr Azima was an accomplice of Dr Massaad heading the "US Team" and involved in a critical press campaign. This enraged the Ruler and led him to demand the targeting of Mr Azima, and the hacking of his emails.
- iii) RAKIA put together a well-armed team with the capability of carrying out the hacking and publication online, including Mr Page who had been repeatedly connected with hacking in other cases and who had connections to Israeli operatives formerly of that country's intelligence services who facilitated the hacking.
- iv) In October and November 2015, acting on the instruction of the Ruler, Mr Page caused or procured the hacking of Mr Azima's emails through spear-phishing attacks on his data.
- v) RAKIA was able to gather information about Mr Azima from the hacked material by December 2015, as evidenced by a document called the View from the Window.
- vi) Although Mr Azima had a genuine entitlement to receive \$2.6 million in compensation from RAKIA in respect of the Training Academy JV, the Settlement Agreement was in fact a device which was intended to equip RAKIA with a legal mechanism to bring a claim against Mr Azima on the basis of material which it already had from hacking his emails. The \$2.6 million was paid to "lure" Mr Azima into an agreement, to "reel him in and use him in our negotiation with Dr Massaad".
- vii) RAKIA's case as to how it came across the hacked material innocently was untrue and designed to conceal RAKIA's role in the hacking. Contemporaneous emails which show that RAKIA innocently discovered the

hacked material were in fact a false "paper trail" created by Mr Buchanan and Mr Gerrard in order to conceal their involvement in the hacking.

- viii) Wrongdoing could be inferred from RAKIA's "highly suspicious" approach to the documentary evidence.

### **The judge's findings**

22. In January 2015 the Ruler asked Mr Page to investigate a rumour that Dr Massaad was working with a member of the royal family to the detriment of the Ruler and RAK. By March 2015 Mr Buchanan had told Mr Page that he was investigating allegations of wrongdoing by Dr Massaad. He wanted Mr Page's help in tracing assets. Thereafter Mr Page had regular monthly meetings with the Ruler and Mr Buchanan. Contrary to Mr Page's evidence at trial, he regularly provided the Ruler with written updates. Although most of the reports were destroyed in accordance with the Ruler's policy, one such report was in evidence dated 26 March 2015. The judge set out its contents at [267]. Among its contents was a statement that Mr Azima was managing a team of Dr Massaad's advisers in the USA. Having named the other members of the team, it went on to say that "we will be able to gather intelligence on their progress in order to monitor their activities and attempt to contain or ruin their plans." The judge found that it showed that Mr Azima's activities were being monitored, although he was not the main target of the investigation.

23. None of RAKIA's witnesses mentioned the Project Update in their witness statements; and the judge found their respective explanations for that omission unconvincing. The judge's conclusion on this aspect of the case was at [276]:

"I do not regard this as a satisfactory explanation, given what I consider to be the clear relevance of the document to the hacking claim (in that it evidences the fact that Mr Azima was the subject of covert surveillance in 2015 being carried out under the supervision of Mr Page who, on RAKIA's own case, was subsequently responsible for finding the hacked material) and the witnesses' accounts in cross-examination as to the importance of the document. I recognise nevertheless that the failure to deal more fully with the Project Update may simply be explained on the basis that it was an unhelpful document that was not referred to in Mr Azima's statements of case rather than on the basis that it was part of a plot to put forward a false case about RAKIA's role in the hacking. I accept that, if there had been such a plot, it is surprising that the Project Update was disclosed."

24. The judge went on to find that in about July 2015 the Ruler wanted to "go after" Mr Azima; and that the motivation for this was the Ruler's perception that Mr Azima was an associate of Dr Massaad who was threatening to cause trouble for him. The judge concluded that there was no indication that consideration was given to hacking Mr Azima's email accounts; but nor was there documentary evidence ruling this out.
25. It was common ground at trial that in October 2015 Mr Azima received a number of spear-phishing emails. He said that his emails were hacked as a result of his opening



or clicking on links contained those spear-phishing emails. The spear-phishing emails were sophisticated and included a malicious email purporting to be sent from Dr Massaad's personal assistant, Ms Beudjekian. In early August 2016, blogging websites began appearing denigrating Mr Azima as a "fraud" and a "scammer" and linking to websites containing Mr Azima's confidential emails which appeared at around the same time.

26. Both sides instructed computer experts, who agreed that Mr Azima received several "spear phishing" emails in October and November 2015. They also agreed that:
- i) there was no evidence that Mr Azima opened any of those emails or clicked on the links within them;
  - ii) there was no evidence that any of those emails (or any other emails received by Mr Azima) led to Mr Azima's online credentials being stolen or to any unauthorised access to his devices;
  - iii) a single spear-phishing email could have been an effective means of targeting Mr Azima;
  - iv) there was no evidence that identified the person(s) who sent the emails. Based on the information made available to them, it was not possible to determine who was responsible for the unauthorised access to Mr Azima's data and the publication of that data online, how and when the unauthorised access occurred or how much data was obtained as a result;
  - v) there were three tranches of data, the first 27.775 GB in size, the second of which became available on or about 30 August 2016 with a size of 10.33MB and the third with a size of 4.43 GB;
  - vi) the contents of two of the three tranches of the hacked data appeared to emanate from iCloud account(s). Mr Azima appeared to have at least two iCloud accounts and a number of Apple devices including an iPhone but since the iCloud logs identifying contemporary access to Mr Azima's iCloud accounts were not available to the experts, they agreed that it was not possible to confirm whether, and if so when, how and by whom, unauthorised access was gained to Mr Azima's iCloud accounts;
  - vii) analysis of the access logs for Mr Azima's fa@fa1.us account and the connection record and recent access change record for his account fa@farhadazima.com did not enable any conclusions to be drawn as to how, and by whom, any unauthorised access to either of those accounts occurred;
  - viii) given Mr Azima's statements that the access to his fa@fa1.us account shown by the logs in October 2015 was carried out without his authorisation, the access on those dates appeared to be suspicious;
  - ix) suspicious activity in October 2015 did not provide determinative evidence of when the fa@fa1.us emails contained in the Internet Data might have been taken from Mr Azima's account.
27. Having considered further evidence from the experts, the judge concluded at [300]:

“In summary, it is possible that the hacking of Mr Azima's emails is linked to his receipt of spear-phishing emails in October 2015 but this is not firmly corroborated by the evidence. There is no evidence as to who carried out the hacking.”

28. The judge then turned to the “View from the Window” document prepared in December 2015. That contained the statement that Mr Azima appeared “to have orchestrated if not (fully) participated in numerous fraudulent activities”. Mr Azima relied on that as showing that at least by then RAKIA must have hacked into his email accounts; because otherwise there would not have been any reference to allegedly fraudulent activities. The judge said:

“[308] It is credible, in my view, that suspicions about Mr Azima's involvement in fraud had arisen because of his association with Dr Massaad rather than because access had been obtained to Mr Azima's confidential emails.....

[309] In my judgment, the references to Mr Azima's orchestrating, if not participating in, numerous fraudulent activities in the View from the Window document are too vague to establish that RAKIA had obtained access to Mr Azima's confidential emails by the time this document was prepared. Although the document lists Mr Azima's apparent orchestration of or participation in fraud as one of a number of established "facts", I agree with RAKIA's submission that the document reads like a series of points for a press release or article rather than a carefully sourced analysis....”

