Neutral Citation Number: [2023] EWCA Civ 507

Case No: CA-2022-002292; 002294 & 002314

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MICHAEL GREEN J
[2022] EWHC 2727 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2023

Before :

SIR JULIAN FLAUX
CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LORD JUSTICE BIRSS

- -

Between :

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

- -
- -

Fionn Pilbrow KC and Aarushi Sahore (instructed by **Charles Fussell LLP**) for the **Second Additional Defendant to the Counterclaim/First Appellant**
Roger Masefield KC, Craig Morrison and Robert Harris (instructed by **Enyo Law LLP**) for the **Third Additional Defendant to the Counterclaim/Second Appellant**

Antony White KC and Ben Silverstone (instructed by **Kingsley Napley LLP**) for the **Fourth Additional Defendant/to the Counterclaim/Third Appellant**

Thomas Plewman KC, Hugo Leith and Frederick Wilmot-Smith (instructed by **Burlingtons Legal LLP**) for the **Counterclaimant/Respondent**

Hearing dates : 7 to 9 March 2023

- -

APPROVED JUDGMENT

Sir Julian Flaux C:

Introduction

1. The Second, Third and Fourth Additional Defendants to the Counterclaim (to whom I will refer as "Mr Gerrard", "Dechert" and "Mr Buchanan" individually and "the Additional Defendants" collectively) appeal with the permission of the judge against the Order of Michael Green J dated 7 November 2022 whereby he granted the Defendant and Counterclaimant (whom I will refer to as "Mr Azima") permission to bring the so-called set-aside counterclaim and to amend his statement of case. By this proposed counterclaim, Mr Azima alleges that the Ras Al Khaimah Investment Authority (to which I will refer as "RAKIA") procured various judgments and Orders of the English courts by fraud. The judge rejected the Additional Defendants' submissions that the proposed counterclaim was an abuse of process.

2. It is well-established that a decision as to whether an action is an abuse is not a question of discretion but an evaluative assessment to which there can only be one answer: see per David Richards LJ (as he then was) in *Harbour Castle Limited v David Wilson Homes Ltd* [2019] EWCA Civ 505 at [6]. However, because the assessment is fact-sensitive and involves taking account of and giving appropriate weight to all relevant factors, the circumstances in which the Court of Appeal will interfere with that assessment are limited. As David Richards LJ continued at [7]:

> "Because the assessment is fact-sensitive and involves taking account of and giving appropriate weight to all relevant factors, an appeal court will not interfere with the judge's assessment unless the judge has taken account of irrelevant factors, ignored relevant factors, applied a wrong principle, come to a decision that was not properly open to the judge or was, in the view of the appeal court, plainly wrong: see *Stuart v Goldberg Linde* [[2008] EWCA Civ 2; [2008] 1 WLR 823] per Sir Anthony Clarke MR at [81]-[82] and Sedley LJ at [76]."

3. Following a trial in the Business List before Mr Andrew Lenon QC (sitting as a Deputy Judge of the High Court and to whom I will refer as "the deputy judge"), by a judgment dated 22 May 2020 ([2020] EWHC 1327 (Ch)), the deputy judge upheld RAKIA's claims against Mr Azima in deceit and conspiracy, finding that he had acted fraudulently and dishonestly. The deputy judge dismissed Mr Azima's so-called hacking defence and a related counterclaim by which he alleged that RAKIA had been responsible for hacking Mr Azima's data and thereby obtained documents which it relied upon in support of its case at trial and that RAKIA and its witnesses had lied to the Court to conceal the fact of the hacking.

4. Mr Azima appealed against the judgment of the deputy judge, contending that RAKIA and its witnesses were responsible for the hacking and had engaged in a massive deception of the Court, so that the judgment had been procured by fraud and the entire case should be remitted to the High Court. By its judgment ([2021] EWCA Civ 349), the Court of Appeal (Lewison, Asplin and Males LJJ) refused to make that order and decided that the part of the judgment relating to Mr Azima's counterclaim for damages for the hacking should be remitted to the High Court for retrial before a different judge. However, it held that the balance of the judgment relating to RAKIA's claim against Mr Azima should be upheld, since the hacked documents

showed him to be a fraudster and were documents he would have been obliged to disclose during the course of the proceedings and to allow the judgment on RAKIA's claims to be set aside would be to allow Mr Azima to profit from his fraudulent misconduct. At [128] of its judgment the Court of Appeal held that: "irrespective of the outcome of the counter claim the judgment in RAKIA's favour on its claims must stand."

5. Mr Azima sought permission to appeal from the Supreme Court principally on the basis that the Court of Appeal had been wrong to hold, before the counterclaim was retried, that the remedies available to him did not include overturning the judgment in favour of RAKIA. Some months after the application for permission was lodged, he sought to adduce fresh evidence before the Supreme Court which was said to show that RAKIA was responsible for the hacking. However, on 28 April 2022, the Supreme Court refused permission to appeal on the ground that the application did not raise an arguable point of law.

6. In the meantime the hacking counterclaim had been remitted to the High Court and allocated to Michael Green J. On 16 July 2021 he gave Mr Azima permission to join four Additional Defendants to the Counterclaim:

   (1) Mr Stuart Page, a private investigator who has since admitted his involvement in the hacking on behalf of RAKIA and that he gave false evidence at the first trial. Mr Azima has settled with Mr Page who has provided an affidavit supporting Mr Azima's case.

   (2) Mr Neil Gerrard, a retired solicitor and former partner of Dechert. Following an adverse judgment against him of Waksman J in unrelated proceedings, he is now represented separately from Dechert.

   (3) Dechert, who, until their replacement by Stewarts Law LLP, were solicitors for RAKIA in the original proceedings which led to the trial before the deputy judge.

   (4) Mr James Buchanan, who was employed by companies in Ras Al Khaimah and who was authorised to undertake certain activities on behalf of RAKIA.

7. Mr Azima now wishes to bring an additional counterclaim, the set-aside counterclaim, in which his cause of action is to have the judgment of the deputy judge set aside in its entirety on the grounds that it was procured by fraud. He contends that he has discovered yet more evidence which shows that a pervasive fraud was perpetrated on the Court by or on behalf of RAKIA and that he therefore satisfies the test for granting permission to amend to bring that counterclaim, namely that there is a real prospect of satisfying the conditions necessary to have the judgment set aside.

8. On 16 June 2022, RAKIA made an open offer to Mr Azima to settle the hacking counterclaim for US$1 million plus the costs of that counterclaim, which was rejected. On 22 June 2022, RAKIA wrote to the Court saying it had withdrawn instructions from its solicitors, Stewarts Law LLP, and that it did not intend to take any further part in the proceedings. However, Mr Azima's application for permission to bring the set-aside counterclaim was strongly opposed by the three Additional Defendants to the Counterclaim still in the proceedings, Mr Gerrard, Dechert and Mr

Buchanan, Nonetheless, the judge allowed the application and gave Mr Azima permission to pursue the set-aside counterclaim.

The original proceedings

9. RAKIA is the sovereign wealth fund of Ras Al Khaimah. Mr Azima is a US-based businessman principally involved in the aviation industry, who had various dealings with RAKIA between 2007 and 2016. In the original proceedings, RAKIA advanced claims against Mr Azima for fraudulent misrepresentation and unlawful means conspiracy. In summary, there were three claims:

    (1) That he fraudulently misrepresented that he had invested $2.6 million in a joint venture with RAKIA via his company HeavyLift International Airlines FZC, thereby inducing RAKIA to refund him that amount pursuant to a Settlement Agreement made in March 2016, whereas he had in truth invested a much smaller amount ("the Investment Representation").

    (2) That he also fraudulently misrepresented and warranted, by clause 3.2 of the Settlement Agreement, that he had always acted in good faith in his dealings with RAKIA and other Ras Al Khaimah entities. This was false for several reasons, including the misconduct in relation to the HeavyLift joint venture and separate misconduct in relation to the sale of a hotel owned by a subsidiary of RAKIA in Georgia. In relation to the latter transaction, RAKIA alleged that Mr Azima had received unauthorised payments totalling $1,562,500 from RAKIA, that he had sought to acquire an interest in the hotel himself, worth $6 million, without full disclosure to RAKIA and that he had bribed RAKIA's then CEO, Dr Massaad, into waving through the transaction by paying him $500,000 ("the Good Faith Representation").

    (3) The claim for unlawful means conspiracy was in connection with the intended sale of the hotel in 2011/2012 and the payment of a total of $1,562,000 to Mr Azima by way of commission for introducing buyers. RAKIA's case was that Mr Azima did not introduce the buyers and that the payments were made pursuant to a sham referral agreement.

10. Mr Azima defended the claims on the merits but also argued, by his hacking defence, that the claims should be struck out or dismissed on the basis that, in bringing the claims, RAKIA was relying on confidential emails obtained through its unlawful hacking of his email accounts.

The judgment of the deputy judge

11. At the outset of his judgment, the deputy judge dealt with the background facts and the general credibility of the witnesses. In relation to RAKIA's witnesses, he found that Mr Buchanan was a generally reliable witness, that Mr Gerrard was not a dishonest witness and that Mr Page was an unsatisfactory and unreliable witness. He noted that the Ruler of Ras Al Khaimah had provided a witness statement but did not attend to be cross-examined, so that he would not attach significant weight to his witness statement, but it carried some limited weight.

12. At [78] to [159] of his judgment he dealt with the claim in respect of the Investment Representation. He held that it was made fraudulently on Mr Azima's behalf and with his knowledge. He made a series of findings of dishonesty and misconduct on the part of Mr Azima. He found that RAKIA had relied on the Investment Representation in entering the Settlement Agreement, on the basis of the principle that it is not necessary to prove that the misrepresentation was the sole or even predominant cause of the decision to enter the contract, but only that the misrepresentation contributed to the decision.

13. At [160] to [246] of his judgment dealing with the Good Faith Representation, the deputy judge found that Mr Azima had been guilty of various kinds of wrongdoing in his dealings with RAKIA. Michael Green J summarised those findings at [42] of his judgment:

> "(1) Mr Azima falsely represented that he had introduced the potential purchasers of the Hotel to RAK Georgia. The main basis for the finding that he had not effected the introduction was a memorandum dated 1 March 2016 (the Adams Memorandum), written over four years after the events in question, in which Mr Ray Adams (Mr Azima's right hand man and witness) had recounted a trip he and Mr Azima had made to Georgia in 2011: "*We were informed that a group of businessmen from Dubai were already negotiating the purchase of the SMP [the Hotel] and were introduced to them*."
>
> (2) Mr Azima created a false referral agreement between Mr Azima and RAKIA which purportedly entitled Mr Azima to 5% of the gross sale price of the Hotel plus 50% of any amount in excess of $50 million but which was in fact a sham intended to conceal misappropriation of funds by Mr Azima.
>
> (3) Mr Azima paid a bribe of $500,000 to Dr Khater Massaad, RAKIA's former Chief Executive Officer, on 18 January 2012, the day on which Mr Azima received a payment of $1,162,500 from RAKIA to which he claimed to be entitled under the referral agreement.
>
> (4) If (contrary to the deputy Judge's conclusion) the referral agreement was not a sham, Mr Azima wrongfully failed to disclose to RAKIA his intended interest in the Hotel (in breach of the referral agreement).
>
> (5) Mr Azima oversaw the commissioning of and payment for a "*Security Assessment*" report, which included a recommendation by which the RAK Government and associated parties could be deceptively lured into entering transactions with serious criminals and deliberately exposed to "*Scams, fraud and deceptive partnerships*".
>
> (6) In the context of a proposed joint venture between RAKIA and Global Defence Services, a corporation of which Mr Azima was a major shareholder and director, Mr Azima made a false representation to RAKIA as to the value of the aircraft that would be acquired by the joint venture."

