Neutral Citation Number: [2022] EWHC 1295 (Ch)

Case No: HC-2016-002798

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

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

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

Date: 27/05/2022

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

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

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Thomas Plewman QC, Hugo Leith, Frederick Wilmot-Smith and Sophie Bird (instructed by **Burlingtons Legal LLP**) for the **Counterclaimant**
Hugh Tomlinson QC and Edward Craven (instructed by **Stewarts Law LLP**) for the **Defendant to the Counterclaim**

Laura Newton and Robert Harris (instructed by Enyo Law LLP) for the Second and Third Additional Defendants to the Counterclaim
Antony White QC and Ben Silverstone (instructed by Kingsley Napley LLP) for the Fourth Additional Defendant to the Counterclaim

Hearing dates: 11 and 12 April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, the National Archive and other websites. The date and time for hand-down is deemed to be 10.30am on 27 May 2022

Mr Justice Michael Green :

1. I am the assigned judge to hear a retrial ordered by the Court of Appeal of the counterclaim brought by the Defendant, Mr Farhad Azima, against the original Claimant, the Ras Al Khaimah Investment Authority (**RAKIA**). RAKIA is the sovereign wealth fund of the Emirate of Ras Al Khaimah (**RAK**), part of the United Arab Emirates. Mr Azima is a businessman, involved in the aviation industry, and has had various dealings with RAKIA over the years. He was also a friend of RAKIA's former chief executive officer, Dr Khater Massaad.

2. RAKIA sued Mr Azima for fraudulent misrepresentation and conspiracy. As well as denying RAKIA's claims, Mr Azima alleged by way of defence and counterclaim that his email accounts had been unlawfully hacked by RAKIA and his data used against him in the case and that as a result the claims should be dismissed or struck out as an abuse of process. The counterclaim alleging hacking and claiming consequential losses was stayed pending determination of RAKIA's claims, although the hacking allegations had to be tried as part of Mr Azima's defence.

3. The trial was heard by Mr Andrew Lenon QC, sitting as a deputy judge of the Chancery Division. He found in favour of RAKIA on its claims as to fraudulent misrepresentation and conspiracy and against Mr Azima on his hacking claim. The learned deputy judge therefore dismissed the counterclaim. The judgment is at [2020] EWHC 1327 (Ch).

4. The Court of Appeal dismissed Mr Azima's appeal against RAKIA's claims but, based on new evidence in relation to the hacking claim, allowed the appeal on the counterclaim and remitted the counterclaim to be tried by a different judge of the Chancery Division. [146] of the Court of Appeal's judgment at [2021] EWCA Civ 349 states:

> "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."

5. I have already heard a number of applications in this case. On 16 July 2021 I gave permission to Mr Azima to join four additional Defendants to the counterclaim. They are: Mr Stuart Page, a private investigator, with whom Mr Azima has since settled and he is no longer a party; Mr Neil Gerrard, a retired solicitor and former partner of Dechert LLP, which is itself an additional Defendant; and Mr James Buchanan who was authorised to undertake various activities on behalf of RAKIA and employed by other companies in RAK. The additional Defendants are alleged to have been involved in some way with the hacking of Mr Azima's data on behalf of RAKIA.[1]

6. On 15 and 17 March 2022 I heard applications on behalf of both Mr Azima and RAKIA to strike out parts of each other's statements of case and an application by Mr Azima for RAKIA to answer his requests for further information. I delivered an *ex tempore* judgment dismissing all three applications – see [2022] EWHC 790 (Ch).

[1] I will call the remaining Defendants to the Counterclaim, the **Defendants.**

7. At this hearing, which is part of the CMC begun in March 2022, I heard two distinct matters:

   (1) Applications by all the Defendants to the counterclaim for Mr Azima to provide security for their costs of defending the counterclaim;

   (2) Certain disputed issues concerning the draft List of Issues for Disclosure (**LOID**).

   This is my judgment on those two matters.

SECURITY FOR COSTS

8. The Defendants have each issued their own applications for security for costs: RAKIA on 8 December 2021; Mr Gerrard and Dechert on 25 January 2022; and Mr Buchanan on 9 February 2022. All three applications are made pursuant to the condition in CPR 25.13(2)(a) that Mr Azima is resident out of the jurisdiction but not resident in a State bound by the 2005 Hague Convention. There is no dispute that this condition is satisfied, as Mr Azima accepts that he is resident in Missouri, USA. Mr Azima however contests whether the court should exercise its discretion under CPR 25.13(1)(a) to order security and also the quantum of the security being sought.

(a) Legal Principles

9. The discretion to order security, once one or more of the conditions in CPR 25.13(2) have been satisfied, is broadly described in CPR 25.13(1)(a) as whether "*having regard to all the circumstances of the case, that it is just to make such an order*." Mr Plewman QC on behalf of Mr Azima sought to limit the discretion to a consideration of the additional burden of enforcement in Mr Azima's place of residence, namely Missouri; whereas Mr Tomlinson QC, Ms Newton and Mr White QC for the applicants submitted that there is a more expansive discretion once they were through the gateway of Mr Azima being resident out of the jurisdiction in a non-Hague Convention State.

10. All parties referred to the helpful summary of the relevant principles by Hamblen LJ (as he then was) in *Danilina v Chernukhin* [2019] 1 WLR 758. In [51] he said:

    > "(1) For jurisdiction under CPR 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.
    >
    > (2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security of costs under CPR 25.13(1) if "it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order".
    >
    > (3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 of the ECHR – see the *Bestfort* case [2017] CP Rep 9, paras 50-51.

> (4) This requires "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned" – see *Nasser's* case [2002] 1 WLR 1868, para 61 and the *Bestfort* case at para 51.
>
> (5) Such grounds exist where there is a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay – see the *Bestfort* case at para 77.
>
> (6) The order for security should generally be tailored to cater for the relevant risk – see *Nasser's* case at para 64.
>
> (7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings – see, for example, the orders in *De Beer's* case [2003] 1 WLR 38 and the *Bestfort* case.
>
> (8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement – see, for example, the order in *Nasser's* case."

11. Hamblen LJ went on to explain the relevant risks and how the particular risk found to exist determines the amount of the security. At [52] he said that:

> "(1) The relevant risks are of (i) non-enforcement and/or (ii) additional burdens of enforcement. A real risk of either will suffice to meet the "threshold" test.
>
> (2) Some of the authorities refer to difficulties of enforcement. Mere difficulty of enforcement in itself is not enough (save in so far as it results in additional costs and therefore an extra burden of enforcement). The relevant risk is non-enforcement, not difficulty in enforcement and this is the risk to which the test of "substantial obstacles" is directed. The obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement. Difficulties may, however, be evidence of the "substantial obstacles" required for there to be a real risk of non-enforcement."