29. One of Mr Azima's pleaded allegations was that RAKIA had engaged investigators and PR consultants (including Bell Pottinger); and that Bell Pottinger engaged a company called Digitalis to conduct an aggressive internet and media campaign with the capability of obtaining material through hacking. At [319] the judge found that “there was no basis in the evidence” for that assertion.
30. Another of his allegations was that in July 2016 Mr Gerrard threatened that Mr Azima would be made “collateral damage” in RAKIA's war against Dr Massaad. That was said to have taken place at a meeting. The judge considered a solicitor's attendance note of that meeting (not prepared by Mr Gerrard). He found that the note was accurate and did not support Mr Azima's version of events. He also held that the demand that Mr Azima said had been made at that meeting would have been both unrealistic and counter-productive.
31. Following that meeting Mr Buchanan sent an email to Mr Azima saying that if Dr Massaad failed to make a realistic settlement offer by “the end of the ceasefire” (i.e. 31 July 2016) the ceasefire would end. The dispute between RAKIA and Dr Massaad was not resolved by that date. At the beginning of August websites appeared making allegations about Dr Massaad. Within days of that, blogging websites appeared attacking Mr Azima. Those websites provided links to BitTorrent websites on which Mr Azima's personal data had been uploaded. Three caches of his data appeared in

August and September 2016. Mr Azima relied on that timing as indicating that RAKIA were behind the attacks. The judge said of that allegation:

“[341] In my judgment, if the hackers were acting on the instructions of the Ruler or RAKIA, it is unlikely that they would have timed the publication of the hacked material to coincide with the end of the "ceasefire" and the posting of the anti-Dr Massaad websites. It is more probable in my view that the two incidents, while close in time, were not in fact related. The posting of the Massaad websites was a deliberate PR campaign instructed by the RAKIA; the other was the unrelated act of hackers.”

32. At trial RAKIA put forward an account of how it came to be in possession of the hacked e-mails. Mr Page said that he had been asked in early 2016 to keep his ears and eyes open for anything he heard about a negative publicity campaign that might be damaging for RAK. He spoke to a few contacts he used occasionally in the investigations business, journalism and PR industry and asked them to keep their ear to the ground. One of those was Mr Halabi, whom he believed he met at a round table lunch in 2012. Mr Halabi was an Israeli journalist who specialised in Middle Eastern affairs. They had more of a friendship than a professional relationship. Later that year, Mr Halabi called him and told him that he had come across something interesting on the internet about Mr Azima. As far as he could recall Mr Halabi sent him the website address where the material could be found. A few weeks later, he learned that a second set of data relating to Mr Azima had been put onto the internet. He believed it might have been Mr Halabi that told him about the second set but it was possible that he was told by one of his other sources. He made no attempt to download the data.
33. Mr Halabi gave evidence in support of this explanation.
34. This explanation began to fall apart in cross-examination; and, as the judge found, was inconsistent with contemporaneous documentation. Having examined the evidence with care, the judge held at [355]:

“I conclude from the unexplained contradictions, inconsistencies and implausible elements that RAKIA's case that Mr Page discovered the blogging websites linked to the BitTorrent sites innocently via Mr Halabi and another unidentified informer is not true and that the true facts as to how RAKIA came to know about the hacked material have not been disclosed.”

35. In addition to this verdict on Mr Page's evidence, the judge held that there were other occasions on which Mr Page had given unreliable evidence.
36. But the judge went on to hold in the next paragraph:

“It does not of course necessarily follow from this conclusion that RAKIA was responsible for the hacking. As RAKIA pointed out, there would [sc. could] be variety of explanations for Mr Page's failure to give a true account of the discovery. He

may, for example, have wanted to conceal his sources of information, even though they were not the hackers, for reasons of confidentiality.”

37. The judge considered a number of factors which Mr Azima said should lead him to the conclusion that RAKIA was indeed responsible for the hacking. For its part, RAKIA pointed to a number of features that tended against that conclusion. He marshalled them as follows:

“[376] The forensic evidence established that the hacking of Mr Azima's emails could have taken place in October 2015 but it is common ground that it is impossible from the forensic evidence to identify the hackers. Mr Azima's case that Mr Page engaged agents to carry out the hacking therefore depends on inferences to be drawn from a series of pieces of circumstantial evidence, what Counsel for Mr Azima referred to as "a few but very powerful forensic pointers".

[377] I consider that the following facts and matters support the inference that the hacking of Mr Azima's emails was carried out by Mr Page acting on the instructions of the Ruler:

[377.1] The fact that, as reported in Mr Page's Project Update, in early 2015 Mr Azima was being monitored by sophisticated surveillance specialists engaged by Mr Page who planned to gather intelligence on the progress of the team of advisors managed by Mr Azima in the US to spread allegations against RAK and the Ruler in order to "monitor their activities and attempt to contain or ruin their plans";

[377.2] The fact that in 2015 the Ruler felt hostile towards Mr Azima, probably because of the matters reported in the Project Update, leading the Ruler to express the wish in April and again in July 2015 that Mr Azima should be targeted and gone after; he wished to obtain information about the role Mr Azima had played in Dr Massaad's schemes;

[377.3] The fact that throughout 2015 the Ruler had regular monthly meetings with Mr Page to discuss the ongoing investigations organised by Mr Page into Dr Massaad's activities, sometimes on a one to one basis without the involvement of Mr Buchanan;

[377.4] The fact that in December 2015 plans were being drawn up by RAKIA for a media campaign against Mr Azima, who was suspected of orchestrating and participating in fraudulent activities, alongside Dr Massaad;

[377.5] The fact that the blogging sites attacking Dr Massaad and the sites attacking Mr Azima with links to the hacked material appeared within a few days of each other, suggesting

that both attacks were coordinated and directed on behalf of RAKIA/the Ruler, (although, as noted above, I recognise that the coincidental timing may also suggest that RAKIA was not involved);

[377.6] The implausible nature of the evidence adduced by RAKIA to explain how Mr Page discovered the blogging sites and the second tranche of data, suggesting that Mr Page, whom I considered to be an unreliable witness, was not disclosing all the facts.

[378] As against these considerations, there are a number of significant features of Mr Azima's hacking case which are improbable and point away from RAKIA being responsible for the hacking, as follows:

[378.1] The inherent improbability of RAKIA, several months after Mr Azima's emails were hacked and at a time when, ex hypothesi, it had had time to analyse the contents of the material hacked in October 2015, entering into the Settlement Agreement with Mr Azima and paying Mr Azima \$2.6 million; Mr Azima's explanation for the Settlement Agreement as a device to trap him is not compelling;

[378.2] The inherent improbability of RAKIA negotiating the ISR joint venture with GDS, of which Mr Azima was a shareholder and director, at a time when it had ex hypothesi concluded, on the basis of the hacked material, that Mr Azima was a fraudster;

[378.3] The absence in RAKIA's internal communications in the period following October 2015 of any reference to the hacking or information clearly derived from the hacking;

[378.4] The fact that from October 2015 onwards RAKIA did not make use of the hacked material other than as the basis for bringing proceedings to recover the settlement sum and did not use the material to exert leverage on Mr Azima in his role as go between with Dr Massaad;

[378.5] The inherent improbability of RAKIA's witnesses, including Mr Gerrard as a solicitor, conspiring together to conceal RAKIA's role in the hacking and participating in proceedings which, if successful, would result in a relatively modest award of damages and reputational damage to Mr Azima but which would carry with them a risk of no less serious reputational damage to RAK, RAKIA and themselves, were the hacking to come to light.”

38. It is clear from these paragraphs that the judge drew together the various factors pointing for and against the inference Mr Azima had asked him to draw; and considered them collectively. Ultimately, he concluded as follows:

“[380] I accept that the hypothesis advanced on behalf of Mr Azima that Mr Page, acting with the express or implied authority of the Ruler, arranged for Mr Azima's emails to be hacked, that the Settlement Agreement was entered for tactical reasons and that it was decided to deploy the hacked material in August 2016 once the ceasefire with Dr Massaad was over, is not impossible. It would provide an explanation for the fact that the hacked material came to light when it did and for RAKIA's failure to provide a convincing account of its innocent discovery of the hacked material. It is equally not impossible that Mr Page arranged for Mr Azima's emails to be hacked without the knowledge of Mr Gerrard or Mr Buchanan or the Ruler's advisers so that the instigation of these proceedings did not entail a conspiracy between them, even though the witnesses may have harboured suspicions about Mr Page's role.