14. In the light of those findings, the deputy judge found that Mr Azima had not acted in good faith, so that the Good Faith Representation was false. He found that RAKIA had relied on that representation, reasoning at [244]:

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

15. In relation to the conspiracy claim, the deputy judge concluded that it was reasonably to be inferred from (a) the receipt by Dr Massaad of a bribe from the illicit payments purportedly made under the sham referral agreement and (b) the involvement of Mr Al Sadeq, former Deputy CEO of RAKIA, in the retrospective drafting of the referral agreement, that Mr Azima had agreed, at least with Dr Massaad and probably Mr Al Sadeq, that the illicit payments would be made. Accordingly Mr Azima was liable to RAKIA in unlawful means conspiracy.

16. In relation to the hacking defence and counterclaim, the deputy judge concluded that Mr Azima had not proved on a balance of probabilities that RAKIA was responsible for hacking his data. He went on to say that, if he had found that RAKIA had hacked Mr Azima's emails, he would not necessarily have excluded the illicitly obtained evidence as, without it, RAKIA would not have been able to prove its claims. However, if he had found that RAKIA had not only hacked the emails but put forward a fabricated case concerning RAKIA's lack of involvement in the hacking, there would have been strong grounds to strike the proceedings out as an abuse of process.

The judgment of the Court of Appeal

17. Mr Azima was granted permission to appeal against the judgment of the deputy judge by Arnold LJ. In summary, his grounds of appeal: (i) challenged the finding that RAKIA had not committed the hacking (grounds 1 to 4); (ii) sought an order that RAKIA's claims be struck out as an abuse of process and/or that the hacked documents should be excluded from the evidence (ground 5); (iii) sought to reverse the dismissal of the counterclaim (ground 6); and (iv) challenged the findings on the merits of RAKIA's claims on limited specific grounds (grounds 7 to 9). Mr Azima sought to adduce some new evidence before the Court of Appeal, much more limited than the evidence on which he now relies, to do with phishing emails sent to Mr Azima and the involvement of CyberRoot, an Indian company, which he said had hacked his emails on the instructions of Mr Del Rosso, a witness for RAKIA at the trial. This new evidence was the subject of two further grounds of appeal, grounds 6A and 6B.

18. As Michael Green J noted at [53] to [56] of his judgment, the Additional Defendants sought to make much before him, as indeed they did before us, of the fact that leading counsel who represented Mr Azima before the Court of Appeal on the previous

occasion, Mr Tim Lord QC, put his case very high, alleging repeatedly that RAKIA and its witnesses had fraudulently deceived the Court in their evidence at trial. He alleged that there had been a massive deception and that RAKIA's whole claim was contaminated. He referred to the fact that Mr Azima had had an alternative to his appeal which was to bring fresh proceedings to set aside the entirety of the deputy judge's judgment, but said that, quite properly, Mr Azima had deployed the further evidence he had obtained on the appeal. There was a discussion with the Court of Appeal during Mr Lord QC's oral submissions as to whether, if the new evidence were admitted, the fraud allegation should be remitted to be tried within the same proceedings or whether Mr Azima should pursue the fraud allegation in a new claim. Mr Lord QC firmly favoured remittal. The Additional Defendants argued strenuously that this amounted to an election not to pursue a new claim, a point to which I will return later in this judgment.

19. At the outset of its judgment at [8], the Court of Appeal recorded that Mr Lord QC was asking the Court, based on the new evidence, to find as a matter of fact, that RAKIA had hacked Mr Azima's email accounts, with the consequence that the action should be struck out as an abuse of process. Having set out the factual background and a summary of the deputy judge's findings, at [39] the Court of Appeal said it would deal with the grounds of appeal in a different order to that in which they were advanced. They would consider first whether, if RAKIA was responsible for the hacking, the evidence obtained through the hacking should have been excluded or the claims struck out.

20. At [40] the Court set out assumptions it would make:

> "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."

21. The Court then discussed the two aspects of Mr Azima's argument, that the evidence should have been excluded, based on *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 WLR 954, or that RAKIA's claims should have been struck out, based on *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004. The Court of Appeal held that, even if the factual assumptions made in [40] were established, it would not be appropriate to exclude the illegally obtained evidence or to strike out RAKIA's claims. Its reasons for reaching that conclusion were based on the distinction drawn in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45; [2017] AC 1 between a claim which is fraudulent and a claim which, although well-founded, is supported by collateral lies. The Court of Appeal said at [60]-[61]:

> "…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."

22. The Court of Appeal emphasised strong policy reasons for not striking out RAKIA's claims, saying at [62]-[63]:

> "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."

23. The Court of Appeal went on to consider and reject Mr Azima's challenges to the deputy judge's reasoning in upholding RAKIA's claims, concluding at [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."

Having dismissed Mr Lord QC's suggestion that the hacking counterclaim operated by way of equitable set off, the Court said at [128]:

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

24. The Court of Appeal went on to consider the hacking allegations and what should happen to them. It considered the alternatives for a litigant who alleges that a judgment has been procured by fraud of commencing a separate action to set aside the judgment or of a trial of the fraud issue within the existing action. At [136], it cited the decision of the Supreme Court in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13; [2020] AC 450 (hereafter "*Takhar*") and, at [138]-[139], the judgment of Asplin LJ in *Dale v Banga* [2021] EWCA Civ 240. The Court of Appeal then noted that Mr Lord QC was inviting it not to order a retrial, but to find that RAKIA was responsible for the hacking. At [141] the Court said it declined that invitation. Given

that there were at least two mutually inconsistent accounts of how the hacking came about, it was not safe to reach any conclusion without a re-evaluation of the evidence.

25. The question the Court then addressed was whether to remit the issue within the existing proceedings or leave Mr Azima to bring a fresh action. The Court was narrowly persuaded in favour of the former, saying at [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."

26. The Court of Appeal then defined the scope of the remitted issues at [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."

27. Paragraph 4 of the Order of the Court of Appeal provided, in relation to ground 5, the ground pursuant to which Mr Azima sought to strike out the whole of RAKIA's claims as an abuse of process:

> "In respect of ground 5, it is declared that even if it is established on the counterclaim that the Respondent was responsible for the hacking and dissemination of the Appellant's data:
>
> a. the evidence obtained as a result of the hacking should not be excluded; and
>
> b. the Respondent's claims against the Appellant should not be struck out."

The judgment of Michael Green J under appeal

28. Having set out the factual and procedural background, at [14] to [20] of his judgment, the judge analysed the application before him to bring the set-aside counterclaim. He then set out the relevant legal principles in respect of setting aside a judgment for fraud. He quoted Lord Sumption in *Takhar* at [60] that: "*An action to set aside an*

earlier judgment for fraud is not a procedural application but a cause of action", noting that Mr Azima could have issued separate proceedings against RAKIA relying on that cause of action, in which case only RAKIA could have challenged his right to bring that claim on the grounds of abuse of process. The Additional Defendants would have had no standing in such fresh proceedings, but because Mr Azima was seeking to bring the counterclaim within the existing proceedings, the Additional Defendants do have standing.

29. At [23], the judge noted that the majority of the Supreme Court in *Takhar* expressly approved the summary of the principles governing applications to set aside judgments for fraud set out by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328; [2013] 1 CLC 596:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

30. The judge went on to cite Lord Briggs JSC in *Takhar* who described the tension inherent in actions to set aside a judgment for fraud graphically as: "…a bare-knuckle fight between two important and long-established principles of public policy. The first is fraud unravels all. The second is that there must come an end to litigation. I will call them the fraud principle and the finality principle." The judge said that the principles set out in *Highland* were an attempt to address that tension. Although Aikens LJ referred to three principles, the third was generally accepted as an elaboration of the second, so that the cause of action had two relevant elements: the Fraud Condition and the Materiality Condition.

31. The judge noted at [27] that the Fraud Condition was relatively straightforward in this case. He said he would deal later with the new evidence relied upon, but none of the Additional Defendants was arguing that Mr Azima did not have a real prospect of satisfying the Fraud Condition, although they would contest his allegations if they were allowed to go forward. The Additional Defendants did challenge whether he had a real prospect of satisfying the Materiality Condition. The judge noted at [28] that in *Highland* Aikens LJ had put the test in two ways. He had first said that the alleged fraudulent evidence, action, statement or concealment must have been "*an*", not "*the*", operative cause of the impugned decision. Later, he put it another way: that the fresh

evidence "*would have entirely changed the way in which the first court approached and came to its decision*". The judge noted that some authorities had suggested that this set too high a test although subsequently judges at first instance had said they were not different tests but two ways of expressing the same test, most recently Leech J in *Tinkler v Esken Limited* [2022] EWHC 1375 (Ch) at [22]-[23]. Michael Green J was content for the purpose of determining whether Mr Azima had a real prospect of satisfying the Materiality Condition to accept that there was no real difference in practice between the two tests.

32. The judge went on at [34] to note that *Takhar* was a case where the relevant allegation of fraud had not been raised at the original trial. The Supreme Court held that there was no requirement to show that the evidence of fraud could not with reasonable diligence have been obtained at the trial. As the judge said, Lord Kerr JSC and Lord Sumption dealt *obiter* with whether the position would be different had there been an allegation of fraud made at the trial. He cited the passages from their judgments. At [55] Lord Kerr JSC said that there were two qualifications to the general conclusion:

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

33. As the judge said, at [66] Lord Sumption was of a similar view:

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

34. At [35] the judge said that Mr Azima was alleging fraud against RAKIA as part of his claim that it was responsible for hacking his data and that its witnesses had put forward a false story. There was no question of a deliberate decision not to investigate. Mr Azima relied on extensive further evidence he has now obtained to seek to prove both the responsibility of RAKIA for the hacking and that it had perpetrated a massive fraud on the court. The judge said that in such circumstances, there was a discretion as to whether he should be allowed to proceed with such a case, which to a very great extent, would depend on the proper interpretation of the findings in the judgment of the deputy judge and the Court of Appeal judgment and whether it

was an abuse of process to run what the Additional Defendants said was essentially the same case as Mr Azima had run before and which had been decided against him.

35. The judge went on to summarise and analyse both the judgment of the deputy judge and that of the Court of Appeal. The judge noted at [75] that, in his unsuccessful application for permission to appeal to the Supreme Court, Mr Azima had sought to rely on affidavits from Mr Page and Mr Majdi Halabi, both of whom had given evidence at trial about the alleged innocent discovery of the hacked material. In these new affidavits they both admitted that their evidence at trial had been false and deliberately concocted together with Mr Buchanan, Mr Gerrard and another partner at Dechert, Mr David Hughes. Despite that new evidence, the Supreme Court refused permission to appeal on the basis that the application did not raise an arguable point of law. The judge accepted at [77] that not much could be read into this refusal of permission to appeal.

36. The judge then went on to describe the additional new evidence which Mr Azima had now obtained. He referred at [79] to the fact that, at a hearing in March 2022, he had been told that there were no invoices from Mr Page for his work for RAKIA. However, after further enquiries, a series of invoices from one of his companies addressed to RAKIA between February 2015 and February 2019 had emerged. They had a false narrative for the work done as: "*conducting feasibility study to identify potential to provide management services in the African Subcontinent establishing Freezones"*. Mr Azima contended that this was to mask the real activity, which was the illegal hacking of his data. The judge noted that RAKIA had not denied that the invoices were paid or that they contained a false narrative. They had not been disclosed during the original trial and they should have been.