Then at [57]:

> "In principle, security should be tailored so as to provide protection against the relevant risk. On the judge's findings the relevant risk is that of non-enforcement of any costs order obtained. The purpose of ordering security in such circumstances is to secure the defendant against the risk of non-recovery of those costs. Since that is the risk against which the applicant is entitled to protection, I agree with the appellants that the starting point should be that the defendant is entitled to security for the entirety of his costs."

And at [64] Hamblen LJ emphasised that:

> "In my judgment, once it has been established that there are "substantial obstacles" sufficient to create a real risk of non-enforcement, the starting point is that the defendant should have security for the entirety of the costs and there is no room for discounting the security figure by grading the risk using a sliding scale approach."

12. It is now well established that the evidential hurdle in these applications is "*real risk of substantial obstacles to enforcement*" rather than "*likelihood*" and that a "*real risk*" can be equated with a "*non-fanciful risk*": see *Bestfort* at [77], [79] and [86]; and as applied by Hildyard J in *Re RBS Rights Issue Litigation* [2017] 1 WLR 4635; Butcher J in *PJSC Tatneft v Bogolyubov* [2019] EWHC 1400 (Comm) at [8] – [9]; and Cockerill J in *JSC Karat-1 v Tugushev* [2021] 4 WLR 66.

13. The main limitation on the Court's power to order security is the non-discrimination principles originally set out by the Court of Appeal in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 (referred to by Hamblen LJ above) and this is sometimes referred to as the *Nasser* condition in the authorities. Broadly stated, the Court must not act in a discriminatory manner towards a non-resident unless there are "*objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned*" ([61] of *Nasser*). Mr Plewman QC submitted, and this was accepted, that a non-resident's impecuniosity cannot alone justify an order for security because that would be discriminatory as a resident individual's impecuniosity cannot lead to an order for security (it is different for companies – see CPR 25.12(2)(c)).

14. Continuing with this theme, Mr Plewman QC submitted that as the jurisdiction arises out of residence in a non-Convention state, the obstacles to enforcement must be in relation to the actual place of residence and there can be no obligation on the claimant to disclose the value, nature and location of their assets. There is no such obligation on a resident individual and it would contravene the *Nasser* condition if a non-resident is so obliged in order to answer an application for security.

15. However I do not think that is borne out by the authorities. In *Nasser* itself, the inquiry was not limited to enforcement in the country of residence. Mance LJ (as he then was), said in [62] and [63]:

> "62 The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some – it may well be many – cases there are likely to be substantial obstacles to, or a substantial extra burden (eg of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state. Insofar as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any judgment but on the ground (where this applies) that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as *do* exist abroad or (ii) as a practical matter, to make it more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad.
>
> 63 It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence <u>or wherever his, her or its assets may be.</u> If the discretion under rule 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be

> encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).” (underlining added)

16. It is clear from cases such as *De Beer v Kanaar & Co* [2003] 1 WLR 38, that it is relevant to look at the actual location of the claimant’s assets not just the assets in their place of residence. As Gross J (as he then was) said in *Texuna International Ltd v Cairn Energy Plc* [2004] EWHC 1102 (Comm) at [23(viii)]:

> “The relevant comparison is between enforcement within the zone and enforcement in the country where enforcement will or may realistically be pursued, whether that is the country of residence of the claimant or the country where his, her or its assets may be: Nasser, at [63]. Of course, in an appropriate case, enforcement may take place both in the country of residence and in the country (or countries) where a claimant’s assets are located. Given the focus on enforcement, the location of the claimant’s assets is relevant and it is not discriminatory to take it into account; alternatively its relevance is objectively justified on grounds related to enforcement. I cannot accept Mr Swaroop’s submission that Nasser requires (as it were) a line to be drawn at the country of residence. The demands of practical justice point the other way; for example, it would be absurd to refuse an order for security for costs against a company claimant, resident outside the zone, on the ground that the obstacles to enforcement are minimal in its country of residence when its assets are situated in an other country where it is well-known that enforcement is impossible…”

17. In this case, there is little or no evidence as to the location, nature and/or value of Mr Azima’s assets. He has chosen not to provide evidence disclosing this information. It is no part of his defence to this application that his counterclaim will be stifled if he had to provide security for costs and Mr Plewman QC submitted that in the circumstances there was no requirement for Mr Azima to adduce that evidence. Indeed he went further to suggest that it would contravene the *Nasser* condition and be discriminatory if Mr Azima was effectively obliged to disclose that information about the value, nature and location of his assets.

18. Ms Newton, in particular, addressed this point head on and submitted that Mr Azima should be required to support his solicitors’ statement that he is a man of substantial means and that there would only be limited additional costs of enforcement in Missouri. She submitted that in circumstances where there is no evidence as to Mr Azima’s assets or their location, together with the extant findings of fraud against him, there must be a real risk that wherever his assets are, a costs order against him will go unmet.

19. Ms Newton referred me to a judgment of Henshaw J in *Pisante v Logothetis and ors* [2020] Costs LR 1815. In that case there was already some knowledge of the claimants’ asset position but Henshaw J took into account the lack of transparency and explanation as to the claimants’ assets and liabilities (see [63]) in deciding that the claimants should provide security for the defendants’ total estimated costs, rather than limiting the security to the additional enforcement costs (see [71] and [87]). As Ms Newton submitted, this shows that if the claimant is arguing that they should only be liable for the additional costs of enforcement in their place of residence, they will have to disclose some information as to the location, nature and value of their assets so that the court can assess whether the costs order could effectively be enforced in

the place of residence. If the court cannot assess that from the information provided, it cannot conclude that the risk is limited to the additional costs of enforcement and may infer that there is a real risk that any costs order may be unenforceable.

20. I accept Ms Newton's submissions that the court can take into account both the lack of disclosure as to Mr Azima's assets and his character, as found by Mr Lenon QC and upheld by the Court of Appeal. As to the latter, the Court of Appeal in *De Beer* took into account the evidence as to the respondent's want of probity, as did Butcher J in the *PJSC Tatneft* case.

21. Mr Plewman QC's submissions in relation to these matters were to the effect that a respondent to a security for costs application on the ground of being non-resident in a Convention state is entitled to say nothing about their assets and merely provide evidence that a costs order could be relatively easy to enforce in the place of residence. It seems to me that, if that was the law, it would be virtually impossible for security for costs applications to succeed to the full extent if the respondent adopted that approach. I consider that a respondent needs to provide some evidence from which the court can assess whether a future costs order will be able to be enforced against the non-resident respondent, wherever their assets are located. If such a respondent decides not to disclose any details about their assets, and there is no other evidence as to the value, nature and location of their assets, the court is entitled to infer that there is a real risk of there being substantial obstacles in the way of enforcing a future costs order.