[381] It is, however, not enough for Mr Azima to advance a case that is not impossible. Based on all of the documentary and witness evidence, I was not satisfied on the balance of probabilities that RAKIA was responsible for the hacking of Mr Azima's emails. The facts supporting the inference that RAKIA was responsible for the hacking are far from conclusive and the improbable features of Mr Azima's case can only be explained away on the basis of speculative assumptions for which there is no sufficiently firm evidence.”

### **Our approach to the appeal**

39. We will take the grounds of appeal in a different order to that in which they were advanced. We will first consider whether, if RAKIA was responsible for the hacking, the evidence obtained through hacking ought to have been excluded; or its claims should have been (or should now be) struck out. Second, we consider the grounds of appeal against the judge's conclusions on the claims in fraudulent misrepresentation and conspiracy, including the application to admit fresh evidence on the conspiracy claim. Then we will consider the attacks on the judge's findings on the hacking claim taken together with the applications to admit fresh evidence on the hacking claim.

### **Should the evidence have been excluded?**

40. Before considering the grounds attacking the judge's rejection of Mr Azima's hacking claim, it is convenient to consider what the consequences would be if that allegation were to be established. We will assume, for present purposes, (a) that RAKIA's case would have failed but for the existence of documents obtained as a result of the unlawful hacking of Mr Azima's computer; (b) that RAKIA was responsible for that unlawful hacking; and (c) that at least some of RAKIA's witnesses gave dishonest evidence about how RAKIA came into possession of the hacked material.

41. Cases of evidence procured by torture aside, the general rule of English law is that evidence is admissible if it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. Relevant evidence is admissible even if it has been stolen: *Kuruma v R* [1955] AC 197. In *Helliwell v Piggott-Sims* [1980] FSR 356 Lord Denning MR said:

“I know that in criminal cases the judge may have a discretion. That is shown by *Kuruma v the Queen*. But so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning. I do not say that it was unlawfully obtained. It was obtained under an Anton Piller order which was not appealed against. But, even if it was unlawfully obtained, nevertheless the judge is right to admit it in evidence and to go on with the case as he proposes to do.”

42. We add to that the pithy statement by Millett LJ in *Bell Cablemedia Plc v Simmons* [2002] FSR 34 at [42]

“The common law has always set its face against preventing a party to civil proceedings from adducing admissible evidence even where it has been improperly obtained: *Calcraft v Guest* [1898] 1 QB 759. Equity has never sought to intervene in this context. It has never sought to mitigate the rule in *Calcraft v Guest*, but on the contrary has applied it to proceedings in its own courts. It is significant that in *Ashburton v Pape* the equitable jurisdiction was firmly based on confidence and not upon any wider principle of fair play in litigation. But in any case the defendant's mistake, as I have already pointed out, is not the kind of mistake in respect of which a court of equity would ever grant relief. It will not protect a dishonest man from the consequences of mistakenly disclosing evidence of his dishonesty.”

43. Under CPR Part 32.1 the court has power “to exclude evidence that would otherwise be admissible”. That is, of course, a power rather than a duty. If it is established that one party has obtained evidence unlawfully, how is the court to exercise its discretionary power?
44. In *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954 the claimant in a personal injury action was surreptitiously filmed at home by an inquiry agent posing as a market researcher. The video footage showed that she did not have the injury that she alleged. The question for this court was whether the defendant should be allowed to rely on that footage at trial. Lord Woolf CJ pointed out that there were two potentially conflicting public policies in play: the achieving of justice in a particular case on the one hand; and promoting the observance of the law on the other. At [28] he said:

“The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each

will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of article 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out. The case, therefore, has to be tried. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case.”

45. In the result, therefore, the balance came down in favour of establishing the truth; and the evidence was held to be properly admissible. Nevertheless, at [30] Lord Woolf suggested that there were other ways in which the court could express its disapproval of unlawful conduct in gathering evidence; most notably by requiring the defendant to pay the costs of the appeals even though it had been the successful party. In *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 WLR 1964, for example, Rix J held that documents relating to the unlawful investigation of banking accounts fell outside the scope of litigation privilege and had to be disclosed.

46. In *Istil Group Inc v Zahoor* [2003] EWHC 165 (Ch), [2003] 2 All ER 252 the claimants sought an injunction to restrain the defendant from using e-mails which were said to be confidential and privileged. Lawrence Collins J held that ordinarily the court would compel the return of confidential documents. At [112] he said:

“In my judgment this is a case in which, in the exercise of the *Lord Ashburton v Pape* jurisdiction, the court is entitled to balance the public interest in supporting legal professional privilege on the one hand, and the public interest in the proper administration of justice on the other hand. This is a case where there has on any view been forgery, and where there was a deliberate decision not to adduce evidence in a context which made the evidence which was put forward misleading. Although the decision not to refer to the bogus appendix 1 was deliberate, I make no finding that there was a deliberate attempt to mislead the court. I have already stated my conclusion that on the material before me it is likely that the forgery was produced for the purpose of this litigation. In my judgment the combination of forgery and misleading evidence make this a case where the equitable jurisdiction to restrain breach of confidence gives way to the public interest in the proper administration of justice.”

47. There are, in addition, two other points to be made. First, the materials which were obtained through hacking Mr Azima's e-mail accounts were “documents” as defined by CPR Part 31.4. *Ex hypothesi* they were within his control. Accordingly, as Mr Lord QC accepted, an order for standard disclosure would have required him to disclose those documents (other than documents properly covered by legal professional privilege) in so far as they either supported RAKIA's case or adversely affected his own case: CPR Part 31.6. It follows that those materials ought to have been available to RAKIA by the time of trial. This was a point that Rix J made in *Dubai Aluminium*



*Co* at 1969F. Second, the materials revealed serious fraud on the part of Mr Azima which would have been a very serious bar to the grant of equitable relief in his favour, as noted in *Istil*.

48. Accordingly, in our judgment, if Mr Azima had applied before trial for an order requiring the return of the hacked materials, he would not have succeeded. There is no reason to apply a different approach after the evidence has been deployed at trial.

49. The judge said at [384]:

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

50. In our judgment, that was entirely correct.

### **Striking out after trial**

51. CPR r 3.4(2) provides that “the court may strike out a statement of case if it appears to the court ... (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings”. The decision of the Supreme Court in *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004 establishes that the court may exercise this power even after trial.

52. Nevertheless, the cases in which that power has been exercised are few and far between. *Summers* was another personal injury case in which the claimant had massively over-stated the value of his claim. His assertion that he was unable to work and unlikely to do so was contradicted by undercover video surveillance evidence. The trial judge held that the claim was substantially fraudulent, but nevertheless refused to strike it out. He awarded damages amounting to about 10 per cent of the sum claimed. The Supreme Court upheld his decision. At [41] the court said:

“The language of the CPR supports the existence of a jurisdiction to strike a claim out for abuse of process even where to do so would defeat a substantive claim. The express words of CPR r 3.4(2)(b) give the court power to strike out a statement of case on the ground that it is an abuse of the court's process. It is common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. It follows from the language of the rule that in such a case the court has power to strike out the statement of case. There is nothing in the rule itself to qualify the power. It does not limit the time when an application for such an order must be made. Nor does it restrict the circumstances in which it can be made. The only restriction is that contained in CPR rr 1.1 and 1.2 that the court must decide cases in accordance with the overriding objective, which is to determine cases justly.”