37. The principal work of Mr Page for RAKIA was to compile Project Update Reports for submission to the Ruler, Mr Buchanan and, occasionally, Mr Gerrard. RAKIA had disclosed at the trial one such Report from March 2015, heavily redacted. The redactions were said to be of irrelevant and confidential material. The judge recorded at [80] that, before the deputy judge, Mr Page and Mr Buchanan had given evidence that all other Project Update Reports had been destroyed pursuant to a "protocol". The one heavily redacted Report had also been the only one before the Court of Appeal. At [81], the judge said that following an application in May 2022, Dechert had disclosed the full unredacted Report. Mr Azima contended that it should never have been redacted because relevant material had been redacted, including information about Dr Massaad. The judge noted that Mr Azima had never received a response from RAKIA or its solicitors as to why the redactions were made.

38. At [82] the judge noted that, in June 2022, Mr Azima obtained a great many more Project Update Reports and associated materials which had been saved by Mr Page's assistant. The judge said there were now a large number of reports from 2015 and 2016 relating to *"Project Beech"* which seems to be a code name for RAKIA's investigations into Dr Massaad and his associates including Mr Azima. Mr Azima says that a review of the Reports shows that RAKIA had access to the hacked material, including privileged and confidential emails well before it was published online and before the Settlement Agreement. He says this shows conclusively that RAKIA's case on hacking has been thoroughly dishonest throughout and that the deputy judge and the Court of Appeal were seriously deceived. It was the discovery

and review of the Project Update Reports which led to the application to bring the set-aside counterclaim.

39. The judge said at [84] that Mr Plewman KC had taken him through some of the Project Update Reports. They contained highly confidential financial and banking information about Mr Azima and his wife and emails sent to or by him that could only have been illegally obtained. The judge said that it was striking that the general allegations in Mr Page's affidavit were confirmed in contemporaneous documentary form which may be difficult for RAKIA to dispute. The judge noted at [85] that, in reliance on these Project Update Reports, Mr Azima had pleaded them fully in his draft amended pleading, in particular in Schedule B setting out the alleged contradictions between RAKIA's case at trial and what the new evidence shows. The judge then set out Mr Plewman KC's summary of those allegations as RAKIA, through the actions of the Ruler, Mr Buchanan and Mr Gerrard, being shown to have:

> "(1) procured the hacking of Mr Azima's documents as part of its investigations;
>
> (2) arranged for the materials stolen from Mr Azima to be placed online in order to provide an innocent explanation for how it came across the data;
>
> (3) created a false documentary trail to support the "*innocent discovery*" story;
>
> (4) dishonestly destroyed, withheld and/or failed to identify the documentary evidence revealing the scale of RAKIA's unlawful investigations of Mr Azima;
>
> (5) provided false witness evidence through the Ruler's witness statement;
>
> (6) suborned the perjurious testimony of Mr Page, Mr Halabi, Mr Buchanan and Mr Gerrard in order to conceal the hacking, support the innocent discovery story, and conceal the fraud from the Court; and
>
> (7) withheld disclosure concerning the Hotel transaction, and dishonestly concealed (in its evidence and otherwise) information regarding that transaction and RAKIA's knowledge of it."

40. The judge said at [86] that he had to assume for the purposes of the application that Mr Azima has at least a real prospect of establishing this on the facts. This would clearly constitute "conscious and deliberate dishonesty" sufficient to satisfy the Fraud Condition and the Additional Defendants did not suggest otherwise. The judge then turned to the reasons why the Additional Defendants nonetheless said that permission should be refused.

41. He dealt first with their submission that he did not have jurisdiction to allow the set-aside counterclaim to be brought because the terms of the Court of Appeal Order limit his jurisdiction to the matters expressly remitted and the judge had no power to extend his own authority to something which the Court of Appeal held should not be

disturbed. The judge recorded the submission of Mr Masefield KC for Dechert that, in the light of the Court of Appeal's clear findings that the judgment in favour of RAKIA must stand regardless of the outcome of the retrial of the hacking counterclaim, the judge's role was limited to the hacking issues remitted. Mr Masefield KC referred to paragraph 4 of the Court of Appeal Order (which I quoted at [27] above) and submitted that the only way Mr Azima could challenge this would be to apply to the Court of Appeal to reopen the Order under CPR 52.30.

42. Having set out the submissions on both sides, the judge said at [95] that, if a fresh claim could have been brought, then he did not think he was limited by the Court of Appeal order in deciding whether to consolidate it for sound case management reasons with the remitted counterclaim. The judge said that he did not think the Court of Appeal could have considered that it was removing, in all circumstances, the jurisdiction of the High Court to hear an application to set aside a judgment on the grounds of fraud. If the most damning evidence of fraud emerged, say a clear confession by Mr Buchanan that they had all deliberately lied to the Court at the original trial and knew that the Settlement Agreement was a trap, it would be very odd if the High Court was debarred from hearing an application based on such evidence.

43. As to whether Mr Azima should have used the procedure under CPR 52.30, the judge recorded at [97] Mr Plewman KC's reference to authorities showing that the correct procedure in such circumstances is to start fresh proceedings, because of the difficulties of an appeal court trying contested issues of fact, particularly where there are allegations of fraud. The judge considered that this was demonstrated by *Jaffray v Society of Lloyd's* [2008] 1 WLR 75 and by *Kuwait Airways Corp v Iraqi Airways Co (No. 8)* [2001] 1 WLR 429, where the House of Lords dismissed a petition to reopen an appeal and directed the appellant to issue a fresh claim. The fresh claim was heard by David Steel J in *Kuwait Airways Corp v Iraqi Airways Co (No. 11)* [2003] EWHC 31 (Comm) where he set aside the House of Lords' earlier decision and order. The judge said that it was thus clear that if fraud was established and both Conditions were met, the High Court can set aside orders of the Court of Appeal or the Supreme Court.

44. He noted at [99] that the jurisdiction to reopen appeals under CPR 52.30 is only available in exceptional circumstances. Mr Azima said that he wished to pursue the more appropriate remedy of applying to set aside the judgment of the deputy judge and the Court of Appeal Order for fraud, so there was no jurisdiction under CPR 52.30 to apply to reopen the appeal. The judge concluded at [101] that there was jurisdiction to give Mr Azima permission to bring the set-aside counterclaim. The High Court had not been deprived of jurisdiction to hear such a claim and it does constitute an alternative effective remedy, so as to rule out an application to the Court of Appeal under CPR 52.30.

45. The judge turned to consider the critical question whether the bringing of that additional counterclaim is an abuse of process. The submission of the Additional Defendants was that it would be, as Mr Azima is seeking to re-litigate matters that have already been decided against him by the Court of Appeal and possibly the Supreme Court, alternatively the counterclaim would constitute a collateral attack on the Court of Appeal judgment. At [103], the judge noted that the finality principle is primarily focused on a party not being vexed endlessly by the same opponent on the same issues. Here the relevant party was RAKIA, but it had chosen to take no further part. At [104] the judge said that some account had to be taken of the fact that it was

the Additional Defendants, who are not parties to the proposed additional claim, who were the ones opposing the grant of permission on the grounds of abuse of process.

46. The judge then cited the oft-quoted passage from Lord Bingham's judgment in *Johnson v Gore Wood* [2002] 2 AC 1 at 31 advocating a broad merits-based approach to abuse of process:

> "That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

The judge said, adopting that approach, that the Additional Defendants are not and have not been sued in respect of this matter and they have to deal with the factual issues anyway on the hacking counterclaim. He said that they could still say that, because of the findings of the Court of Appeal, the Court should be astute to prevent its processes from being abused and the judge would examine whether that was so. However he considered that, if the impact on the Additional Defendants was limited, that was a relevant factor which went into the broad merits-based approach.

47. In relation to re-litigation, at [106] the judge set out the argument of the Additional Defendants that Mr Azima is seeking to run essentially the same case as he ran in the Court of Appeal. He said that it is an important part of their case that Mr Azima had elected before the Court of Appeal to pursue his appeal and a remission to the High Court rather than bringing a fresh claim to set aside the judgment of the deputy judge. He noted at [107] that Mr Plewman KC disputed that the same issues were before the Court of Appeal, submitting that it was only considering the narrow issue raised by ground 5, namely whether RAKIA's claims should be struck out or its evidence excluded on the principles of *Summers* and *Jones v University of Warwick*. The issue for the Court of Appeal was whether the deputy judge was "wrong" whereas the issue in the set-aside counterclaim was whether RAKIA's fraud was an operative cause of the deputy judge's decision. Furthermore, the fact that fraud had been raised before was no bar to bringing a claim to set aside the judgment of the deputy judge if based on new evidence and now there was substantial new evidence with a real prospect of showing pervasive dishonesty in RAKIA's pursuit of its claims against Mr Azima.

48. The judge then dealt in detail with *Koshy v DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH* [2006] EWHC 17 (Ch) a decision of Rimer J and the decision of the Court of Appeal in that case, [2008] EWCA Civ 27 on which the Additional Defendants placed particular reliance. That was a case where the claimant made several attempts to set aside a substantial costs order made against him by Harman J on the grounds of fraud. The particular third attempt with which the decisions were concerned was a fresh claim which the defendants applied to strike out as an abuse of process, in particular because of an election made previously in the Court of Appeal to pursue the appeal rather than start fresh proceedings to set aside the order. Rimer J struck out the claim on that basis and his decision was upheld by the Court of Appeal.

49. The judge noted at [112] that Mr Plewman KC submitted that *Koshy* was very different on the facts, in that in that case there was an explicit election to pursue one course over another and there was no new evidence available to the claimant to support his new claim. This was made clear by both Rimer J and the Court of Appeal. The judge considered that the fact that there was substantial new evidence in the present case was a distinguishing feature from *Koshy*, but he also doubted whether the election point was properly levelled against Mr Azima. As he had already explained, the submissions of Mr Lord QC to the Court of Appeal about whether to pursue the appeal or start a fresh action were made during a discussion as to the appropriate procedural route for considering whether the whole of the judgment of the deputy judge should stand or not. The discussion centred around the judgment of Asplin LJ in *Dale v Banga* delivered the previous week, discussing the options in this situation.

50. The judge then cited [39] to [41] of the judgment of Asplin LJ:

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

51. As the judge said at [116], this was about setting aside the whole of the original judgment for fraud, which was the context of Mr Lord QC's submissions to the Court of Appeal. There was no discussion of whether he would prefer a limited remission of just the hacking counterclaim or to be able to start a fresh action to set aside the judgment of the deputy judge. The judge said at [120] that he did not accept that Mr Azima had made an election of the sort made by Mr Koshy in the Court of Appeal: "he made no unequivocal election that whatever new evidence might emerge in the future he would not seek to deploy it in a fresh action to set aside the First Judgment for fraud, assuming he could satisfy both the Fraud and Materiality Conditions."