(b) Enforcement in Missouri

22. RAKIA and Mr Azima have adduced expert evidence on Missouri law from lawyers practising in Kansas City, Missouri: Mr Michael Dillon Hockley of Spencer Fane LLP for Mr Azima; and Mr John W. Shaw of Berkowitz Oliver LLP for RAKIA. It does not seem to me that there is much between them as to the law. The main area of dispute is whether Mr Azima will seek to run points that will have the effect of delaying or even possibly avoiding a costs order being enforced.

23. I will deal with this shortly, as I think it rather misses the point, as highlighted by Ms Newton, that there is no evidence before the court as to whether Mr Azima even has any valuable assets in Missouri against which the Defendants might be able to enforce their costs judgment. If, as a matter of fact, Mr Azima's assets are located outside of Missouri, there is no material from which to assess obstacles to enforcement against such assets, because Mr Azima has chosen not to identify what those assets are and where they are situated.

24. Both experts are agreed that in order to enforce a costs order in Missouri it would first have to be registered under the Uniform Foreign Money-Judgments Regulation Act. Once registered, it could then be enforced under the Uniform Enforcement of Foreign Judgments Law (**UEFJL**).

25. The steps required to register and enforce an English judgment in Missouri are summarised below:

i) The first step is registration of the foreign judgment, which takes place by filing a verified petition for registration with an authenticated copy of the judgment, and by providing notice to the judgment debtor.

ii) The judgment debtor may then raise objections to registration of the judgment, which would be tried in the same way as other civil actions. There are limited grounds for objecting to registration of a foreign judgment.

iii) Once a foreign country judgment is registered, it is enforceable in the same manner as a final judgment from a court in a different US state.

iv) The procedure for enforcement of a foreign judgment is governed by the UEFJL.

26. Mr Tomlinson QC sought to argue that Mr Azima would be able to obstruct the registration of an English costs order in Missouri on a number of grounds.

(1) The costs order may not be "*final*" or "*conclusive*" which is required if an order is to be capable of being registered in Missouri. Mr Azima could therefore argue that a costs order made at the conclusion of the trial may be an interim costs order on account and the final costs order could be different after there has been a detailed assessment. Mr Plewman QC pointed out that, at most, there might be some delay to enforcement of an interim costs order on this ground but this provides no basis for asserting that the final costs order would not be enforced.

(2) Mr Azima could try to allege that "*the judgment was obtained by fraud*" which is a statutory ground of objection to registration. If this objection is relied upon, the fraud must be extrinsic to the merits of the proceedings, and so Mr Azima would not be barred by the principles of res judicata and issue estoppel from arguing that such an unadjudicated fraud brought about the judgment against him. Whether such an objection had any substance would have to be decided by the Missouri court before the costs order could be registered and so this would be capable of adding to the costs of enforcement and delay. Mr Plewman QC submitted that this is purely hypothetical and highly unlikely in the event that Mr Azima fails on his counterclaim which is basically a claim in fraud. He also submitted that if there were grounds for challenging the judgment, they would be available to Mr Azima in England. At best, it seems to me, there may be scope for suggesting that there may be added costs and delay occasioned by Mr Azima theoretically running such an objection.

(3) A further objection that is available to Mr Azima is to challenge the costs order as being "*repugnant to the public policy*". There is little Missouri authority on the application of this objection. It is therefore difficult to judge whether there is a real risk of this objection being taken. It seems to me to be more a question of whether Mr Azima is the sort of person who would take every point available to him, whether good or bad, so as to delay and disrupt the enforcement of any order or judgment against him. This does however seem a little tenuous and again probably only goes to delay and increased cost.

27. Mr Tomlinson QC also relied on potentially substantial obstacles to the execution of an English costs order in Missouri even after it has been registered. Under the law of

Missouri, there are various statutory controls that exempt particular classes of assets from being the subject of execution, including an individual's private residence and jointly-owned property.

28. This argument gave rise to a dispute between the parties on the law, with two apparently conflicting first instance decisions about whether the court is properly concerned with obstacles to the execution of a judgment as opposed to the enforcement of it. Hamblen J (as he then was) in *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm) considered that the *Nasser* principles were only applicable to "*enforcement*" not "*execution*"; whereas Mr David Donaldson QC, sitting as a High Court Judge in *Cody v Murray* [2013] EWHC 3448 (Ch) thought that Hamblen J had misinterpreted *Nasser*. Mr Plewman QC said that Mr Donaldson QC should have followed Hamblen J as a matter of precedent. Mr Tomlinson QC submitted that where there are conflicting first instance decisions, the later one should be followed if it took into account the first judgment and explained why it was being departed from.

29. I do not need to decide this interesting debate on the doctrine of precedent. I have to say that I am more attracted to the *Cody v Murray* approach as I do not consider that the Court of Appeal in *Nasser* intended to distinguish "*execution*" from "*enforcement*" – the latter generally incorporates the former – and it would be odd to rule out consideration of specific statutory restrictions on execution in Missouri when deciding whether there are potentially substantial obstacles to enforcement there. Be that as it may, I have no evidence as to Mr Azima's assets in Missouri and so I am unable to assess whether any of the statutory exemptions might apply.

30. Mr Shaw on behalf of RAKIA estimated that the additional and irrecoverable costs of enforcing an English costs order in Missouri would exceed $100,000, on the basis that Mr Azima pursued the various objections discussed above. Such costs would not be recoverable from Mr Azima as the general rule in the United States is that each party bears their own costs and that is apparently followed in Missouri. Mr Plewman QC submitted that if security is ordered in respect of the additional costs of enforcement rather than the full costs, then it is necessary to deduct from the estimated costs in Missouri the irrecoverable costs of enforcing in England which Mr Azima has estimated to be between £10,000 and £50,000. He suggests that security should therefore be limited to £25,000 for each Defendant.

(c) Non-disclosure of Mr Azima's assets

31. The only information that Mr Azima has provided in relation to his assets is a historical list of businesses that were partly or wholly owned by him. This was in response to RAKIA's request for further information as to Mr Azima's plea that he "*resided in and conducted business from Missouri*". Of the 11 companies listed, only 3 were incorporated in Missouri; the rest were incorporated in Nevada, Delaware or offshore jurisdictions such as the Cayman Islands, British Virgin Islands and Gibraltar. No indication was given as to the nature, location or value of any assets held by such companies. If valuable assets are located offshore, Mr Tomlinson QC submitted that that would add greatly to the additional costs of enforcement.

32. It is clear from the *Texuna*, *PJSC Tatneft* and *Pisante* cases discussed above that the court had some information concerning the location of the claimants' assets and was

able to consider the obstacles to enforcement in the relevant jurisdictions as well as the risk that such assets may be moved to other jurisdictions to evade enforcement. In this case, I have no such information at all and am therefore not able to assess the difficulties in enforcing an adverse costs order against Mr Azima's assets.