53. Having held that the court had jurisdiction to strike out a claim even after trial, the court went on to hold at [43] that:

“... while the court has power to strike a claim out at the end of a trial, it would only do so if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined. The Court of Appeal said that this is a largely theoretical possibility because it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way. We agree and would add that the same is true where, as in this case, the court is able to assess both the liability of the defendant and the amount of that liability.”

54. The court added at [49]:

“The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small.”

55. The court concluded at [61]:

“The test in every case must be what is just and proportionate. It seems to us that it will only be in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial.”

56. It is important to stress that the cases about striking out after trial are cases in which the underlying substantive claim has been fraudulently brought: either because documents have been forged or perjured evidence given; or because the quantum of the claim has been fraudulently exaggerated. No case has been brought to our attention in which a claim was struck out solely because of the manner in which evidence was obtained, even though the underlying claim was both genuine and well-founded; let alone a case in which the unlawfully obtained evidence has demonstrated fraud on the part of the defendant.

57. There is, in our judgment, an important difference between a claim which is itself fraudulent or fraudulently exaggerated on the one hand, and a claim which, although well-founded, is supported by collateral lies. Lord Sumption drew this distinction in the context of marine insurance in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] AC 1. He said:

“[25] In this context, there is an obvious and important difference between a fraudulently exaggerated claim and a justified claim supported by collateral lies. Where a claim has

been fraudulently exaggerated, the insured's dishonesty is calculated to get him something to which he is not entitled. The reason why the insured cannot recover even the honest part of the claim is that the law declines to sever it from the invented part. The policy of deterring fraudulent claims goes to the honesty of the claim, and both are parts of a single claim ...

[26] The position is different where the insured is trying to obtain no more than the law regards as his entitlement and the lie is irrelevant to the existence or amount of that entitlement. In this case the lie is dishonest, but the claim is not. The immateriality of the lie to the claim makes it not just possible but appropriate to distinguish between them.... ”

58. In the same case Lord Hughes said at [92]:

“The collateral lie is immaterial to the liability of the insurer. In analysing the issue in that way one is, in a sense, re-stating the question: does a collateral lie defeat the claim? But one is also focussing on the critical difference between the collateral lie and the false or exaggerated claim. The collateral lie is certainly told with the aim of improving the position of the liar, but in fact and in law it makes no difference to the validity of his claim whether it is accepted or found out. The false or exaggerated claim is also made with the aim of improving the position of the liar, but if accepted it provides him with something to which he is not entitled in law.”

59. This court made the same distinction in *Howlett v Davis* [2017] EWCA Civ 1696, [2018] 1 W.L.R. 948 in considering whether a personal injury claim was “fundamentally dishonest” for the purposes of CPR Part 44.16 (1). In the course of his judgment, Newey LJ approved the following passage from the judgment of HHJ Maloney QC in *Gosling v Hailo* (unreported) 29 April 2014:

“The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.”

60. To put it another way, any unlawful conduct by RAKIA in obtaining the emails was not central to its underlying claims against Mr Azima: compare *Grondona v Stoffel & Co* [2020] UKSC 42, [2020] 3 WLR 1156 concerning the defence of illegality.

61. In the present case, in so far as Mr Page and Mr Halabi told lies, they were collateral or lacked centrality in this sense; because they did not go to the merits of RAKIA's underlying claims.
62. Three other points are worthy of note. First, as we have said, the hacked materials ought to have been disclosed by Mr Azima anyway (except to the extent that they were legitimately covered by legal professional privilege). Second, to strike out RAKIA's claim would leave Mr Azima with the benefit of his fraud. That element of public policy in civil cases is at least as strong, if not stronger, than disapproval of the means by which relevant evidence is gathered. Third, there are other ways in which the court may express its disapproval of the conduct of a party found to have procured relevant evidence by unlawful means: notably by penalties in costs or, perhaps, the refusal of interest on damages awarded.
63. In our judgment, even if the judge had found that RAKIA had been involved in the hacking of Mr Azima's email accounts, it would have been wholly disproportionate to have struck out its claim, thereby leaving Mr Azima with the benefit of his frauds.
64. In paragraph 42.3 of the Re-Re-Amended Reply RAKIA pleaded:
- “Even if ... RAKIA had been responsible for obtaining documents unlawfully from Mr Azima, the public interest in the court reaching the correct decision on the basis of all the evidence available would substantially outweigh any such unlawfulness. Accordingly, RAKIA's claim based on those documents would not constitute an abuse of process, nor would there be any basis for excluding any of those documents from the proceedings.”
65. In our judgment that was a valid plea.

### **Appeals on fact**

66. Lewison LJ has said elsewhere that an appeal court should not overturn findings of fact (including inferences drawn from findings of primary fact) unless compelled to do so: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]. Those observations have been approved and applied many times.
67. The question for this court is not what we make of the evidence called before the judge. The question is whether we are satisfied that the judge was wrong in the findings that he made. As Lord Reed said in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [62]:
- “It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.”
68. There are, of course, occasions where an appeal court can interfere with the trial judge's findings of fact. An appeal court may overturn a finding of fact if, for example, the judge has applied the wrong standard of proof (*Bank St Petersburg PJSC*

*v Arkhangelsky* [2020] EWCA Civ 408, [2020] 4 WLR 55); or there is “some identifiable flaw in the judge’s treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion” (*Re Sprintroom Ltd* [2019] EWCA Civ 932, [2020] BCC 1031 at [76]).

69. This court said in *ACLBDD Holdings Ltd v Staechelin* [2019] EWCA Civ 817, [2019] 3 All ER 429:

“[31] The mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it. That point, too, was made in *Henderson* at [48]:

“An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration ...”

[32] At [57] Lord Reed added:

“I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration *only if the judge’s conclusion was rationally insupportable*.” (Emphasis added.)”

70. See also *Fage UK Ltd* at [115] to [116].

### **The judge’s finding of reliance on the fraudulent misrepresentation**

71. This ground of appeal attacks the judge’s finding that RAKIA relied on Mr Azima’s fraudulent representation in entering into the settlement agreement. It does not attack the finding of fact that Mr Azima made a fraudulent misrepresentation. The judge found at [150] that Mr Buchanan relied on the representation in deciding that RAKIA should enter into the settlement agreement; and recommended that RAKIA should enter into the agreement. Those findings are not challenged either. The essence of the argument is that the decision to enter into the settlement agreement was made by the Ruler; and the representation was not made to him. It was made to Mr Buchanan; and there was no evidence that Mr Buchanan had passed on that representation to the Ruler.
72. The judge formulated the principle in terms that are not challenged. If a misrepresentation is made to an agent who relies on it to make a recommendation to the decision-making principal but does not pass the representation on, the principal

will nevertheless be entitled to relief for misrepresentation. Applying that principle to the facts, the judge concluded at [151]:

“Mr Buchanan then recommended to the Ruler that RAKIA should enter the Settlement Agreement. It is a reasonable inference, in my judgment, that in deciding to enter the Settlement Agreement the Ruler was acting on the basis of Mr Buchanan's recommendation. The fact that, as stated in his witness statement, the Ruler wished to enter the Settlement Agreement in order to settle the claims brought by Mr Azima and to obtain assurance from him that he had acted in good faith towards RAKIA and RAK does not mean that he was not also acting on the basis of the recommendation.”