52. The judge noted that the Additional Defendants placed heavy reliance on the factual assumptions in Mr Azima's favour made by the Court of Appeal at [40] of its judgment, asserting that the new evidence would only demonstrate what the Court of Appeal assumed in his favour and so could not have led to a different conclusion by the Court of Appeal. However, at [122] the judge said care had to be taken to see what the Court of Appeal was assuming and whether it could be said to include the new evidence as to RAKIA's responsibility for the hacking and the alleged perjury at the original trial. The judge's conclusion at [123] was that the assumptions made by the Court of Appeal at [40] do not capture the scale and implications of the new evidence and what Mr Azima alleges it demonstrates. As the judge put it:

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

53. The judge then went on to consider the argument that the proposed counterclaim was a collateral attack on the judgment and order of the Court of Appeal and on the Supreme Court's refusal of permission to appeal. Mr Masefield KC had referred to the public policy reasons given by the Court of Appeal at [47] and [62] of its judgment for not disturbing RAKIA's judgment against Mr Azima. He submitted that these public policy reasons continued to apply notwithstanding the new evidence.

54. At [130], the judge said that he did not think that the collateral attack argument takes the matter beyond the points on re-litigation and finality. He said:

> "But where the new evidence has not been tried and tested on its merits and where it potentially could lead to a finding that the Court was seriously deceived by coordinated perjured evidence, I do not see that the Court of Appeal was ruling out the possibility that Mr Azima could on that basis seek to set aside the First Judgment on the grounds of fraud. Indeed I do not think it would be right for it to do so when it has no idea what sort of new evidence might emerge."

55. This was all dependent upon the new evidence being significant enough to have a real prospect of satisfying the Materiality Condition which the judge then went on to consider. He noted at [133] that the overarching point made by Mr Azima is that, if all of RAKIA's witnesses conspired together to give perjured evidence and to mislead the Court, that would have been bound to affect their credibility generally, including in relation to the fraudulent misrepresentation and conspiracy claims against Mr Azima. If that evidence had been available at the original trial it would have had a material effect and would at least have been *"an operative cause"*.

56. At [135] he noted that Mr White KC submitted that greater stringency should be applied to the Materiality Condition where it is said to undermine the trial judge's general assessment of a witness's credibility. However, the judge considered that in this case, the alleged dishonest evidence was not purely as to credit. It was at the very least highly relevant to the hacking counterclaim. In any event, the judge endorsed what was said by Leech J in *Tinkler* at [26]:

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

57. The judge then set out at [137] to [141] the various respects in which Mr Plewman KC explained that the lack of credibility of RAKIA's witnesses as a result of the new evidence of their alleged fraud would have impacted on the deputy judge's findings on RAKIA's three heads of claim. It is not necessary to set out the detail of that explanation, since one of the striking aspects of this appeal, to which I will return below, is that none of the Additional Defendants has challenged on the appeal the judge's conclusion at [142] that Mr Azima has a real prospect of satisfying the Materiality Condition:

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

58. The judge went on to consider a submission by Mr White KC that many of the categories of allegedly fraudulent evidence relied upon by Mr Azima were all implicitly covered by the assumptions in [40] of the Court of Appeal judgment and therefore were taken into account by the Court of Appeal in concluding that they could not affect RAKIA's judgment against Mr Azima. The judge rejected this submission, saying at [146] and [147]:

> "146 I repeat what I said in [123] above as to whether the assumptions made by the Court of Appeal really do capture the full extent of Mr Azima's allegations of "*pervasive dishonesty*" in respect of RAKIA's

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

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

The ground of appeal

59. The Additional Defendants advance a single ground of appeal, that the judge was wrong and erred in law in concluding that Mr Azima's application to bring an additional counterclaim to set aside the deputy judge's judgment on RAKIA's claims was not an abuse of process. In particular:

(a) Mr Azima's application was an attempt to re-litigate the case which Mr Azima had already fought and lost, before both the Court of Appeal (which rejected his appeal) and the Supreme Court (which refused permission for a further appeal).

(b) Mr Azima's application constituted a circumvention of and/or collateral attack on the prior decision of the Court of Appeal (in relation to which the Supreme Court refused permission to appeal).

The parties' submissions

60. The legal teams for the three Additional Defendants all made submissions, although they endeavoured not to repeat each other's submissions. What might be described as the heavy lifting on the appeal was done by Mr Masefield KC.

61. Mr Masefield KC submitted that the case now advanced by Mr Azima involved two volte faces from his previous position: (i) he now contends that he could commence fresh proceedings having previously said strenuously that he should not have to; and (ii) he now argues that, contrary to his submissions to the Supreme Court, the Court of Appeal did not rule out the present challenge to the deputy judge's judgment. He

submitted that the Court of Appeal did intend to preclude him from such a challenge whatever the outcome of the hacking counterclaim, as was clear from its order. It is worth pointing out that during the course of his submissions, Mr Masefield KC, like the other Additional Defendants' counsel, in answer to questions from the Court, resiled from any extreme position that the Court of Appeal had intended to impose an absolute prohibition on fresh proceedings, a point to which I will return later.

62. He submitted that Mr Azima was running the same case as he had run before in the Court of Appeal: that RAKIA had procured the judgment by fraud, that it had procured the hacking, that Mr Page and Mr Halabi had given false evidence and that Mr Buchanan and Mr Gerrard had created a false paper trail. Mr Lord QC had submitted that there had been pervasive dishonesty which had contaminated the whole trial and called into question RAKIA's witnesses' credibility so that its case on reliance was unsustainable. Mr Azima had also sought to put forward evidence that he had introduced the buyers of the hotel. Mr Masefield KC submitted that nothing has changed so far as that case is concerned. All that has emerged is evidence which arguably corroborates his case. This made no difference as the Court of Appeal must have contemplated that new evidence might emerge and that the hacking counterclaim might succeed.

63. Mr Masefield KC submitted that this appeal gave rise to three questions: (i) What did the Court of Appeal decide?; (ii) Is Mr Azima trying to achieve by a different route what the Court of Appeal said should not happen?; and (iii) Has there been a material change of circumstance? In summary he submitted that the Court of Appeal had decided that even if the hacking counterclaim was successful, the judgment on RAKIA's claim in its favour should stand. Mr Azima was seeking to achieve by this application a different result to what the Court of Appeal had said should happen. There was no material change of circumstance and specifically success on the hacking counterclaim would not be a material change of circumstance. Mr Masefield KC explained that the Additional Defendants were resisting the application because if it were successful, they would have to address the fraud allegations in detail which would add considerably to their evidential burden and would require an additional two to three weeks of hearing beyond the hacking retrial.

64. Mr Masefield KC took this Court through the judgment of the deputy judge in detail. He submitted that it clearly demonstrated that Mr Azima had perpetrated numerous frauds and lied to RAKIA and to the Court. The deputy judge's conclusions were largely made on the basis of Mr Azima's own documentation and his and his witnesses' implausible explanations.

65. Mr Masefield KC then took this Court through the grounds of appeal and Mr Lord QC's submissions before the Court of Appeal putting his case very high (as I have already mentioned at [18] above). Mr Lord QC sought the setting aside of the whole judgment. He recognised that there were options of the bringing of a new claim or the remission of the existing claim, but argued strenuously for the latter. Mr Masefield KC drew particular attention to exchanges between Mr Lord QC and the Court on Day 2 of the appeal hearing, where Mr Lord QC accepted in answer to Lewison LJ that ground 5 was to the effect that, even if Mr Azima acted fraudulently, because RAKIA had orchestrated the hacking, its whole claim ought to be struck out and ground 5 was not challenging the findings of fraud against Mr Azima. This led Lewison LJ to make the point that, if the deputy judge had found that RAKIA had

been lying about the hacking, he would surely have given himself a *Lucas* direction to the effect that, just because its witnesses were lying about the hacking, that did not mean they were lying about everything. Accordingly Lewison LJ put to Mr Lord QC that his point that if the witnesses were disbelieved on hacking, they would have been disbelieved on reliance, was a non-sequitur.

66. Mr Masefield KC then went through the Court of Appeal judgment in detail. He focused, as the Additional Defendants did before the judge, on the assumptions made in [40] of the judgment. In relation to assumption (c): *"that at least some of RAKIA's witnesses gave dishonest evidence about how RAKIA came into possession of the hacked material",* he pointed out that Mr Lord QC's case before the Court of Appeal had been that all the RAKIA witnesses had lied. Mr Masefield KC also drew attention to [61], the finding that any lies by Mr Buchanan and Mr Gerrard were collateral in that they did not go to the merits of the underlying claim. In other words, the Court of Appeal rejected the argument that because those witnesses had lied about the hacking, they had lied about everything, the point about the *Lucas* direction.

67. He stressed the importance of [145] and [146] (which I quoted in [25] and [26] above) where the Court of Appeal set out the scope of what was being remitted and clearly saw real benefit in the findings of fraud against Mr Azima and the judgment on RAKIA's claims remaining in place. He also stressed [4] of the Court of Appeal order (set out at [27] above) submitting the Court of Appeal could not have been more clear: even if Mr Azima succeeded on the hacking counterclaim, the judgment on RAKIA's claims must stand.

68. Mr Masefield KC submitted that the further evidence of hacking on which Mr Azima now relied did not amount to a material change of circumstance such as would not make it an abuse to reopen the issue. In relation to the Project Beech reports, he said that Mr Plewman KC relied upon them on three grounds: (i) that they suggest Mr Azima did introduce the purchasers of the hotel; (ii) that they showed that RAKIA already believed that Mr Azima had acted wrongfully when it entered the Settlement Agreement; and (iii) that they suggested that RAKIA already had access to the financial materials relating to the HeavyLift joint venture when it entered into the Settlement Agreement and that the Settlement Agreement was a trap designed to get Mr Azima to make the good faith representation which would bring him within the jurisdiction.

69. Mr Masefield KC submitted that the problem for Mr Azima was that firstly the Project Update Reports do not in fact go as far as he would like them to and secondly and more fundamentally, these are not in fact new arguments but ones Mr Azima had tried to run unsuccessfully before the deputy judge and the Court of Appeal. Mr Masefield KC then sought to make good those points and his case that there was no material change of circumstance by a detailed analysis of some of the Project Update Reports. However, in my judgment, there is a fundamental problem with this part of the Additional Defendants' case which is that the judge decided that the new evidence now relied upon has a real prospect of satisfying the Materiality Condition and, as I have already said, there is no appeal from that finding. This was pointed out by Mr Plewman KC at the end of Mr Masefield KC's submissions. Mr Masefield KC sought to answer that by submitting that, whilst he was not appealing the judge's finding on materiality, it was open to him to argue that there was no material change of

circumstance. That seems to me to be an attempted distinction without a difference, for reasons I will return to below.

70. Mr Fionn Pilbrow KC on behalf of Mr Gerrard limited his submissions to various legal points. At the outset of his submissions he accepted that the test which the Additional Defendants had to meet on this appeal is that set out by David Richards LJ in *Harbour Castle* cited at [2] above. He submitted that if they were right on the points made by Mr Masefield KC then each of the grounds for interference identified by David Richards LJ was made out. The point being made on appeal was not that the judge was wrong to conclude that the Fraud Condition and the Materiality Condition in *Highland* had been made out at the stage of permission to amend (to the standard of a real prospect of success), but that notwithstanding that, the counterclaim should not be allowed to proceed because it amounts to an abuse of process, as it seeks to relitigate what has already been decided against Mr Azima by the Court of Appeal or is a collateral attack on the Court of Appeal judgment.