33. I do not even know if Mr Azima has sufficient assets to meet such an order. If he loses the remitted trial of his counterclaim, he would be likely to be subject to a very substantial costs order, given the serious and complex issues involved, the number of parties and their large and expensive legal teams. The total will be many millions of pounds including his own legal fees. In this respect it is relevant to refer to Mr Azima's submissions on Consequential Issues dated 30 June 2020 when he was arguing for a stay of Mr Lenon QC's judgment pending appeal. He said:

> "the hacking and the campaign of denigration perpetrated by … RAKIA and its agents, has had a very significant impact on Mr Azima's means. In addition, Mr Azima has had to pay substantial legal fees in the US and in this jurisdiction since 2016. The Court will appreciate the difficulties that an order for immediate payment of the judgment debt may cause to Mr Azima. In these circumstances, while Mr Azima's appeal is pending it would be just to stay the judgment against him, given that his reduced finances are *ex hypothesi* the work of RAKIA."

34. Mr Azima has suggested that at the time he was suffering temporary cashflow difficulties. Through his solicitor's witness statement (Mr Dominic Holden), he has stated that he has substantial means and this has been demonstrated by his payment of all adverse costs orders and the judgment sum of $8.5 million. He was ordered to pay the latter sum into a joint solicitors' account by Arnold LJ as a condition of being able to proceed with the appeal. In my view there is a substantial qualitative difference between being ordered to pay a sum of money or costs as the price of continuing with the litigation and being willing to pay an adverse costs order at the end of the proceedings, having lost.

35. The Defendants have raised a concern in their evidence that a third party may be funding Mr Azima's pursuit of these proceedings. This was not dealt with in Mr Azima's evidence. A similar point to that made in the previous paragraph applies, namely that a third party is unlikely to want to fund a costs order made against Mr Azima at the conclusion of the proceedings. Furthermore, it is unclear because there are no details as to such third-party funding, whether the Defendants would be able recover their costs from the third party or whether the third party would be able to satisfy such an order.

36. In the circumstances, I have no evidence as to Mr Azima's assets and whether he even has any assets that would be sufficient to meet an adverse costs order of several million pounds. As I said above, he is not saying that the proceedings would be stifled if he had to provide security for the Defendants' costs. But I cannot assume that he therefore has sufficient assets to meet such an order. Nor can I assume that all such assets are in Missouri and will be available to be enforced against him there.

(d) Mr Azima's character and the risk of dissipation

37. It is also relevant, in my view, to take into account the findings that have been made against Mr Azima and which have been upheld on appeal and cannot be overturned in

the retrial. In the *de Beer* case, the Court of Appeal considered it material to consider whether there was a want of probity on the part of Mr de Beer (see [65]). It took into account misleading and partial evidence as to his assets ([79] – [85]) and the ease with which assets in Switzerland (ie a Convention state) may be moved. The Court of Appeal concluded that the defendant "*is at risk of being unable to enforce an order for costs against Mr de Beer, whether in part or at all, due either to lack of available assets against which such an order could be enforced, or to the unenforceability of such an order in Florida, or both*." ([90]).

38. In the *PJSC Tatneft* case, Butcher J ordered security partly because he feared the claimant would seek to move assets to make them difficult to enforce against. He said as follows:

> "48. I consider that there is a real risk that the assets within the zone will not be available, or not available in sufficient amounts, if and when there arises an issue of enforcement of a costs order. The shareholding arrangements within the Tatneft group are neither fully transparent, nor fully explained. The assets relied on are ones which might readily cease to be available, and this might happen for legitimate reasons. Moreover, this is very hard-fought litigation between parties which are on opposite sides not just of this case, but of wider issues. Looking at those realities I see no good reason to think that if there was a course of conduct which Tatneft was advised was open to it which diminished the assets which would be available to the defendants to enforce against, that course would not be taken. Indeed, the way in which every point has been taken on this application tends to suggest it would be.
>
> 49. .. [I]t appears to me that the approach of Gross J in *Texuna International Ltd v Cairn Energy plc* [2004] EWHC 1102 (Comm), especially at [27–28], is one which focuses on whether, despite there being evidence of assets in a jurisdiction where enforcement will not be subject to significant obstacles, there is a real risk of there nevertheless having to be attempts to enforce in a jurisdiction where there may be substantial obstacles. Gross J's assessment is not limited to whether such risk arises from steps taken by a claimant which lacks probity to move assets out of a jurisdiction where enforcement will not be subject to substantial obstacles, though obviously a lack of probity would be highly relevant."

39. This case is stronger than that before Butcher J as not only is it "*very hard-fought litigation*" but also there has been no disclosure at all of Mr Azima's assets and there have already been findings of Mr Azima's dishonesty and fraud by the trial judge. Mr Lenon QC not only found that RAKIA's allegations of fraudulent misrepresentation and conspiracy were proved against him but also held that Mr Azima's evidence was untruthful, dishonest and self-serving. That is certainly sufficient for me to be satisfied that there is a real risk that Mr Azima would seek to diminish the assets that may be available for the Defendants to enforce against.

(e) Conclusion on whether security should be provided

40. Mr Azima has been found to have acted fraudulently and dishonestly in relation to his dealings with RAKIA. In response to these applications, he has chosen to provide no

details whatsoever as to the nature, value or location of his assets; nor that he actually has assets from which he would be able to meet a very substantial costs order made against him. His solicitor has merely stated in a witness statement that he is "*of substantial means*" and has met every adverse costs order in these proceedings.

41. In my judgment, even if a claimant is not suggesting that his claim will be stifled if ordered to provide security, there needs to be some evidence before the court to substantiate the allegation that the claimant will be able to pay any such adverse costs order. Merely because Mr Azima is resident in Missouri and he has said that his businesses are based there is wholly insufficient for the Defendants and the court to be satisfied that there are assets in Missouri against which the costs order can be enforced. To that extent the expert evidence on Missouri law misses the point, as Ms Newton rightly submitted. If there are in fact no assets in Missouri, then the obstacles to enforcement that the Defendants may be faced with there are largely irrelevant.

42. I have to decide whether "*having regard to all the circumstances of the case, that it is just to make such an order*." I have no doubt that it would be just to make an order for security against Mr Azima on the grounds that there is a real risk that the Defendants would face substantial obstacles to enforcing a costs order against him. Those obstacles arise to a certain extent in Missouri but more importantly, in my view, is that they stem from the fact that there is no relevant information about Mr Azima's assets and so no possibility of testing whether Mr Azima is indeed of substantial means or whether his assets are located in a place where they can be easily enforced against. I understand Mr Azima's reluctance to disclose such information to the Defendants; but the consequence of not doing so is that the Court is entitled to infer that there is a real risk that there will be substantial obstacles in the way of enforcing costs orders made against him.