73. Mr Lord argued that the person who took the decision to enter into the settlement agreement was the Ruler. The Ruler gave no evidence to the effect that he was induced to do so by anything that Mr Buchanan had said to him; or, indeed, by his recommendation. There was, therefore, an evidential gap. Where there is an evidential gap which a party could have filled, but chose not to, it is wrong in principle for a court to draw an inference in that party's favour. If any inference is to be drawn it should be drawn against him: *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, approving *R v Inland Revenue Commissioners ex p TC Coombs & Co* [1991] 2 AC 283.
74. The principle here, in our view, is that absence of evidence may *entitle* a court to draw an adverse inference, but does not *require* it to do so: see *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882, [2018] Med LR 552. The drawing of an inference depends on an appreciation of all the evidence. Whether the court should draw an adverse inference is a judgment that the trial judge is especially well-placed to make.
75. The general position is stated in Chitty on Contracts (33<sup>rd</sup> ed) at para 7-041 as follows:

“Once it is proved that a false statement was made which is “material” in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent.”
76. We do not consider that the judge can be criticised for drawing the inference that he did.
77. In addition, clause 3.2 of the settlement agreement provided:

“Mr Azima and HeavyLift each expressly and separately warrants and confirms to RAKIA that he/it (respectively) has at all times acted in good faith and with the utmost professional integrity and will continue in the future to act in good faith and

with the utmost professional integrity towards RAKIA, RAK Airways and any other RAK Entity.

The payment made to HeavyLift pursuant to this Settlement Agreement is made in reliance on this express warranty and confirmation.”

78. This warranty clearly relates to the past as well as the future. If, as the judge found, Mr Azima had made fraudulent misrepresentations, he would clearly have been in breach of the warranty. Clause 3.2 stated in terms that the payment to HeavyLift was made in reliance on the warranty. It is, in our judgment, a very short step from that contemporaneous statement to the judge’s inference that RAKIA relied on the representation in entering into the settlement agreement.

### **The conspiracy claim**

79. This claim related to the hotel in Georgia. The judge found that Mr Azima had conspired with Dr Massaad, Mr Al Sadeq and Mr Adams to induce RAKIA to pay him US\$1,562,500 under a sham referral agreement, on the pretext that the agreement entitled Mr Azima to a commission from RAKIA for introducing it to individuals who agreed to buy the hotel from RAKIA Georgia. Mr Azima had said in his evidence that his commission had been agreed between Dr Massaad and the Ruler; and that the Ruler knew of and approved his commission. The latter allegation was specifically denied in the pleadings.
80. The judge gave a number of reasons for his finding that the referral agreement was a sham which he set out at [181]. They included:
- i) The implausibility of the alleged agreement to pay the commission plus a share of the sale price.
  - ii) The implausibility of a revised agreement which Mr Azima said he had made.
  - iii) The mismatch between the referral agreement and the terms of the agreement that had been alleged.
  - iv) The way in which the referral agreement had come into existence.
81. In support of his conclusion, the judge also drew inferences from the fact that (as he found) Dr Massaad received a bribe out of the illicit payments; and from the fact that (as he also found) Mr Al Sadeq was involved in the retrospective drafting of the referral agreement.
82. In addition, he found that a memorandum prepared by Mr Adams (which was intended to constitute a formal and accurate record of events) stated clearly that the potential purchasers of the hotel were already negotiating the purchase of the hotel before Mr Azima came on the scene. Mr Azima had seen that memorandum; but had not asked for any corrections to it to be made.
83. The complaint under this head is that Mr Azima’s assertion that the Ruler knew of and approved the commission agreement was not put to relevant witnesses in cross-examination.

84. The basic principle is not in doubt. As May LJ observed in *Vogon International Ltd v The Serious Fraud Office* [2004] EWCA Civ 104:

“It is ... elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves.”

85. The question in reality is: what amounts to a proper opportunity? This court considered that question in *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31. The court referred to the decision of the House of Lords in *Browne v Dunn* (1894) R 67, although indirectly via the judgment of Hunt J in the Australian case of *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607. In *Browne* Lord Herschell said:

“My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.”

86. Nevertheless, as Hunt J said in *Allied Pastoral*:

“His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is ‘perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling’.”

87. What Lord Herschell in fact said in *Browne* was this:

“Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of *there having been no suggestion whatever in the course of the case that his story is not accepted.*” (Emphasis added)

88. Hunt J concluded in *Allied Pastoral*:

“I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to



rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings.”

89. That was expressly approved by this court in *Markem*. This way of putting the point leaves it open in a particular case for a judge to find that a witness has been dishonest, even though the dishonesty has not been put to him in cross-examination, provided that he has been given notice by other means that his story is not to be believed. There are, however, cases in which a stricter line has been followed.
90. In *Revenue and Customs Commissioners v Dempster* [2008] STC 2079 HMRC alleged that certain alleged transactions were a dishonest sham. On appeal from the VAT Tribunal HMRC argued that because their statement of case before the tribunal had constituted a case of dishonesty, it was unnecessary for it to be put specifically in cross-examination to the taxpayer either that he was a knowing party to a VAT fraud, or that he knew, or turned a blind eye to the fact, that the software which he traded was fake or worthless. Briggs J said ([26]):

“I emphatically disagree with that submission. First, the tribunal’s summary of what was not put in cross-examination is stated with clarity on no less than three occasions in the decision and I was provided neither with a transcript, nor notes (whether by the tribunal itself or the by the parties) of the cross-examination with which to be in any position to conclude that the tribunal’s summary of the cross-examination was other than fair and accurate. Secondly, it is a cardinal principle of litigation that if a serious allegation, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross-examination. In my judgment the tribunal’s conclusion that it was constrained, notwithstanding suspicion, from making the necessary findings of knowledge against Mr Dempster (necessary that is to permit the consequences of the alleged sham to be visited upon him) was nothing more nor less than a correct and conventional application of that cardinal principle”

91. Lewison J expressed agreement with that approach in *Abbey Forwarding Ltd (in liquidation) v Hone* [2010] EWHC 2029 (Ch). More importantly, however, it was endorsed by this court in *Haringey LBC v Hines* [2010] EWCA Civ 1111, [2011] HLR 6.
92. Those cases were cited to the court in the more recent case of *Howlett v Davis* where one of the issues was whether a personal injury claim was “fundamentally dishonest”. Newey LJ said at [32] that:

“The key question in such a case would be whether the claimant had been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence.”

93. In relation to the course of evidence at trial, Newey LJ said that the question was whether the claimant's veracity had been "adequately explored". At [39] he said this:

"First, where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide."

94. That approach was approved by this court in *B (A Child)* [2018] EWCA Civ 2127, [2019] 1 FCR 120; and is also supported by other cases. In *Williams v Solicitors Regulation Authority* [2017] EWHC 1478 (Admin) Carr J referred to *Browne* and said at [73]:

"The rule is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of written statement served in advance, and then verified on oath in the witness box."

95. In *Sait v General Medical Council* [2018] EWHC 3160 (Admin) Mostyn J took the view that the rule in *Browne v Dunn* was obsolete, having regard to the way in which civil litigation is now conducted. At [46] he said:

"It is impossible to conceive that the modern system of pleadings, witness statements and skeleton arguments will not give the necessary notice of impeachment of credit. The modern system requires all cards to be put face up on the table and forensic ambushes are basically impossible."

96. To these domestic authorities one can add the decision of the Privy Council in *Chen v Ng* [2017] UKPC 27. The Board said at [54]:

"It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him."

97. The "relevant issue" with which we are concerned was whether the referral agreement was a sham. Two witnesses were relevant to that issue: Mr Azima and Mr Adams.