71. Mr Pilbrow KC acknowledged that the jurisdiction in relation to abuse of process is a broad merits-based one as Lord Bingham said in *Johnson v Gore Wood.* He emphasised that there is a common thread of finality. He relied upon what Lord Wilberforce said in *The Ampthill Peerage Case* [1977] AC 547 at 569 (cited with approval most recently by Marcus Smith J giving the main judgment of the Court of Appeal in *Allsop v Banner Jones* [2021] EWCA Civ 7; [2022] Ch 55 at [23]):

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

Mr Pilbrow KC only cited to the Court this passage on the need for finality down to the sentence ending: “prevents further inquiry” saying it was not necessary to read the

rest. I do not intend to be critical of him, but in fact the second half of the citation is of considerable significance, as Mr Plewman KC pointed out, since it recognises that the law allows judgments to be challenged if they are procured by fraud and that this is an exception to the principle of finality.

72. Mr Pilbrow KC submitted that the same emphasis on the need for finality was made by Lord Bingham in *Johnson v Gore Wood* at pp 30-31. Mr Pilbrow KC also relied upon the general public interest in the same issue not being litigated over again referred to by Lord Hoffmann in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 701, cited with approval by Simon LJ in *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646 at [41]. He referred to the various cases cited by Simon LJ and to his reference, in his summary of principles at [48] to there being both a private interest and a public interest in avoiding re-litigation:

> "(1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter v. Chief Constable*, Lord Hoffmann in the *Arthur Hall* case and Lord Bingham in *Johnson v. Gore Wood*. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter v. Chief Constable*. Both or either interest may be engaged."

73. Mr Pilbrow KC pointed out that Mr Plewman KC on behalf of Mr Azima was keen in his skeleton argument to stress that the primary concern in abuse of process cases was double vexation and that the abuse of process argument in this case was weakened because the set-aside counterclaim was brought only against RAKIA not against the Additional Defendants. This argument found favour with the judge at [103]-[105] of his judgment. Mr Pilbrow KC submitted that this was wrong as a matter of law. As the cases cited show, there are two interests at play, the private interest in not being vexed twice and the public interest in finality.

74. During the course of his submissions, I pointed out that, given that RAKIA had dropped out of the picture, the principle enunciated by Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1 at [38] came into play:

> "If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute."

Mr Pilbrow KC accepted that this was so, but submitted that the proposed counterclaim brought the administration of justice into disrepute because it offends the public interest in not re-litigating the same issue again in circumstances where the

counterclaim falls within the prohibition imposed by the Court of Appeal in remitting only the hacking counterclaim.

75. Mr Pilbrow KC submitted in relation to the principle that fraud unravels all that it is not an all-defeating principle, but subject to limitations, so not the trump card that Mr Azima would wish that it is. He analysed the decision of the Supreme Court in *Takhar,* noting that Mr Azima sought to derive from that case the proposition that a litigant is entitled to re-litigate fraud even if it was argued before if there is new evidence. He submitted that the case did not establish any such proposition. The issue in that case was whether or not a party who seeks to set aside a judgment on the basis that it was obtained by fraud, had also to demonstrate that he could not have discovered the fraud by the exercise of due diligence. The Supreme Court held that he did not, overturning the Court of Appeal and restoring the judgment of Newey J (as he then was). The allegation of fraud was an entirely new point not raised at the trial. This was repeatedly emphasised by Lord Kerr JSC in his judgment. He reached the general conclusion at [54] that, where no allegation of fraud had been raised at the original trial, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment. Mr Pilbrow KC said that the point about what the position would be if an allegation of fraud had been raised at the trial, which Lord Kerr JSC notes as one of the two qualifications to his general conclusion, was not a decision on the issue but an *obiter* view which was expressly not final. He submitted that the fact that Lord Kerr JSC considered that, in that situation, the Court would have a discretion suggests that he thought that the default answer in that situation is that the Court should refuse such an application.

76. Lord Sumption expressed a "provisional view" in relation to the position if fraud had been raised at the original trial at [66] and [67]. He considered that an action to set aside the judgment for fraud would lie if there was "decisive new evidence" although he does not define what that means. Mr Pilbrow KC submitted that Lord Sumption was not saying anything about whether a claim would be barred if the claim was abusive because the party was re-litigating the same issue of fraud. Asked by the Court whether he was saying that one or other of Lord Kerr JSC or Lord Sumption was setting out the right test or that they were both wrong, Mr Pilbrow KC submitted that neither view was binding on this Court and that the correct analysis was in *Koshy*.

77. Mr Pilbrow KC submitted that Lord Sumption's provisional view could not be right for two reasons. First, Lord Sumption's analysis does not address what troubled Lord Kerr JSC, and indeed Lord Briggs JSC, which is what happens where the party raised fraud at the first trial but is raising it again with new evidence because a conscious deliberate decision was made in the first proceedings not to investigate further. Second, it does not address the situation where the first Court in its judgment says, in effect, whatever evidence emerges when this matter is investigated further, this judgment should still not be reopened, which he submitted was effectively this case. He submitted that the problem with Lord Kerr JSC's analysis was his use of the word "discretion" when all the cases on abuse of process make clear it is not a matter of discretion. Mr Pilbrow KC would accept the analysis if the reference to discretion were amended to "it may be appropriate to" or "justice may require".

78. Mr Pilbrow KC made detailed submissions about *Koshy*. He noted that Mr Azima contends and the judge found that that case could be distinguished on two grounds: (i) it involved an election and there was no comparable election here and (ii) Mr Koshy

did not have any new evidence, whereas Mr Azima does. Before dealing with those two arguments, Mr Pilbrow KC took this Court through the judgment of Arden LJ in some detail. He noted that, at [36], she said that the appeal was to be dismissed on three grounds:

> "In my judgment, the appeal falls to be dismissed on the following three grounds: (1) Mr Koshy had voluntarily accepted that, if this court determined his case on the limited basis on which he then chose to put it, he would not bring any further proceedings and (in the light of (2) and (3) below) it is too late for Mr Koshy to go back on that acceptance and (2) in any event, this court dealt with the case put by Mr Koshy on appeal on its merits and he cannot therefore bring another claim to set aside the costs order of Harman J and (3) even if I am wrong on (2), it is an abuse of process to start a new action. That is an end of the matter."

79. Arden LJ then analysed those grounds in turn. She dealt with election concluding at [44] that on balance the judge had been right to conclude there had been an election. As Mr Pilbrow KC pointed out, ground 2 was prefaced "in any event" indicating that it was independent of the election point. Arden LJ concluded at [50] to [52] that the issue on which Mr Koshy wanted the Court to adjudicate had already been heard on the merits and determined against him. Ground 3 was also independent of the other grounds. At [55] Arden LJ made clear that she was proceeding on the basis that an election or waiver had not been shown. She still concluded at [58]-[59], having set out the factors in favour of and against Mr Koshy, that fundamentally he had had at least one opportunity to have his claim fully ventilated in court and that it would be an abuse of process for him to commence a fresh action and seek to have another opportunity to bring a claim to have the order of Harman J set aside.

80. In relation to the distinguishing of the election point in the present case, Mr Pilbrow KC emphasised that election was not the sole ground on which the Court of Appeal decided the case against Mr Koshy. Mr Azima's argument that he has not made a comparable election does not address Arden LJ's analysis on grounds 2 and 3. In any event, in this case Mr Azima had two options: to bring a new action alleging fraud or to seek to appeal alleging that the original judgment was procured by fraud. Fully advised, he decided to pursue the appeal. On the appeal the Court put to him that he could proceed by fresh proceedings or he could seek a *Noble v Owens* order. He argued strenuously for the latter, seeking to persuade the Court of Appeal to make such an order and remit the whole proceedings to be reheard. Mr Pilbrow KC said that whilst this was not an election in the same sense as in *Koshy*, it was at least as strong a position. The Court of Appeal partially accepted Mr Azima's position but unfortunately for him, it only remitted the hacking counterclaim.

81. The problem for Mr Azima was the Court of Appeal order. At that point he only had two options, to appeal to the Supreme Court or to seek to persuade the Court of Appeal to reopen its order under CPR 52.30. In the light of the order, Mr Pilbrow KC submitted that simply ignoring the Court of Appeal's order and commencing fresh proceedings was not an option which was open to Mr Azima. That was not an effective alternative remedy for the purposes of CPR 52.30 because it would be abusive. Although Mr Pilbrow KC accepted that CPR 52.30 imposes a high bar, if Mr Azima had the fresh evidence on which he now relies, his correct course was to apply

to the Court of Appeal under that rule. However, Mr Pilbrow KC submitted that further consideration of this point was arid since in his skeleton Mr Azima had said that, if this appeal succeeds, he will apply to the original Court of Appeal to reopen its order under that rule and Mr Pilbrow KC did not want to pre-empt any argument on that point.

82. The judge sought to distinguish *Koshy* on the basis that Mr Azima was seeking to have the whole claim remitted on the basis of a massive fraud, not just the hacking counterclaim, but the Court of Appeal had only remitted the hacking counterclaim. Mr Pilbrow KC submitted that that made the Additional Defendants' point for them, that Mr Azima is now seeking to have a second go to achieve that end, which is abusive.

83. In relation to the judge's second ground for distinguishing *Koshy*, that there was no new evidence in that case, unlike in the present case, whilst that was factually correct, Mr Pilbrow KC submitted that this was not a relevant point in the Court of Appeal's analysis. Mr Koshy having had an effective opportunity to put his case, it did not matter if he had been coming back to put his case on a full evidential basis. On the Court of Appeal's analysis, he had had his one opportunity to put his case and justice did not require him to be given a second. Mr Pilbrow KC submitted that the same analysis applies to Mr Azima. He accepted in answer to Newey LJ, as had Mr Masefield KC, that if there was new evidence which cast a whole new light on the case or a "smoking gun", that would change the situation. That was not the position here, because Mr Azima was simply seeking to deploy further evidence in support of the same case as he had run before the Court of Appeal. The critical failing of the judge was that, when the Court of Appeal said whatever the outcome of the hacking counterclaim, the claim must stand, he thought that this meant something less than what they said. This critical failing meant that this Court should look again at this multi-factorial assessment.

84. Mr Antony White KC made short submissions on behalf of Mr Buchanan. He submitted that, in many abuse of process cases, the re-litigation is not anticipated by the original court. He gave the example of *Hunter*: when Bridge J gave his judgment on the *voir dire* he did not have in mind that there might be a subsequent civil claim against the police. What made the present case unusual is that the Court of Appeal expressly anticipated and directed re-litigation, but fixed the boundaries of the permitted re-litigation, ruling on what could and what could not be re-opened by Mr Azima.

85. In relation to what points were and were not being argued by Mr Azima before the Court of Appeal, Mr White KC referred to the critical exchange between Males LJ, Lewison LJ and Mr Lord QC, culminating in the reference to the *Lucas* direction, to which Mr Masefield KC had referred this Court, in which Mr Lord QC accepted that it was no part of his case to challenge the findings of fraudulent conduct on Mr Azima's part. Mr White KC submitted that this was an important part of the foundation for the approach which the Court of Appeal took.