43. To reach such a conclusion is not discriminatory against non-resident claimants; nor does it breach the *Nasser* condition. Mr Azima relies on his alleged "*substantial means*" but there has been no objective verification of his assertion of that. He also relies on apparent ease of enforcement in Missouri but has adduced no evidence that that is where his assets are located and therefore whether it is the applicable enforcement regime to scrutinise. In other words, he has chosen to put forward that defence to the application but has not supported it with real evidence that would substantiate it. The fact that he has acted in this way in response to the application only adds to my conclusion that there are real risks that he will place substantial obstacles in the way of enforcement of any costs order.

(f) Whether security should be for all costs or for the additional costs of enforcement

44. Given my conclusion set out above, which is not based merely on the risk of there being additional costs or delay because of the objections that Mr Azima could take to enforcement in Missouri, it is inevitable that the order for security has to be by reference to the costs of the proceedings as a whole. I think that, based on the evidence before me, there is a real risk that an adverse costs order at the end of these proceedings will not be able to be enforced at all. Accordingly, as Hamblen LJ explained in *Danilina*, the order for security should be tailored to cater for the relevant risk found to be present.

(g) Amount of security

45. All three Defendant teams seek 65% of their total estimated costs up to March 2022. Mr Plewman QC said that, if the Court was minded to order full security to be provided (which he was resisting), it should be 60% of those costs. Mr Tomlinson QC accepted on behalf of RAKIA that 60% suggestion; however Ms Newton and Mr White QC still maintained that Mr Azima should provide security for 65% of their costs.

46. The latest costs schedules from the Defendants do show very high costs already incurred in relation to the counterclaim, which has not even reached the stage of pleadings being closed. Those costs schedules showed as follows:

    (1) RAKIA's estimated costs up to and including the March CMC are £1,407,748. RAKIA was seeking security in the amount of £915,000, being approximately 65%.

    (2) Mr Gerrard and Dechert's estimated costs to the end of February 2022 are £1,362,410.70; 65% of this is £885,567.

    (3) Mr Buchanan's estimated costs to the end of March 2022 are £910,544.38; and he is claiming £591,854 which is 65% of the total less the sum included in the costs total for the security for costs application.

47. Mr Plewman QC submitted that the sums expended by the Defendants to date are astonishing and indefensible. However he has not indicated what Mr Azima's own costs have been to date, although he did make the point that, as the counterclaimant, Mr Azima would inevitably incur greater costs than the Defendants particularly where it has involved substantial and costly investigations to try to uncover who was responsible for the hacking of his data. That said, the Defendants have had to respond to seven iterations of Mr Azima's counterclaim, as well as substantial requests for further information. It should also be noted that Mr Gerrard, Dechert and Mr Buchanan are new to these proceedings and by comparison with RAKIA they had a lot of catching up to do.

48. It is material to see what Mr Azima has previously said about the Defendants' costs. In rejecting RAKIA's proposal that the costs management provisions should apply to these proceedings, Mr Azima's solicitors, Burlingtons, wrote a letter dated 19 January 2022 (after receipt of RAKIA's updated costs schedule) stating as follows:

> "Mr Azima alleges serious wrongdoing by the defendants involving hacking, a conspiracy to deliberately mislead the court and to procure a judgment by fraud. The costs incurred to date by both the defendants and the claimant are likely to be proportionate in view of the importance of the case… [B]oth sides have incurred increased costs. In light of these factors, it cannot be said that the costs incurred to date are disproportionate"

49. Mr Plewman QC submitted that the Defendants' costs will be likely to be heavily taxed down on assessment and that they would not recover more than 60% of their costs. He referred to cases such as *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm) in which Leggatt J (as he then was) in deciding what amount of interim

payment on account of costs to order said that the touchstone on assessment is "*the lowest amount which [the Defendants] could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the circumstances*".

50. Ms Newton submitted that if Mr Azima were to lose, he would be likely to have to pay the Defendants' costs on an indemnity basis because he would have unjustifiably pursued serious and wide-ranging allegations of dishonesty and impropriety that he failed to prove. As such, the Court should be more generous in the award of security, as shown for instance by Teare J in *Danilina v Chernukin* [2018] EWHC 2503 (Comm). However I do not think I am yet in a position to come to any such view as to the likely assessment basis for the ultimate costs award in this case.

51. I was also referred to Henshaw J's comments in the *Pisante* case, where he said at [88(iii)] that the court may take into account the "*balance of prejudice*" and would normally favour the applicant for security over the claimant, as the applicant is more likely to suffer loss as a result of being under-secured, whereas the claimant would only suffer the cost of having to put up the excess amount of the security.

52. In my judgment, however, with RAKIA having accepted that there should be security for 60% of their costs to date, it would be wrong to distinguish between the Defendants and the appropriate percentage for all of them should be 60%. That is not to say that in any future applications that are not agreed, the Defendants are precluded from arguing that security should be provided in a higher percentage. But for present purposes, it seems to me just and fair that they should be treated equally and the balance of prejudice is adequately addressed by ordering Mr Azima to provide security in the sum of 60% of the costs schedules provided by the Defendants in the amounts specified above.

53. I therefore make orders as sought in the application notices for security to be provided by Mr Azima for the Defendants' costs of defending his counterclaim and that the sums I have indicated above – 60% of their current costs schedules – be paid into their respective joint solicitors' accounts within a date to be agreed or failing that as directed by me. I would hope that the parties can agree a form of order reflecting my judgment above.

DISCLOSURE

54. I turn now to the quite separate issues on disclosure, more particularly in relation to the LOID. There are two broad matters before me:

    (1) The wording and/or inclusion of certain issues for disclosure;

    (2) The appropriate disclosure Model for some of the issues.

55. The parties have debated these matters at length in correspondence between their solicitors and the majority of the issues for disclosure, together with the appropriate disclosure Model, have been agreed. I understand why it happened, but it was in any event unhelpful, as Mr Plewman QC accepted, that Mr Azima's solicitor, Mr Dominic Holden, only served his 18th witness statement dealing with these matters some 36 hours before the deadline for the filing of skeleton arguments. Be that as it may, the parties have been able to deal fully with those matters and I will go through the disputed Issues one by one.

56. Originally it was thought that there may be issues to be resolved about the parties' respective proposals for section 2 of the Disclosure Review Document (**DRD**). But by the time of the hearing, all parties were agreed that these issues should be postponed to be dealt with at a later stage, if they could not be agreed in the meantime.

Legal Principles arising out of CPR PD 51U, the Disclosure Pilot

57. There was no real dispute between the parties as to the relevant legal principles in relation to the operation of the Disclosure Pilot in CPR PD51U, as explained in certain recent authorities.