98. Whether the referral agreement was a sham was an issue clearly signalled in advance of the trial. RAKIA's statement of case pleaded expressly that it was. Paragraph 8.12.12 of the Re-Amended Particulars of Claim pleaded that Mr Azima "deliberately procured the creation of a sham document" for the purpose of "creating the false appearance" that he was entitled to commission. Paragraph 13.4 of the Re-Re-Amended Reply pleaded that Mr Azima and others had conspired to produce that sham document that falsely recorded that Mr Azima had introduced the buyers for the hotel which in fact he had not. At the opening of the trial RAKIA's skeleton argument also explained that it was RAKIA's case that the referral agreement was a fraudulent sham. Paragraph 22.1.2 of the Re-Re-Amended Reply pleaded that neither RAKIA nor the Ruler understood or agreed that Mr Azima would receive any payment from RAKIA in connection with the sale of the hotel. That plea was repeated in paragraph 22.2.
99. In his witness statement Mr Azima had given evidence about the circumstances in which he said the commission had been agreed. The suggestion of a 5% commission had come from Dr Massaad in 2010. He said that in the following year Dr Massaad had told him that he had discussed Mr Azima's commission with the Ruler, and that the Ruler had agreed to it. Mr Azima added that at a later meeting with the Ruler he told the Ruler that he had been informed of the latter's generosity (by which he meant agreement to pay his commission) and thanked the Ruler.
100. Except on one occasion (relating to a celebration after completion of the sale of the hotel) Mr Adams did not feature in his account of events surrounding the agreement of the commission. As regards the referral agreement Mr Azima said this:
- "111. I saw nothing wrong with RAKIA's desire for an executed version of the agreement. Various emails followed in which proposed amended drafts of the agreement were exchanged between me, Mr Adams and Mr Al Sadeq.
112. RAKIA now alleges that the referral agreement was a sham. I categorically deny this – it is absurd to suggest that the document was a sham. The commission had been agreed. This document had been sent by Mr Al Sadeq to me (through lawyers) to record the terms of the agreement already reached. As far as I was concerned, there was nothing wrong with this agreement."
101. Whether Mr Azima was entitled to commission and whether the referral agreement was a sham was canvassed with Mr Azima in the course of his cross-examination.
102. It was put to him that the payment to Dr Massaad was a bribe. It was also put to him that none of his account was true; and that he did not reach an agreement with Dr Massaad to be paid a commission. He was also asked about his conversations with the Ruler; and that he concealed what he was doing from the Ruler.
103. The judge plainly understood that Mr Azima had been challenged on his account because he said at [181]:

“It was put to Mr Azima in cross examination that he was not entitled to any commission and that the Referral Agreement was a sham.”

104. Mr Adams’ evidence in his witness statement was that he drafted the agreement which reflected an agreement that had actually been made. Mr Lord argues that this evidence was never challenged; and that it was not put to Mr Adams in cross-examination that he was party to the conspiracy.

105. In his witness statement Mr Adams said that he had read Mr Azima’s witness statement and confirmed that it accorded with his memory and understanding of events. But as we have said, Mr Adams did not feature in Mr Azima’s narrative of how his commission came to be agreed. As regards the referral agreement all that he said was:

“17. In relation to the exchange of drafts of the referral agreement with Mr Al Sadeq, I also did not see anything unusual or improper at the time about RAKIA’s desire for a written version of the agreement that had already been reached in relation to the payment of Mr Azima’s commission.”

106. He did not purport to give any first hand evidence about the prior agreement that he said the referral agreement was intended to record; nor could he have since he was not involved in the making of the alleged agreement. In the course of his cross-examination it was put to him that the referral agreement was a “false document which misleads.” He replied that:

“it’s not a false document. It’s my understanding that Mr Al Sadeq asked for this document. We had already been paid.”

107. He was then asked why he thought he was entitled to expenses under the agreement. His answer was that:

“I made no determination on that. Mr Azima said it was part of the agreement.”

108. He repeated a short time later that he had not agreed anything but that “Mr Azima had agreed”. It seems to us to be clear, then, that Mr Adams did not claim to have any first-hand knowledge about the agreement that the referral agreement was intended to record. What he claimed to have known about it came from Mr Azima. In those circumstances, putting the allegation of sham to Mr Azima was enough. There was no need for the judge to find (and he did not find) that Mr Adams had given a dishonest account of what Mr Azima had told him. It was enough to find that what Mr Azima told him was itself false. In addition, it is worthy of note that at an earlier stage in his judgment the judge had found that Mr Adams was responsible for producing a large number of fabricated back-dated documents in connection with the fraudulent misrepresentations about HeavyLift.

109. In our judgment the judge was entitled to find that Mr Azima was not entitled to the commission and that the referral agreement was a sham. Mr Azima and Mr Adams

were both given the opportunity to elaborate their versions of these events. The judge's finding was not unfair.

### **Fresh evidence on the conspiracy claim**

110. This court's power to receive fresh evidence is to be found in CPR Part 52. 21 (2). The general principles on which that power are exercised are in essence those established by *Ladd v Marshall* [1954] 1 WLR 1489, viz (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive and (3) it must be apparently credible. In an ordinary civil claim satisfaction of these criteria is a necessary but not a sufficient condition for the reception of fresh evidence: *Khetani v Kanbi* [2006] EWCA Civ 1621. If these criteria are met, the appeal court has a discretion to exercise. In deciding how to exercise that discretion this court held in *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255 at [23]:

“The interests of the parties and of the public in fostering finality in litigation are significant. The parties have suffered the considerable stress and expense of one trial. The reception of new evidence on appeal usually leads to a re-trial, which should only be allowed if imperative in the interests of justice.”

111. The fresh evidence on this claim is a witness statement prepared by or on behalf of Mr Pourya Nayebi. That forms the subject of ground 8A. In that witness statement Mr Nayebi says that he was, in fact, introduced to RAKIA by Mr Azima, as a potential purchaser for the hotel in Tbilisi. Mr Lord submits that that is material to the questions of whether the referral agreement was a sham, whether \$500,000 paid to Dr Massaad by Mr Azima was a bribe and the judge's finding against Mr Azima in conspiracy. Mr Nayebi explains in his witness statement that he had had “very little contact” with Mr Azima in the “past several years” having had “a fall out” over the hotel transaction; but on seeing the judgment in this matter (although he does not explain how it was that he came to see it) and reading in the press that Mr Azima intended to appeal, he “considered that [he] owed it to Mr Azima to set the record straight to avoid a miscarriage of justice taking place.” It is submitted, therefore, that Mr Nayebi's evidence could not, with reasonable diligence, have been adduced at trial, it is apparently credible and would have an important influence on the claim.
112. In his witness statement in support of the application Mr Holden, Mr Azima's solicitor, said that until recently “Mr Nayebi was (as he confirms) unwilling to be a witness”. In fact, Mr Nayebi says no such thing. All that he says is that in the past several years he had had “very little” contact with Mr Azima. He does not even say that he had *no* contact with Mr Azima. In addition, although Mr Holden says that Mr Nayebi is resident in Iran, the address that he gives in his witness statement is an address in Tbilisi, Georgia. There is no evidence of any effort that Mr Azima or his lawyers made before trial to obtain evidence from Mr Nayebi, despite the fact that he must have been an obvious witness. This deficiency in the evidence was identified by Ms Ward, RAKIA's solicitor, in her 13<sup>th</sup> witness statement dated 31 August 2020. Mr Holden has made three further witness statements since then; but has made no attempt to repair the deficiency. Nor has Mr Azima given any explanation.