86. Mr Azima did challenge the findings of the deputy judge on reliance. Mr White KC noted that before the Court of Appeal Mr Azima contended that the finding that RAKIA relied on the Investment Representation and the Good Faith Representation was wrong and should be set aside for various reasons including that RAKIA was responsible for the hacking so that the evidence of its witnesses as to reliance on the

representations could not be credited. Mr White KC confirmed what I had suggested during the course of Mr Masefield KC's submissions, that Lewison LJ's point about the *Lucas* direction seems to have been directed at Mr Buchanan, since Mr Page and Mr Halabi had been determined to be unreliable witnesses. Mr White KC pointed out that after the intervention about the *Lucas* direction, Mr Lord QC moved rapidly from his wider submissions about reliance to the narrower "evidential gap" point on reliance, that although Mr Buchanan said he relied, it was the Ruler who made the decision and he had not given evidence about reliance. The Court of Appeal ruled against Mr Azima on that narrower point but did not deal expressly with the wider challenge to the finding of reliance. However, Mr White KC submitted that there was absolutely no basis for suggesting that the Court of Appeal did not have it well in mind when considering whether to remit the judgment in favour of RAKIA on its claims on the basis that it had been procured by fraud. The Court of Appeal also was alive to the point that if RAKIA was responsible for the hacking, it would have had the hacked documents about the HeavyLift transaction in its possession before the Settlement Agreement. This was clear from the references to the dates of the alleged hacking in [15] and [20(ii)] of the Court of Appeal judgment. Notwithstanding that, the Court of Appeal still held that Mr Azima should not be permitted to reopen the judgment in favour of RAKIA on the grounds that it had been procured by fraud.

87. Mr White KC submitted that it was important to see something that happened in the Court of Appeal which may have led them to think that this point was not being pressed particularly hard by Mr Azima. His case on hacking by CyberRoot was that it occurred in March 2016 after the Settlement Agreement was made. This was clear from [134] of the Court of Appeal judgment. Mr Tomlinson QC for RAKIA drew attention to this on Day 3 of the appeal hearing saying the hacking theory did not work if the hacking was after the Settlement Agreement but that the point did not seem to be being strongly pursued. Mr Tomlinson QC made the same point later about the theory that the Settlement Agreement was a trap. Mr White KC submitted that this may explain why the Court of Appeal did not feel it necessary to determine the wider point on hacking.

88. Mr Plewman KC began his submissions by dealing with a concern raised by the Court that the case involved the High Court attacking a Court of Appeal decision. He submitted that this was exactly what the House of Lords said should happen in *Kuwait Airways* because the enquiry into whether a judgment has been procured by fraud is in many cases too factually heavy and complex to be dealt with by an appeal court. That this was the correct approach procedurally was clear from the early cases such as *Flower v Lloyd* (1877) 6 Ch D 297 and *Jonesco v Beard* [1930] AC 298 which required a fresh action to challenge any judgments procured by fraud.

89. A related point was the one about CPR 52.30 raised by Mr Pilbrow KC. The judge had decided that there was another effective remedy so that an application under CPR 52.30 was not available and there was no appeal against that finding. It was not open to the Additional Defendants to argue the point at this stage.

90. Mr Plewman KC submitted that the Additional Defendants' repeated argument that Mr Azima was running the same case as he had been running before the Court of Appeal was completely wrong. The Court of Appeal had been concerned with what it categorised at [61] as collateral fraud, which did not address the merits of RAKIA's claims, including on reliance. Contrary to Mr White KC's argument, the Court of

Appeal noted at [71] that: "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." However, in the proposed set-aside counterclaim, there is now a root and branch challenge to reliance by Mr Buchanan and a root and branch case against him that he has been dishonest from top to bottom. This case was not before the Court of Appeal. The core analysis of the Court of Appeal was that what it was dealing with was collateral lies and all its statements about how the judgment on the main claim must stand are on the basis that the collateral lies were insufficient to justify setting aside everything. It was not foreclosing any enquiry in the future concerning the RAKIA claims.

91. Mr Plewman KC noted that the Additional Defendants did not in fact contend that the Court of Appeal judgment was imposing an absolute prohibition on the deputy judge's judgment on the RAKIA claims ever being set aside as procured by fraud. They accepted Newey LJ's point in argument that if there were a "smoking gun" in this case or if there were evidence which was "qualitatively different" evidence of fraud, the judgment could be reopened. Mr Plewman KC submitted that this conceded exactly the principle that the Court of Appeal did not foreclose and could not in law have foreclosed an application to set aside the judgment of the deputy judge on the grounds that it was procured by fraud. In the same context, Mr Pilbrow KC had referred to Lord Sumption's judgment in *Takhar* which talked of "decisive new evidence" permitting such an application. As to what was decisive new evidence, Mr Plewman KC submitted that it was evidence which was material and so had a real prospect of satisfying the Materiality Condition in *Highland*. The judge had found that the new evidence did satisfy the Materiality Condition and there was no appeal against that assessment. The new evidence was, to adopt the expression used by Mr Masefield KC, qualitatively different.

92. Mr Plewman KC stated that the permission application was issued after over 1,000 pages of Project Update Reports first became available to Mr Azima in June 2022, revealing a raft of evidence not just as to hacking, but as to RAKIA's claims and making it obvious that the Ruler, Mr Buchanan and Mr Gerrard were pervasively dishonest throughout the first trial. It was not just that those documents were not disclosed but said to have been destroyed, but their evidence about the extent of the investigation and its targets and their suggestion that it did not really involve Mr Azima at all, was dishonest.

93. None of the Additional Defendants would be vexed if this counterclaim goes to trial as they were not parties to the original judgment and the set-aside counterclaim was only brought against RAKIA. Mr Masefield KC had referred to the trial length being extended but it had only been marginally increased from its original 8 week estimate to 8 to 10 weeks. Mr Plewman KC said that it had effectively been common ground before the judge that all the new material would have to be dealt with on the hacking counterclaim in any event, so there would not be a substantial lengthening of the trial by the set-aside counterclaim.

94. Mr Plewman KC referred to the two Conditions set out in *Highland*. It was common ground in this case that there was a real prospect of the Fraud Condition being satisfied so that it was sufficiently arguable that there was conscious and deliberate dishonesty and the judge had found that there was a real prospect of the Materiality

Condition being satisfied, which was not being appealed. *Highland* had defined the materiality test as evidence that would have entirely changed the way in which the first court approached and came to its decision. Since the judge accepted and adopted that test, his finding on materiality was a finding that the evidence would have entirely changed the way in which the deputy judge approached and came to his decision.

95. Mr Plewman KC made the point that, as was accepted by the Additional Defendants, this Court will not interfere with the judge's multifactorial assessment that the proposed counterclaim is not an abuse of process unless the judge was plainly wrong in the ways identified by David Richards LJ in *Harbour Castle* cited at [2] above. The same principle was recently restated by this Court in my judgment in *Koza Ltd v Koza Altin* [2022] EWCA Civ 1284 at [170]. It was not suggested by the Additional Defendants that the judge had misapplied the relevant law. Rather, as Mr Plewman KC put it, they sought to raise a whole range of more granular arguments about the judge's evaluation of what happened on the appeal and of the new evidence. He submitted that the right analysis is that the judge carefully considered all the arguments now advanced and reasoned his way through them. He did not take irrelevant considerations into account and did not fail to take any relevant consideration into account. It followed that the only question on this appeal was not any of the granular ones but the macro question can it really be the case that the Court of Appeal is intending to preclude forever this entire jurisdiction to set aside the judgment of the deputy judge for fraud. Mr Plewman KC submitted that the answer was clearly not.

96. Mr Plewman KC took this Court in some detail through the new evidence in the Project Update Reports and elsewhere to demonstrate that it went not only to negative reliance by RAKIA and its witnesses on the Investment Representation and the Good Faith Representation, but also to showing that the Referral Agreement was not a sham and that Mr Azima had not bribed Dr Massaad. I do not propose to set out that detail, other than to record certain points Mr Plewman KC made about the new evidence: (i) the evidence now given by Mr Page and Mr Halabi is compelling evidence not only that the explanation of the innocent discovery of the hacked documents is contrived and dishonest, but that contrived and dishonest case was presented to the court on the initiative of RAKIA, Mr Buchanan and Mr Gerrard and under the tuition of Mr Gerrard at the perjury school; (ii) Mr Page's evidence provides compelling evidence that, contrary to the case put forward by RAKIA and its witnesses at trial, RAKIA in fact procured the unlawful hacking and was receiving regular reports on Mr Azima based on illegally obtained material; (iii) RAKIA suppressed disclosure of Mr Page's invoices and the disguising of the invoices must be dishonesty to which the Ruler and Mr Buchanan were party; (iv) the Project Update Reports show an extensive unlawful investigation of Mr Azima with the express object of taking him out of play. There is also a whole range of material in the Project Update Reports supporting Mr Azima's case not only on the issue of reliance but on other elements of RAKIA's claims, including that RAKIA dishonestly withheld disclosure on important issues; and (v) the Project Update Reports show that RAKIA had unlawful access to Mr Azima's privileged communications during negotiation of the Settlement Agreement.

97. I do not consider it necessary or appropriate to delve further into the detail of what the new evidence and, in particular, the Project Update Reports show (although Mr

Plewman KC took us to that), nor is it necessary or appropriate to go into the detail of the challenges to the points he made which were in turn made by the Additional Defendants' counsel in their reply submissions. This is because the judge considered the new evidence carefully in the context of the case then presented by the Additional Defendants challenging its materiality and found that it had a real prospect of satisfying the Materiality Condition, a finding not challenged on appeal. Mr Plewman KC made submissions to this Court about the materiality of the new evidence to the various claims made by RAKIA, but as he said, materiality is outside the scope of this appeal so it is not necessary to consider the detail of those submissions.

98. Mr Plewman KC made submissions in relation to a number of the authorities, starting with the obiter views of Lord Kerr JSC and Lord Sumption JSC in *Takhar*, noting that in each case the judgment was agreed to by the other three members of the majority who allowed the appeal. In relation to Lord Sumption's qualification at the end of [66], he made the point that this was not a case where Mr Azima had decided not to investigate RAKIA's fraud but where RAKIA dishonestly concealed it. He submitted that, despite Mr Pilbrow KC's criticisms, the collective position of Lord Kerr JSC and Lord Sumption is a correct analysis of the law. He also referred the Court to other passages in the judgments in that case on the approach of the Courts to setting aside judgments for fraud. He noted that the second part of the passage from Lord Wilberforce's speech in *The Ampthill Peerage Case* (set out at [71] above) is quoted by Lord Kerr JSC at [44] of his judgment, demonstrating that the ability to set aside a judgment for fraud in an appropriate case is an important qualification to the principle of finality in litigation. Lord Kerr JSC went on to analyse the Australian and Canadian authorities on judgments obtained by fraud, saying at [52] that Newey J had found the reasoning in those cases compelling and so did he. He concluded at [53]:

> "It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming."

Mr Plewman KC submitted that whilst finality is an important principle, what Lord Kerr JSC's analysis shows is that it needs to be put in its proper context and that if fraud is shown, finality takes more of a back seat.

99. He also referred to a passage in the decision of this Court in *Salekipour v Parmar* [2017] EWCA Civ 2141; [2018] QB 833 dealing with witnesses who had perjured themselves. At [95]-[96] Sir Terence Etherton MR said:

> "95 The suborning of a witness by a party to give perjured evidence in order to succeed at trial is a most serious matter, which not only taints the evidence of the witness but potentially undermines the credibility of that party on all issues. That certainly is the case here where so much turned on credibility. If the fact of subornation and perjury, as described in Mr Fiszer's witness statement, had been known to Judge Marshall, it is highly likely that it would have had a material impact on her assessment of the credibility of all the evidence given by Mr and Mrs. Parmar.
>
> 96 I, therefore, see no reason in the present case to deviate from Lord Buckmaster's statement in *Hip Foong Hong v H Neotia & Co* [1918]

888 at 893 that a judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail, and his statement in *Jonesco* (at 301-302) that:

> "Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the Court, it spreads to and infects the whole body of the judgment."”