58. Paragraph 7.3 of PD51U provides that:

> "The List of Issues for Disclosure should be as short and concise as possible. "Issues for Disclosure" means for the purposes of disclosure <u>only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission</u>. For the purposes of producing a List of Issues for Disclosure the parties should consider what matters are common ground but <u>should only include the key issues</u> in dispute in the list." (Emphasis added)

59. In *McParland & Partners v Whitehead* [2020] Bus LR 699 Sir Geoffrey Vos C (as he then was) gave guidance as to the application of paragraph 7.3 of PD 51U:

> "44. The starting point for the identification of the issues for disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination. Rather it is the relevance of the categories of documents in

> the parties' possession to the contested issues before the court that should drive the identification of the issues for disclosure. […]
>
> 46. It can be seen, therefore, that issues for disclosure are very different from issues for trial. Issues for disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim." (Emphasis added)

He concluded as follows:

> "56. The important point for parties to understand is that the identification of issues for disclosure is a quite different exercise from the creation of a list of issues for determination at trial. The issues for disclosure are those which require extended disclosure of documents (i.e. further disclosure beyond what has been provided on initial disclosure) to enable them to be fairly and proportionately tried. The parties need to start by considering what categories of documents likely to be in the parties' possession are relevant to the contested issues before the court.
>
> 57. Unduly granular or complex lists of issues for disclosure should be avoided*."* (Emphasis Added)

60. In *Curtiss v Zurich Insurance PLC* [2021] EWHC 1999 (TCC) HHJ Keyser QC, sitting as a High Court Judge, further explained what a "*key issue for disclosure*" is:

> "14. Paragraph 7.3 of the Practice Direction makes clear that the mere fact that an issue is a matter of dispute in the statements of case does not suffice to make it a proper Issue for Disclosure. The Chancellor's remarks in *McParland* make clear that this is so even if the issue is central to the case. The parties must identify the undisclosed documentation that is likely to be available and assess whether it is likely to be relevant and important for the fair resolution of the claim. Paragraph 7.3 does not in terms explain what is meant by a "key" issue in dispute, but in the context of the entirety of the first sentence of the paragraph it seems to me that an issue in dispute will be a "key issue" if—and, I think, only if—it is an issue that must be determined in order for there to be a fair resolution of the proceedings." (Emphasis added)

61. Mr Plewman QC submitted that key issues must include all issues that a party is putting up as a route to judgment in their favour. In other words, it means an issue that fairly falls for determination before the court would reject the claim or defence, as the case may be.

62. As to Extended Disclosure Models, this is dealt with principally in paragraph 8 of PD51U. But paragraph 6 sets out some general principles as follows:

> *"*6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

6.5 A request for search-based Extended Disclosure (ie Models C, D and/or E) must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4).

6.6 The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity." (Emphasis added)

63. In *Castle Water Ltd v Thames Water Utilities Ltd* [2021] Bus LR 1452 Stuart-Smith J (as he then was) explained what "*reasonable and proportionate*" means, at [7(iii)]:

> "The phrase "reasonable and proportionate" is a recurring theme throughout the practice direction and was intended to effect a culture change: see the *UTB LLC* case [2019] Bus LR 1500, para 75. Thus the court will be concerned that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate in order fairly to resolve those issues, and specifically the issues for disclosure (para 2.4); any order must be reasonable and proportionate having regard to the overriding objective (para 6.4); it is for the party requesting extended disclosure to show that what is sought is reasonable and proportionate (para 6.5) […]"

64. The main issue on the appropriate Models are between Model D and Model E. The difference between the two Models is that Model E disclosure includes "*train of inquiry*" documents (or what used to be called *Peruvian Guano*[2] documents). Paragraph 8.3(2) of PD 51U provides that Model E disclosure "*is only to be ordered in an exceptional case.*" In *Kelly v Baker* [2021] EWHC 964 (Comm) Moulder J explained at [16]:

[2] (1882) 11 QBD 55

> "[T]he starting point, as is clearly set out in the Practice Direction is that Model E is only to be ordered in an exceptional case. Thus it is not enough to say that this is a relatively high value case, that it is important to the Claimants or that it involves allegations of fraud. In relation to the latter factor (fraud) this Court cannot take a view on the merits of the allegations or the alleged egregious nature of the conduct."

65. In *State of Qatar v Banque Havilland SA* [2020] EWHC 1248 (Comm), Cockerill J similarly stated:

> "22. […] it is clear from the disclosure pilot that Model E is exceptional. It is, as I have already noted, the case that the disclosure pilot is designed to try to produce something which is more limited than might have been the case in the past; and so it is plainly not enough to say that this is a serious case involving conspiracy and therefore Model E must follow. That is not the approach which the disclosure pilot indicates
>
> 23. On the basis of *Berezovsky* which was pre-disclosure pilot and the fact that Model E is now supposed to be more rare, we would expect to get Model E being ordered in fewer cases and in more demanding circumstances than in *Berezovsky*."

66. Mr Plewman QC referred me to a further decision in the same case, this time by Mr David Edwards QC, sitting as a High Court Judge, when the applicants came back to seek Model E disclosure for certain issues after more evidence had come to light – *State of Qatar v Banque Havilland SA* [2021] EWHC 2172 (Comm). Even though Cockerill J had previously ruled that Model E was inappropriate for any of the issues for disclosure, Mr Edwards QC thought it appropriate to revisit this in relation to a much more limited issue and on the basis of new evidence relating to the respondents' previous attempts at disclosure. He gave four reasons for ordering Model E for that particular issue [228] to [231]:

(1) The first was about the withholding of a recording of a telephone conversation;

(2) The second concerned the fact that "*communications about relevant matters had been taken "offline" and to other matters that bear on issues and the supposed conspiracy*" [229];

(3) The third was an acceptance of the force of Counsel's submission that "*where there is a covert conspiracy, it is often very unlikely that any smoking gun will be found*" [230];

(4) And fourthly he bore in mind "*that certain potentially important sources of information are, for one reason or another, not available to Qatar or to the court*". [231] He referred to one person's mobile phone data being wiped, an email address being deactivated and notebooks being lost.

67. Mr Plewman QC submitted that those reasons were analogous to the reasons why Mr Azima was seeking Model E disclosure on a small number of critical issues. Mr Tomlinson QC submitted that it was not a sufficiently exceptional case to justify

Model E disclosure. I will come back to consider these submissions in relation to the particular issues they are relevant to.

Background and context

68. Mr Plewman QC invited me to take into account, in considering these disclosure issues, two background matters that he said give context to their position. These are: (i) RAKIA's previous alleged failures in relation to disclosure, including a substantial loss of documents; and (ii) the nature of the alleged wrongdoing relied upon by Mr Azima.