113. In addition, according to his witness statement Mr Nayebi says that he was one of three prospective purchasers of the hotel. There is no evidence that Mr Azima took any steps before trial to obtain evidence from either or both of the other two.
114. In effect, Ms Ward's witness statement challenged Mr Azima and his legal team to rebut the inference that Mr Nayebi's evidence could have been obtained with reasonable diligence before trial. They have not done so.
115. In addition, RAKIA argues that it is not clear that Mr Nayebi can be considered to be independent of Mr Azima. He has every reason to be hostile to RAKIA having paid a \$20 million deposit which has been the subject of protracted litigation. We consider that there is force in this point too, which has also gone unanswered. It is also the case that both in his witness statement and in his oral evidence at trial Mr Azima himself cast considerable doubt upon Mr Nayebi's probity. We see no reason why the court should now accept him as a witness of truth.
116. Third, Mr Nayebi's evidence does not touch upon the judge's main reasons for finding that the unlawful means conspiracy was proved; namely his finding that Dr Massaad received a bribe out of the illicit payments. It does not, therefore, go to undermine the judge's central finding of fact.
117. Finally, in relation to Mr Nayebi's evidence, we take into account the prospects of a retrial after what has already been protracted litigation. We place considerable weight on the principle of finality.
118. We refuse to admit this category of new evidence.

#### **RAKIA's alternative case**

119. The judge said at [196] that if he had found that the referral agreement was a genuine agreement, he would have concluded that Mr Azima's failure to give full disclosure to RAKIA of his intended interest in the hotel was a breach of clause 1 of the referral agreement.
120. The complaint under this head, which forms ground 9, is that the case that the judge said he would have accepted was not RAKIA's pleaded case.
121. But whether that is right or wrong does not matter. The judge had already found that the referral agreement was not a genuine agreement. So this question did not (and does not) arise.

#### **Conclusion on Rakia's claims**

122. We consider that the attacks on the judge's findings of fact in relation to RAKIA's claims fail; and that even if RAKIA was responsible for the hacking those claims should not be struck out or dismissed.
123. We ought also to deal briefly with Mr Lord's contention that Mr Azima's hacking claim operated by way of equitable set-off so as to provide him with a defence to those claims. Before the Judicature Act common law courts and courts of equity had separate jurisdictions. Where the defendant to a common law claim sought to rely on a cross-claim by way of equitable set-off in response to the claim, he would apply to a

court of equity for an injunction to restrain further proceedings in the common law claim until his own cross-claim had been determined. As Lord Cottenham LC explained in *Rawson v Samuel* (1841) Cr & Ph 161, 178:

“... this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand.”

124. The connection between an equitable set-off and the right to an injunction was repeated by Lord Alverstone CJ in *Bankes v Jarvis* [1903] 1 KB 549, 552:

“If grounds exist which formerly would have entitled a defendant to file a bill in Chancery to restrain the plaintiff from proceeding with his action, I think a defendant is now enabled to rely on those grounds as a defence to the action.”

125. In *The Aries* [1977] 1 WLR 185, 191 Lord Wilberforce also referred to requirement for some equitable ground for intervention:

“One thing is certainly clear about the doctrine of equitable set-off - complicated though it may have become from its involvement with procedural matters - namely, that for it to apply, there must be some equity, some ground for equitable intervention, other than the mere existence of a cross-claim.”

126. That observation was approved by the House of Lords in *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056.

127. We have already seen, however, that equity will not protect a dishonest man from the consequences of his dishonesty. The consequences of Mr Azima's dishonesty are reflected in the judge's award of damages. Had he applied for an injunction to restrain continuation of the action, he would have failed. We do not consider that Mr Azima's hacking claim can give rise to an equitable set-off.

128. Accordingly, we consider that irrespective of the outcome of the counter claim the judgment in RAKIA's favour on its claims must stand.

### **The counterclaim**

129. If the judge had found that RAKIA had been responsible for the hacking, in theory the counterclaim might have been either wholly or partly valid. We turn, then to consider the hacking claim, but only in the context of the counterclaim.

### **Fresh evidence on the hacking claim**

130. Before looking at the criticisms of the judge's approach to the evidence at trial it is convenient to consider the fresh evidence that Mr Azima wishes to adduce on the hacking claim. A tip-off from Thomson Reuters after the trial led Mr Azima to conclude that he had not been the only victim of spear-phishing emails but that others who had been named in the Project Update had also been targets. Linked with the tip-off was a report by The Citizen Lab released on 9 June 2020 which claimed to have

uncovered a “massive hack-for-hire operation” said to be linked to an Indian company called BellTrox.

131. The information provided by Thomson Reuters consisted of email addresses (both recipients and senders) together with dates and times of sending, beginning in March 2015. The recipients included not only Mr Azima but also others who had been named in the Project Update. Following the information provided by Thomson Reuters Mr Azima’s computer expert (who had given evidence at trial) produced a further report in which he said that certain features of the material demonstrated that these emails were spear-phishing emails. This evidence was said to show that Mr Azima had been the target of phishing emails which began at the same time as the Project Update was provided to RAKIA: that is to say in March 2015. RAKIA’s computer expert (who had also given evidence at trial) made a number of sustained criticisms of that report. RAKIA also took the point that since one of the allegations at trial was that Mr Azima’s emails had been hacked because he was named in the Project Update, it would have been open to him to have asked the others also named in that report to allow access to their email accounts. Indeed, RAKIA had applied for disclosure from at least three of those individuals, which Mr Azima refused.
132. Mr Azima subsequently instructed Mr Rey, a security consultant based in Switzerland, to investigate. Mr Rey’s investigations into BellTrox led him to another Indian company called CyberRoot. He spoke to a Mr Vikash Kumar Pandey, a former employee of CyberRoot. Mr Pandey told him that he and four of his colleagues had worked on the hack of Mr Azima on the instructions of Mr Del Rosso (who had given evidence for RAKIA at trial, but had not mentioned CyberRoot). Mr Pandey began working on the hack in June or July 2015; that is to say some three to four months after the date of the Project Update. Mr Pandey described the methods that he and his colleagues had used. CyberRoot’s efforts to hack Mr Azima’s emails were initially unsuccessful; but they gained access to them in March 2016. He also described how CyberRoot had disseminated Mr Azima’s information on the internet. CyberRoot had been paid about \$1 million for this work.
133. In response to this evidence Mr Del Rosso made another witness statement. He accepted that he had engaged CyberRoot to carry out work on RAKIA’s behalf; and had arranged the payment to CyberRoot of the \$1 million. But he said that that was for different work which had nothing to do with Mr Azima.
134. Whether RAKIA was involved in the hacking is hotly in dispute. Moreover, Mr Pandey’s account of how the hacking began is at variance both with Mr Azima’s case and also with what the first tranche of fresh evidence is said to demonstrate. His evidence is that CyberRoot only gained access to Mr Azima’s email accounts in March 2016, whereas Mr Azima’s case was that the hacking had taken place many months earlier. If RAKIA had already obtained access to Mr Azima’s email accounts many months earlier, it is difficult to see why CyberRoot would have been instructed to replicate the hacking. Nevertheless, if Mr Pandey’s account is true, it seems to us that it will support Mr Azima’s allegation that RAKIA was responsible for the hacking (although not the way in which it was put at trial); and that RAKIA’s defence to the counterclaim was dishonestly advanced. That will in our judgment require a complete re-evaluation of the evidence in support of the hacking claim. It was common ground that where an allegation is made that a judgment was procured by



fraud (in this case judgment for RAKIA on the counterclaim), the principles in *Ladd v Marshall* do not apply.

135. What the court should do when a contested allegation is made that a judgment was procured by fraud has been the subject of some case-law. There are, in essence, two alternatives. The first is that the litigant alleging fraud may bring a separate action to set aside the judgment. The second is that the court may direct a trial of the fraud issue within the existing action.

136. *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 was a case about a fresh action to set aside a judgment on the ground that it was procured by fraud. Fraud had not been alleged in the first action. The Supreme Court held that that there was no requirement in such an action that the evidence of fraud should not have been obtainable with reasonable diligence for use at trial. But Lord Kerr, who gave the leading judgment, said at [55] that there were two qualifications of that general principle; of which the first was:

“Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. Since that question does not arise in the present appeal, I do not express any final view on it.”