100. Mr Plewman KC sought to carry over that principle into the present case. Mr Azima and Mr Adams had been found by the deputy judge not to be credible witnesses but his evaluation of their credibility took place in the prism in which the Ruler, Mr Buchanan and Mr Gerrard had also given evidence and found to be essentially credible. On the basis of the new evidence now available all three were lying through their teeth and Mr Gerrard conducted a perjury school. This inevitably would have an impact on the deputy judge’s assessment of the credibility of Mr Azima and Mr Adams.

101. Mr Plewman KC made submissions about abuse of process. He stressed what Lord Bingham said in *Johnson v Gore Wood* at 31C to the effect that there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. He pointed out that essentially this point had also been made by Sir Andrew Morritt V-C in *Bairstow* in the passage quoted at [74] above and again by Simon LJ in his summary of the principles in *Michael Wilson & Partners* at [48] where at (5) he said:

> “It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris* [2001] 1 WLR 1388.”

102. He also referred to my judgment in *PriceWaterhouseCoopers LLP v BTI 2014 LLC* [2021] EWCA Civ 9, where having cited amongst other cases *Bairstow* and *Michael Wilson & Partners* I said at [86]:

> “Furthermore, where the parties to the second proceedings are not the same as the parties to the first proceedings, the authorities are clear that it will only be in a very rare or exceptional case that the court will find that the second proceedings are an abuse of process: see for example per Sir David Cairns in *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132 at 138-9, per Lord Hobhouse at [26] *In re Norris* [2001] 1 WLR 1388, per Simon LJ in *Michael Wilson & Partners* at [48(5)] and per Flaux LJ in *Kamoka* at [119].”

He submitted that, applying that principle, unless it could be said that the set-aside counterclaim fell foul of a prohibition in the Court of Appeal judgment of any re-litigation of the RAKIA claims, which it did not, the abuse of process doctrine as interpreted in these cases did not apply at all.

103. Mr Plewman KC then dealt with *Koshy*. He submitted that it was a completely different case from the present. There was no new evidence but only repeated attempts by Mr Koshy to run the same argument. Also it involved an election on his

part to rely on only two paragraphs of the merits judgment of Rimer J. He was offered by the Court of Appeal at the first appeal hearing remission to the Chancery Division of the issue as to whether there had been misrepresentation to Harman J, but he did not want that, as he thought, as Mr Plewman KC put it, that he had an "ace in the hole" before the Court of Appeal on the two paragraphs of the merits judgment and he elected to rely only on those paragraphs. The Court of Appeal gave him time to confirm that election overnight and the next morning the consequences of that election were clarified and debated with the Court and his counsel confirmed the election.

104. Mr Plewman KC said that Mr Pilbrow KC was right that in the Court of Appeal which dismissed the subsequent appeal from Rimer J striking out as an abuse of process Mr Koshy's fresh action seeking to challenge the order of Harman J, three reasons were given for dismissing the appeal: (i) that there had been an election; (ii) that he was wrong to say the previous Court of Appeal had not dealt with the point on the merits but only dismissed the appeal on procedural grounds and (iii) abuse of process. However, Mr Plewman KC submitted that Mr Pilbrow KC had been wrong to say that the third reason was an independent, free-standing one. He submitted that when one looked at the analysis of Arden LJ as to why there was an abuse of process, particularly at [56] and [58]-[59] of her judgment, the facts relating to the election were fundamental to the finding of abuse of process.

105. Accordingly, Mr Plewman KC submitted that that case was a much more extreme one than the present, in that there was the clearest possible express election not to seek to reopen the challenge to the Harman J order by any other procedure if the first appeal was unsuccessful and Mr Koshy advanced no new evidence in support of his fresh action. He submitted that the analogy between that case and the present which Mr Pilbrow KC sought to draw was unsustainable. He noted that Mr Pilbrow KC had also sought to derive a more general point from *Koshy* that one only got one opportunity to fully present one's case and that if one has done so, it may be an abuse to try again. Mr Plewman KC submitted that the shortest and most direct answer to that point, even if it were correct, was that in this case Mr Azima had not had the full and proper opportunity to present the case which he now knows he has before the first Court of Appeal and the submission to the contrary was absurd.

Discussion

106. As was essentially common ground at the appeal hearing, the critical question on the appeal is what the Court of Appeal intended by its determination in its judgment, as repeated in [4] of its order, that whatever the outcome of the hacking counterclaim, the judgment of the deputy judge on RAKIA's claims should stand. Obviously, if they had intended to impose an absolute prohibition on any counterclaim or claim to set aside the judgment for fraud whatever evidence emerged at a later stage, then the proposed set-aside counterclaim would be contrary to that prohibition and would amount to an abuse of process. From this it would follow that the judge's determination that the set-aside counterclaim should be permitted to proceed would be clearly wrong and this Court would overrule that determination.

107. However, even the Additional Defendants do not contend for such an absolute prohibition. They recognise and effectively concede that fresh evidence of fraud in relation to RAKIA's claims could have been sufficiently significant that the Court of

Appeal would have accepted that it was open to Mr Azima to pursue the set-aside counterclaim. The Additional Defendants expressed that level of significance in various ways: Mr Masefield KC talked about a material change of circumstance or evidence which was "qualitatively different", Mr Pilbrow KC about fresh evidence which cast a whole new light on the case or a "smoking gun", whilst they both submitted that, however the threshold was expressed, it was not reached on the material before this Court.

108. In my judgment, the problem with that argument is that the judge concluded that the new evidence now available had a real prospect of satisfying both the Fraud Condition and the Materiality Condition in *Highland*. Satisfaction of the Fraud Condition meant there was a real prospect of establishing conscious and deliberate dishonesty by RAKIA and its witnesses, which was not challenged before the judge or this Court. Satisfaction of the Materiality Condition was challenged by the Additional Defendants before the judge, but significantly, his conclusion was not appealed to this Court. Although Mr Masefield KC in particular sought to avoid the implications of that unchallenged finding by the judge that there was a real prospect of the Materiality Condition being satisfied by submitting that material change of circumstance was somehow a different test for the purposes of assessing whether the proposed set-aside counterclaim was an abuse of process, that submission is unsustainable. Satisfaction of the stringent test in *Highland*, as summarised at [94] above, is on any view also a material change of circumstance. Put another way, the judge's unchallenged conclusion that there was a real prospect of the Materiality Condition being satisfied is confirmation that the new evidence is, in Lord Sumption's words in *Takhar* "decisive new evidence" or, as Mr Masefield KC put it "qualitatively different" evidence. These are all just different ways of expressing the same test as to whether the Materiality Condition is satisfied.

109. It is no answer to the conclusion that the set-aside counterclaim has a real prospect of meeting both the Fraud and the Materiality Conditions in *Highland* and so should be allowed to proceed, that Mr Azima adopted the wrong procedure and, rather than making the present application, should have pursued an application to the Court of Appeal under CPR 52.30. This is for two reasons:

(1) As the House of Lords determined in *Kuwait Airways* where a party seeks to set aside a judgment at first instance and consequential judgments of appellate courts for fraud, and that is opposed, the complexity of the factual issues means that they are not appropriate to be determined by the appellate courts but only by a first instance judge. This point is really made good by the Court of Appeal's own decision in this case at [141] of the judgment (referred to at [24] above) that inconsistent accounts of how the hacking came about would have to be determined by a re-evaluation of the evidence following pleadings, in other words a determination by a first instance judge.

(2) The present set-aside counterclaim is an effective alternative remedy precluding an application under CPR 52.30 which is essentially a remedy of last resort. The judge's analysis of this point, referred to at [43] and [44] above, was correct.

110. Furthermore, the fact that Mr Azima sought to appeal the decision of the Court of Appeal to the Supreme Court is of no particular significance. As the judge said at [77]

of his judgment, not much can be read into the application for permission to appeal and its refusal, not least because the refusal of permission is based on a short determination, as is usual in the case of refusal of permission by the Supreme Court, that the proposed appeal did not raise an arguable point of law. There is no indication of what consideration was given to the new evidence or what the Supreme Court made of it.

111. As Mr Plewman KC correctly submitted, the question for this Court is not what will be the outcome of the set-aside counterclaim, but whether Mr Azima satisfies the threshold of showing that he has a real prospect of success on that counterclaim, which in the light of the judge's findings he clearly does. It necessarily follows that, on the basis of the concession made by the Additional Defendants and the unchallenged finding of the judge that there is a real prospect of the Materiality Condition being satisfied, the appeal must fail. The judge made a multifactorial assessment which, far from being clearly wrong was clearly right.

112. Furthermore, irrespective of any concession by the Additional Defendants, it is clear that the Court of Appeal did not intend there to be an absolute prohibition on a future claim by Mr Azima to set aside the judgment of the deputy judge as having been procured by fraud. Insight into the intentions and thinking of the Court of Appeal is provided by Lewison LJ's reference to a *Lucas* direction and by [61] of the judgment, from both of which it is apparent that the Court of Appeal considered that it was dealing with collateral dishonesty or fraud relating to the hacking, not more pervasive dishonesty or fraud which tainted RAKIA's claims.

113. The so-called *Lucas* direction (after the decision of the Court of Appeal Criminal Division in *R v Lucas* [1981] QB 720) when given to a jury is usually in terms which explain that, where a defendant has told lies about something (which is either admitted or proved beyond reasonable doubt) that is not in itself evidence of guilt, since a defendant may lie for "innocent" reasons such as out of shame or to disguise disgraceful behaviour from family and friends or to bolster a just cause (see per Lord Lane CJ at 724F-G). Lewison LJ had in mind a self-direction by the deputy judge to himself, tailored to a civil context, to the effect that, merely because RAKIA's witnesses were lying about hacking (perhaps to bolster what was otherwise a good case against Mr Azima), it did not necessarily follow that they were lying about everything else, such as about reliance. However, such a *Lucas* direction is not really of any relevance or assistance if the defendant or witness is lying about every relevant aspect of the case. In my judgment, Lewison LJ, in referring to a *Lucas* direction, clearly did not have in mind a situation where there is now a great deal of new evidence which supports a case that RAKIA's witnesses were lying about, if not everything, at least many relevant aspects of the case.

114. Putting the matter another way, (contrary to the submissions Mr White KC was advancing referred to at [86] and [87] above) I have little or no doubt that, if the evidence now available to Mr Azima (specifically the 1,000 pages of Project Update Reports previously said to have been destroyed) on the basis of which the judge concluded that there was a real prospect of the Materiality Condition being satisfied, had been before the Court of Appeal, they would not have made an order that, whatever the outcome of the hacking counterclaim, the judgment on RAKIA's claims must stand. Rather they would obviously have remitted both the hacking counterclaim

and RAKIA's claims for retrial in the light of the real prospect of satisfaction of both the *Highland* Conditions.

115. In one sense, in view of those conclusions, it is not necessary to engage in any further analysis of the Additional Defendants' case on appeal, since it is clearly unsustainable for the reasons I have given. However, in deference to the excellent quality of the submissions which all parties addressed to the Court, I will deal in more detail with some of the points made.