69. In relation to alleged failures of disclosure, Mr Plewman QC referred to the following:

(1) Reports being shared in hard copy between Mr Buchanan, Mr Gerrard and the Ruler of RAK which were systematically returned to Mr Page for destruction;

(2) Mr Buchanan and Mr Gerrard communicated using an app known as "*Confide*" which is described as "*encrypted, self-destructing and screenshot-proof*"; they also communicated via Signal which can be permanently deleted; in other words, these messages may be wholly irrecoverable;

(3) Mr Buchanan claims to have lost or destroyed electronic documents and devices including after RAKIA had begun proceedings against Mr Azima in September 2016; his emails were apparently mistakenly deleted by an Apple Store employee on 14 October 2016 (this was dealt with in the first trial); he has retained no mobile phones (or the data on them) from before 2017; and he has claimed that his laptop was stolen on 12 January 2017 (this was only disclosed to Mr Azima nearly three years later);

(4) There was inadequate disclosure in the first trial by RAKIA; there were invoices from Mr Page to RAKIA in relation to his Project Update reports – Mr Page has recently disclosed these invoices and RAKIA maintains that it does not have copies of them; it is also apparent that Mr Buchanan sent a copy of the Project Update to Mr Gerrard by email but the email was not disclosed, even though RAKIA had been ordered to provide disclosure from its agents and consultants including Mr Gerrard, Dechert and Mr Buchanan;

(5) Mr Plewman QC also complained about the lack of disclosure of the records of interviews between Dechert and Mr Karam Al Sadeq; there are issues about the relevance of these interviews for the retrial but it was submitted that the records show that relevant matters for the first trial were discussed (this is disputed by RAKIA);

(6) RAKIA did not disclose that Mr Buchanan and Mr Gerrard were communicating using Confide and Signal even though they were asked specifically about messaging apps that were used.

70. Plainly I cannot determine whether these instances show a deliberate policy of document destruction or lack of candour in RAKIA's approach to disclosure. (RAKIA disputes that there was any non-compliance with their disclosure obligations in the first trial.) But they do properly inform the present debate about the extent of

disclosure that should be required in this case and there has undoubtedly been a substantial loss of documentation. This puts Mr Azima at serious disadvantage in terms of having available contemporaneous documentation from which to test the evidence and the credibility of the witnesses. Documentary loss and inadequate previous disclosure were two of the reasons given by Mr Edwards QC in *State of Qatar and Banque Havilland SA* for ordering Model E disclosure.

71. As to the nature of the allegations that Mr Azima makes, this is relevant to a further reason by Mr Edwards QC for ordering Model E disclosure on select critical issues. Mr Azima alleges a clandestine conspiracy to hack his confidential data. Because those involved in the alleged conspiracy would be unlikely to create documents that revealed it or contained smoking guns together with the policies of document destruction, this means that Mr Azima's case will largely have to be built on inferences. Mr Plewman QC said that with these sorts of allegations of serious wrongdoing, including the giving of perjurious evidence and of misleading the court, there should be scepticism and possibly alarm at any attempt by the Defendants to limit their disclosure obligations.

72. With that background, I can now turn to the specific items in the LOID that remain disputed and I will go consecutively through the respective Issues by their number.

Issue 3(a)

73. I will set out the proposed wording for Issue 3(a), with the additional words proposed by the Defendants underlined:

> 3.(a) From 1 December 2014 until 30 September 2016 what steps, <u>which were or might reasonably be construed as being unlawful,</u> were taken by or on behalf of RAKIA, RAK DEV or other RAK government persons or entities (or on behalf of other Defendants) to obtain information about or belonging to Mr Azima.
>
> What information was thereby obtained, to whom was it provided, and for what purpose was it provided?

74. There are two issues about Issue 3(a): (i) whether the Defendants' wording should be included; and (ii) whether disclosure should be provided by them pursuant to Model E, as Mr Azima says, or Model D, as the Defendants say.

75. There is no dispute that this is a central issue in the case. RAKIA says that it acted lawfully in investigating Mr Azima and that it was not responsible for the unlawful hacking of his data, which it was able to take advantage of when it was published on the torrents. Mr Tomlinson QC therefore submitted that the issue must be confined to potentially unlawful steps being taken by or on behalf of RAKIA to obtain information about or belonging to Mr Azima because lawful steps could not possibly be a "*key issue*" for disclosure.

76. Mr Plewman QC however submitted that this both begs the question as to whether the steps were indeed lawful or unlawful, which is an issue to be decided at the retrial, and also it puts the reviewer of disclosure in an impossible position in that they would have to decide whether any particular document referred to, or was related to, illegal activity. It is necessary for Mr Azima's case to look at the whole corpus of material in

order to assess whether RAKIA had taken unlawful steps and it would be no good in the circumstances of this case for documents to be picked out in isolation and a decision made by the Defendants as to whether it was relevant to potentially unlawful activity. The lawfulness or otherwise of the step being taken may depend on other steps being taken or the contents of other documents, which in themselves, may not appear to disclose anything at all about unlawful steps being taken. Mr Plewman QC often referred to the mosaic of the evidence and documents where individual pieces of the mosaic may not be obviously relevant to unlawful activity but put together with other pieces could form a very different picture. The reviewer will be unable to judge whether any particular piece is actually part of the mosaic.

77. Mr Plewman QC referred to two particular examples which demonstrated the difficulties facing the reviewer if the issue was limited to unlawful steps. First was the Project Update Report from March 2015 to which Mr Azima attaches great significance. This has been disclosed in redacted form and on the face of the unredacted parts there is no reference to hacking of Mr Azima's data. Accordingly it would not be disclosable under Issue 3(a) if the wording was limited in the way proposed by the Defendants.

78. The second example was the Page invoices referred to above and which have recently been provided to Mr Azima by Mr Page. These invoices are from a Mr Page entity, PGME JLT, and are addressed to RAKIA, starting on 6 February 2015. They are in UAE Dirhams and have the same narrative description: "*To: Conducting feasibility study to identify market potential to provide management services in the African Subcontinent [sic] establishing Freezones.*" On the face of it, these invoices have nothing to do with Mr Azima or unlawful hacking of his data. Apparently there was no such Freezones project but any reviewer might well not realise that these invoices were actually related to investigations into Mr Azima. The fact that the narrative allegedly conceals what was really going on may help Mr Azima in terms of proving a clandestine conspiracy in which the Defendants were seeking to cover their tracks. I am not saying that they do prove that, just that at this stage I can see why Mr Azima would be concerned not to limit the disclosure on this issue.