137. Lord Sumption also left open the position where fraud had been raised at the original trial; but thought that if the new evidence of fraud was “decisive” then the position was the same.

138. In *Dale v Banga* [2021] EWCA Civ 240 Asplin LJ put it this way:

“[42] In this case, the issue of fraud is hotly contested. In the circumstances, this court must decide first whether the fresh evidence is sufficient to warrant a trial of the fraud issue. The relevant threshold test has been variously described and was referred to in different ways in *Noble v Owens* itself. It seems to me that it is necessary to decide whether the new evidence is capable of showing that the judge was deliberately misled by the Respondents and that the judgment may have been obtained by fraud. It must be sufficient to justify pleading a case of fraud. It must be capable of showing that there was conscious and deliberate dishonesty which was causative of the judgment being obtained in the terms it was. The conscious and deliberate dishonesty must be that of a party to the action, or was at least suborned by or knowingly relied upon by a party.

[43] Secondly, if that threshold test is satisfied, the court must determine whether on the facts and in the circumstances of the particular case, it is appropriate that the fraud issue should be remitted or otherwise dealt with within the same proceedings. There is no question but that the appeal court has power to

"refer any claim or issue for determination by the lower court": CPR 52.20(2)(b). The question is whether the discretion to do so should be exercised. It is not possible to list the matters which will be relevant to the exercise of that discretion because they inevitably depend on the circumstances."

139. On the facts of that case, the court considered that the threshold test was not met. In this case, however, Mr Tomlinson QC did not argue that the fresh evidence, taken as a whole, failed to meet the threshold test. So far as the second stage was concerned, Asplin LJ went on to say:

"[52] Even if the threshold test were met, I would, nevertheless, decline to exercise the discretion to remit the matter to the lower court. This is not a case in which it is expedient, convenient and proportionate that this matter should be dealt with in that way. The judge has since retired. A new judge would have to pick up this matter and begin again. It is unlikely, therefore, that any time or costs would be saved (save for a new issue fee). This is all the more so given the wide ranging nature of the fraud issue as pleaded in the draft Points of Claim and the need to prove that Mr Banga [who was alleged to have forged documents and given perjured evidence] produced false invoices in the face of his acquittal. In effect, it would involve satellite litigation."

140. Mr Lord argued (particularly in his reply) that despite this radical change in the account of how the hacking came about, this court should not order a retrial; but should instead find that RAKIA was indeed responsible for the hacking. He drew the analogy with the doctrine of recent possession as applied in the law of theft. If the accused is found in recent possession of stolen goods, that possession calls for explanation; and if no explanation is given, or an explanation is given which the jury are convinced is untrue, then they are entitled to infer that the accused is either the thief or the handler of the stolen goods. Here, RAKIA had possession of Mr Azima's hacked e-mails shortly after the hacking took place. It offered an explanation for how it came into possession of the first tranche of material, which the judge found to be untrue. It had no explanation for how it came into possession of the second tranche. RAKIA had tried to distance itself from Mr Page and his dishonest account, despite the fact that its pleaded case was that Mr Page was acting as RAKIA's agent. Since Mr Page was acknowledged to be RAKIA's agent, it was legally responsible for his dishonest account. In addition, RAKIA had the motive, the means, and the ability to hack Mr Azima's e-mails. That combination of facts not only entitled the judge to find that RAKIA was responsible for the hacking but in effect compelled him to do so; or at least should lead us to conclude that his refusal to make that finding was rationally insupportable. We should, therefore, make that finding ourselves.
141. We decline that invitation. In our judgment the fact that there are at least two mutually inconsistent accounts of how the hacking came about means that it is not safe to reach any conclusion without a re-evaluation of the evidence. The new case will have to be pleaded and proved in the usual way.

142. The question then arises whether we should remit the issue of fraud to the High Court within the existing proceedings; or leave Mr Azima to begin a fresh action. Not surprisingly, Mr Lord argued for the first alternative, and Mr Tomlinson for the second.
143. Mr Lord pointed to a number of potential obstacles that RAKIA might try to throw in Mr Azima's way. They included possible objections to the exercise of jurisdiction, to service out of the jurisdiction and to an assertion of sovereign immunity. These particular objections were met by RAKIA's offer of an undertaking to the court not to take any of these points in a future action. But in addition to these factors, Mr Lord also submitted that it would be more costly to start afresh; that fresh proceedings would take up more court time and would take much longer to resolve; and that much of the material already disclosed or in evidence could be re-used. He acknowledged, however, that it would be necessary to recall at least Mr Page, Mr Gerrard, Mr Del Rosso and the experts. Mr Rey would also have to give evidence.
144. On the other hand, Mr Tomlinson argued that the new hacking case would have to be properly pleaded; that further disclosure would have to be made (especially concerning RAKIA's instructions to and relationship with CyberRoot) and that little would be saved either in time or cost by remission rather than by a fresh action. It would not be right to remit the issue of fraud to the deputy judge; so a new judge would have to consider the question.
145. We are narrowly persuaded that remission of the hacking claim would be more expeditious and less costly than leaving Mr Azima to begin a fresh action. We agree with Mr Lord that it would place the deputy judge in an invidious position if he had to revisit all his findings of fact on the hacking claim; and therefore the remission will have to be to a different judge of the Chancery Division. Remission in the current action also has the benefit that RAKIA's judgment against Mr Azima on its own claims will stay in place, irrespective of the outcome of the counterclaim.
146. Having reached that conclusion we do not propose to deal with Mr Lord's more detailed criticisms of the judge's handling of the evidence. Suffice it to say that to the extent that those criticisms were well-founded, they could only have led to a retrial of the hacking claim. This court would not have substituted its own findings of fact for those of the judge. We should also make it clear that neither the parties nor the judge who hears the remitted issues will be bound by any of the findings of fact made by the judge on the hacking claim. But his findings of fact on RAKIA's substantive claims stand. It will be for the Chancery Division to give directions about the future conduct of the hacking counterclaim.

## **Result**

147. We dismiss the appeal on grounds 7, 8 and 9. We refuse permission to appeal on ground 8A. We allow the application to adduce new evidence on the hacking claim; and allow the appeal on ground 6. We remit the hacking counterclaim to the Chancery Division for a further trial in accordance with directions to be given by the Chancery Division.
148. Following circulation of this judgment in draft, and in the light of the parties' comments, we think it appropriate to clarify the relief that we give in relation to

grounds 5, 6A and 6B. Ground 5 wraps up three separate points: (a) whether the judge should have found that RAKIA was responsible for the hacking; (b) if he had so found whether he should have excluded the evidence obtained as a result of the hacking and/or (c) that having so found, he should have struck out RAKIA's claim. We have decided (b) and (c) in RAKIA's favour. Because we are remitting the hacking counterclaim in the light of the fresh evidence we cannot allow or dismiss the appeal on (a). Grounds 6A and 6B suffer from a similar defect. They assert that in view of the new evidence (a) RAKIA should be found responsible for the hacking; and (b) that the consequences in grounds 5 and 6 should follow. We have decided that the consequence in ground 5 does not follow even if (a) is decided in Mr Azima's favour following a new trial. Ground 6 refers to the judge's dismissal of the counterclaim, which we have set aside. Once again we are not in a position to rule definitively on (a). All that we have done in relation to the fresh evidence is to admit it on the appeal; and to remit the hacking counterclaim for retrial. In the light of the way in which these grounds of appeal are drafted, it is probably better to deal with our conclusions by way of declarations.

149. We are presently minded to stay execution of RAKIA's judgment, pending trial of the counterclaim; but we will entertain submissions on that subject.