116. In relation to abuse of process, the suggestion by Mr Pilbrow KC that the judge had erred in law in concluding that, because the set-aside counterclaim was brought against RAKIA not the Additional Defendants, who were therefore not being vexed again by litigation by Mr Azima, the abuse of process argument was weaker, is misconceived. Mr Pilbrow KC submitted that the judge had given insufficient weight to the importance of finality, which should be given equal weight to the question of double vexation. However, as Mr Plewman KC pointed out, that is not what Lord Bingham said in *Johnson v Gore Wood*. At 31A-C he said:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter… I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

117. As a number of cases referred to at [101] and [102] above, culminating most recently in *PriceWaterhouseCoopers* at [86] establish, where there is no issue of vexation or double vexation of a party (which there is not here since the Additional Defendants were not parties to the original proceedings), it will only be in very rare or exceptional cases that there will be any question of the proposed proceedings amounting to an abuse of process. Obviously, if it were the case that the Court of Appeal had imposed an absolute prohibition on re-litigation of the RAKIA claims, then the proposed set-aside counterclaim would fall foul of that prohibition and would be within the second head of abuse of process identified in *Bairstow* (cited at [74] above), as bringing the administration of justice into disrepute. However, for the reasons I have already given, there is no such absolute prohibition in the Court of Appeal judgment and no question of the set-aside counterclaim which Mr Azima seeks to bring on the new evidence being prohibited by the Court of Appeal.

118. The need for finality in litigation is obviously a factor to be considered in determining whether re-litigation would be an abuse of process, since there is, as many authorities recognise, a public interest in not having issues re-litigated, but, as the authorities to which I referred in the previous paragraph demonstrate, where there is no question of the fresh proceedings causing vexation to one of the parties to them (or their privies), it is only in very rare or exceptional cases that the fresh proceedings will be an abuse of process, a clear indication that, where there is no question of vexation, finality of

litigation is unlikely to be a ground for a finding of abuse. In any event, as the second part of the passage from Lord Wilberforce's speech in *The Ampthill Peerage Case* quoted at [71] above makes clear, a well-founded application to set aside a judgment as procured by fraud, such as in the present case, is a recognised exception to the need for finality.

119. It is necessary to deal with the Additional Defendants' particular reliance on the decision of this Court in *Koshy* as supporting their contention that Mr Azima is precluded from bringing the set-aside counterclaim. I agree with Mr Plewman KC that *Koshy* is an entirely different case from the present and does not support the argument which the Additional Defendants seek to advance. It is necessary to examine with some care the procedural history of that case, helpfully set out by Arden LJ at [2] to [28] of her judgment.

120. What Mr Koshy was seeking to challenge was an order made by Harman J in March 1998 dismissing Mr Koshy's application to discharge a worldwide freezing order obtained against him by DEG and ordering him to pay the costs of the application, which were substantial. There was no appeal against that order at the time. There was a subsequent trial on the merits before Rimer J who, by his judgment in October 2001, dismissed DEG's claim and discharged the freezing order, but that did not affect the order for costs made by Harman J. Mr Koshy then applied to the Court of Appeal out of time for permission to appeal against the order of Harman J. He was given limited permission to appeal on terms that the only material on which he could rely were two paragraphs of Rimer J's judgment, as set out by Arden LJ at [10] of her judgment. The appeal on that limited basis was heard by the full Court (Mummery, Hale and Carnwath LJJ) in July 2002.

121. During the course of argument, Mummery LJ raised the possibility of remitting the matter to Rimer J for an issue to be tried as to whether there was material non-disclosure to Harman J and if there was, what impact that had on costs. Counsel for DEG did not object to that course, but counsel for Mr Koshy did not accept that invitation and said he wanted the Court of Appeal to decide the issue on the basis of the two paragraphs in Rimer J's judgment. In answer to a question from Mummery LJ as to what would happen if he failed to persuade the Court of Appeal to decide in his favour on the basis of Rimer J's findings, he accepted that that would be an end of the matter but then said that, before formally making an election, he would like to take instructions. The Court then adjourned to enable him to do so. Having done so, when the hearing resumed, counsel made a statement that: "upon instructions, I would like to elect to have this matter decided here on the basis of those two paragraphs in Rimer J's judgment, and either we win or lose and, as your Lordships have very clearly pointed out, if we lose then that is it."

122. Counsel for DEG then submitted that, by proceeding straight to an appeal against the order of Harman J, rather than first instituting a fact-finding inquiry before Rimer J on a post-judgment application for the discharge of the freezing order for non-disclosure, Mr Koshy had adopted the wrong procedure, which should itself be a ground for dismissal of the appeal. The hearing then adjourned part heard until the following day. When the hearing resumed the following day counsel for Mr Koshy provided the Court of Appeal with a note which read:

> "*Mr Koshy's election to proceed with the appeal rather than trial of an issue before a Chancery Judge*
>
> This election was made on the basis that the Court of Appeal would be deciding the substantive issue (i.e. whether the Judgment of Rimer J, insofar as his findings could not be successfully challenged, established that there had been a material non-disclosure if so the effect of that).
>
> I noted that Mr Thompson continued to submit that the Appeal was not the appropriate route for Mr Koshy to challenge the decision of Harman J.
>
> I assume, and would like to be corrected if I am wrong, that if the Court decides that Mr Thompson is correct on the procedural issue and so the Court does not decide the substantive issue, the other route will not be closed to Mr Koshy."

123. When the hearing resumed, there was a further exchange between counsel for Mr Koshy and Mummery LJ as to the implications of this election. Counsel sought clarification in relation to the last paragraph of his note, as to whether if the Court of Appeal dismissed the appeal on the procedural grounds contended for by DEG, rather than on the substance of the issue, it would be open to Mr Koshy to go back to the Chancery Division. The clear answer from the Court was a negative one. Mummery LJ made clear (and counsel agreed) that, if the appeal was heard and then failed, Mr Koshy had elected against any other procedure and had turned down the offer of remission to the Chancery Division, putting all his eggs in "this basket" i.e. the appeal. The appeal hearing then proceeded and the Court reserved judgment. In the judgment subsequently handed down, the Court of Appeal dismissed the appeal.

124. Mr Koshy then commenced the fresh action, which Rimer J struck out on the basis that, although technically what he had agreed was not an election, he had clearly agreed that if the Court of Appeal heard his appeal he would not be able to start a fresh action and his doing so was an abuse of process. The Court of Appeal dismissed his appeal against Rimer J's order striking out his fresh claim. There was a debate both before Rimer J and the Court of Appeal as to whether what had occurred was a true election, but that issue need not trouble this Court. The critical point is that both determined that there had been a clear agreement by Mr Koshy that, if the appeal proceeded, he would not seek to bring a fresh claim by way of a new action in the Chancery Division, which is precisely what he subsequently did.

125. Whether or not that was a true election, what happened in the present case was in no sense similar to what happened in *Koshy*. The highest it can be put is that, in the context of an appeal which sought to rely upon the evidence of hacking to have the whole judgment of the deputy judge set aside, Mr Lord QC pressed strenuously for remission of the whole claim to the Chancery Division rather than commencement of a fresh action, the alternative courses which *Dale v Banga* had confirmed were available. In contrast to the position in *Koshy*, where the implications of what Mr Koshy was asking for were spelt out by Mummery LJ to his counsel and agreed to, there was no discussion between Mr Lord QC and the Court of Appeal as to what would be the appropriate course if the Court decided only to remit the hacking

counterclaim, let alone (in contrast to the position in *Koshy*) anything which could be said to amount to agreement by Mr Lord QC that, in that eventuality, no other claim to set aside the judgment on RAKIA's claims would be pursued. There is simply no legitimate comparison between what happened in the two cases.

126. I also agree with Mr Plewman KC that, contrary to the submissions by Mr Pilbrow KC, the third reason the Court of Appeal in *Koshy* gave for dismissing the appeal on the grounds of abuse of process, was not independent of the first, election, ground and was not free-standing. The whole basis on which Rimer J had found that there was an abuse of process was that Mr Koshy was seeking to go behind the agreement his counsel had made before the Court of Appeal. As Mr Plewman KC submitted, the decision of the Court of Appeal that the fresh action was an abuse of process was itself founded upon the fact that he was seeking to go behind the agreement his counsel had made.

127. That the abuse of process in that case was not just re-litigation *per se* but attempting to go behind the agreement made at the first Court of Appeal hearing is clear from two passages in the judgment of Arden LJ. At [56] she said:

> "I do not consider that there was any doubt but that Mr Koshy made a fully informed and free decision to go on with the appeal. He was advised by experienced counsel and the court gave counsel time to take instructions... In principle this court should respect the autonomous decision which he took to go on with the appeal rather than submit to a trial before a Chancery judge, despite being offered the opportunity of using an appropriate procedure. I do not consider that Mr Koshy would be in a position to establish any violation of art 6 of the Convention if he has no access to court because of a fully informed and free decision in these circumstances."

Then at [59] she said:

> "For the reasons given, I would hold that it was an abuse of process for Mr Koshy to commence the new action and to seek to have another opportunity to bring a claim to have the order of Harman J as to costs set aside. In my judgment, the factors mentioned in the preceding paragraph, and in particular the factor that Mr Koshy has already had the opportunity to have an adjudication of the issues in the new action, which he rejected despite the clear warnings given by this court, outweigh the factors which weigh in his favour."

128. There is simply no question of anything comparable having occurred in the present case. As I have already found, there was no agreement, let alone an "election" by Mr Azima that, in the event that the Court of Appeal declined to remit the whole proceedings to the Chancery Division but only remitted the hacking counterclaim, he would not seek to re-litigate the attempt to set aside the deputy judge's judgment on RAKIA's claims as procured by fraud. A fundamental further difference between this case and *Koshy* is that, in the present case, Mr Azima is seeking to pursue the set-aside counterclaim on the basis of a raft of new evidence which the judge has found has a real prospect of being found to be material, whereas Mr Koshy was simply seeking to re-litigate the same point on the same evidence.

129. So far as the more general point made by Mr Pilbrow KC that, where a party has had a full opportunity to present its case in court, to seek to relitigate is an abuse of process, is concerned, even if his analysis of Arden LJ's judgment were correct (which I rather doubt for the reason identified at [127] above), the short answer to the point is the one Mr Plewman KC gave: given that the case Mr Azima now wishes to pursue is founded on a raft of new and potentially material evidence he has only recently obtained, the suggestion that he has previously had a full opportunity to ventilate his case in Court is, as Mr Plewman KC said, absurd.

130. Although, as Mr Plewman KC said, the Additional Defendants engaged in a granular criticism of the judge's analysis of the new evidence now available, since they did not appeal his finding that this new evidence had a real prospect of satisfying the Materiality Condition in *Highland*, that line of argument was simply not open to them. Both *Highland* conditions clearly had a real prospect of being satisfied, so that the judge was right to allow the set-aside counterclaim to proceed and any other matters are for the eventual trial.

131. The answers to the three questions posed by Mr Masefield KC on behalf of the Additional Defendants at the outset of his submissions (referred to at [63] above) are: (i) The Court of Appeal did not decide that there should be an absolute prohibition on fresh proceedings or a counterclaim in the existing proceedings to set aside the deputy judge's judgment on RAKIA's claims as having been procured by fraud and certainly did not intend to preclude the present set-aside counterclaim if, as is the case, it has a real prospect of satisfying the Fraud and Materiality Conditions; (ii) No, following the answer to (i), Mr Azima is not seeking to achieve by a different route what the Court of Appeal said should not happen; and (iii) Yes, the raft of new evidence does amount to a material change of circumstance or decisive new evidence or evidence which is qualitatively different, all of which are ways of expressing the point that there is a real prospect of the Materiality Condition being satisfied, as the judge rightly found.

132. For all these reasons, the appeal must be dismissed.

Lord Justice Birss

133. I agree.

Lord Justice Newey

134. I also agree.