79. This also seems to me to be relevant to the question of whether Model E disclosure should be ordered of this issue. There may ultimately be little difference between Model D and Model E on this issue but where there has potentially been a cover-up of wrongdoing, there needs to be a mechanism for exploring whether there was indeed a cover-up and, if so, how it worked. I believe that train of inquiry searches may be required in order to understand, for example, how the Page invoices relate to the issues in this case. Mr Tomlinson QC said that under either Model D or Model E, the invoices would be disclosable because they are from Mr Page and therefore relevant. However, be that as it may, and as I think Mr Tomlinson QC accepted, the narrative on those invoices may require further investigation and could lead the reviewer on a train of inquiry into what those invoices actually related to.

80. Accordingly I consider that this critical central issue together with the surrounding circumstances make it sufficiently exceptional to justify there being Model E disclosure.

81. As to the limitation to potentially unlawful steps, Mr Tomlinson QC submitted that the only issues in the case and on the pleadings are as to unlawful activity by the

Defendants and, if the wording is not included, there would be a risk that the Defendants may be required to disclose irrelevant documents. He said that, for instance, a company search done on Mr Azima in Nevada, USA could not be relevant but would be disclosable under Issue 3(a) if the wording is not included. The trouble with this is that something may not appear relevant at this stage and in isolation but may become relevant when put together with other documents or evidence. I think that this is amply demonstrated by the Page invoices which Mr Tomlinson QC accepted would be disclosable by RAKIA if it had them. On the face of them, they are not relevant and are not disclosing unlawful activity. They are only disclosable because they may be covering-up unlawful activity and involve Mr Page. They may ultimately be found not to have done so but that does not mean they are irrelevant or should not be disclosed.

82. I therefore think that the Defendants' proposed limitation goes too far and could potentially be used to avoid disclosing what I think Mr Azima is entitled to see on this core critical issue. I will direct that Mr Azima's wording should be used without the Defendants' proposed additional wording and that disclosure be given on a Model E basis.

Issue 3(b)

83. This Issue follows on from Issue 3(a) but instead of Mr Azima it seeks disclosure in respect of investigations into Dr Khater Massaad who was the CEO of RAKIA for several years up until 2012, from which time there has been a dispute between RAKIA and Dr Massaad in which RAKIA has accused Dr Massaad of fraud and embezzlement. RAKIA believed that Dr Massaad, together with others including Mr Azima were on a campaign to denigrate RAK publicly with various allegations of human rights abuses. It therefore sought to investigate Dr Massaad and his associates including Mr Azima.

84. Originally as I understand it, Mr Azima had included Dr Massaad in Issue 3 and it was not split into (a) and (b). But after objections were raised he separated it out into Issue 3(b) and this has been further narrowed by Mr Azima, so as to make the task more proportionate. Issue 3(b) that Mr Azima now proposes is in the following terms:

> 3(b) From 1 December 2014 until 30 September 2016 what steps were taken by or on behalf of RAKIA, RAK DEV or other RAK government persons or entities (or on behalf of other Defendants) by or through Mr Page (and his companies), Mr Del Rosso (and his companies), Mr Forlit (and his companies), Mr Jain (and his companies), Mr Pandey (and his companies), Mr Robinson (and his companies), CyberRoot and/or Cyber Defence & Analytics, to obtain information about or belonging to Dr Massaad.

85. The individuals and entities mentioned in the Issue are alleged to have been involved in the unlawful hacking of Mr Azima's data on behalf of RAKIA. Mr Azima seeks Model D disclosure in relation to the investigations into Dr Massaad. The trouble with this is that there was a huge investigation by RAKIA in relation to Dr Massaad, all of which RAKIA says was entirely legitimate because it believed that he had defrauded RAKIA and RAK and that those investigations have nothing to do with the case against Mr Azima.

86. Mr Plewman QC responded to this by saying that this Issue is seeking disclosure as to whether RAKIA, through the named agents, acted unlawfully in relation to Dr Massaad and that this would help in showing that RAKIA would probably have acted the same way in relation to Mr Azima. RAKIA has admitted that it sought to obtain information about Dr Massaad and that this was linked in some way to investigating Mr Azima. In the Counterclaim, Mr Azima does allege that the Defendants were involved in hacking Dr Massaad's data (see [81f.] and [81Bb]) but it seems to me that these are really evidential pleas supporting the case that the Defendants hacked Mr Azima's data. From those pleas, it does not look like a "*key issue*".

87. Mr Tomlinson QC and Ms Newton referred to the scale of the investigation that was carried out into Dr Massaad who was said to have caused losses to RAK of over $2 billion and who has been convicted *in absentia* to lengthy terms of imprisonment (he is currently in Saudi Arabia pending extradition proceedings to RAK). Ms Newton's clients have done some preliminary searches with keywords for Mr Azima and Dr Massaad which show that if Dr Massaad is included it more than doubles the responsive documents to a total of over 68,000. That is just Dechert's and Mr Gerrard's documents on a preliminary search and is likely to be very much greater for all the Defendants. It is clear that a search of documents in relation to investigations of Dr Massaad will have to be extensive if this Issue is allowed in.

88. In my view this is disproportionate to the relative lack of importance of the Issue. As will be seen, there are references to Dr Massaad in Issues 5 and 6 which the Defendants have partially accepted. It seems to me that if the purpose is to show that the Defendants were capable of unlawful hacking of Mr Azima, because they did the same in relation to Dr Massaad, then the Model E disclosure of the broad Issue 3(a) that I have ordered, adequately covers this general Issue and will enable Mr Azima to piece together the mosaic, assuming the pieces are there. I do not think that this is a "*key issue*" on which extended disclosure should be required and I therefore reject Issue 3(b) and it should not be included in the LOID.

Issue 5

89. Issue 5 involves the same proposed insertion by the Defendants of the limitation to "*illegal*" activities and, as I understand their position, if I do not include the word "*illegal*" they say that the reference to "*Dr Massaad, or associated persons*" should be excluded. It is agreed that this should be Model D. The proposed Issue 5 with those words underlined is as follows:

> 5. Did Mr Page engage Mr Forlit (and/or Gadot, Insight or other associated entities) at any time between 1 January 2015 to 30 September 2016 to obtain information (through hacking and/or other <u>illegal</u> means) relating to Mr Azima, <u>Dr Massaad, or other associated persons</u>, and if so did Mr Buchanan, Mr Gerrard or other persons connected with RAKIA know and/or approve of this engagement of Mr Forlit's hacking activities, and/or payments being made to Mr Page to maintain access to information provided by Mr Forlit?

90. The inclusion of "*illegal*" is the same as for Issue 3(a) and in my view it would be too limiting to add that qualification. It is alleged that Mr Forlit was specifically engaged in hacking activities and the issue is only related to the engagement of Mr Forlit and

the Defendants' knowledge of this. It would not present a clear picture as to the full extent of that engagement if all relevant documents related to it were not to be disclosed.

91. As to the exclusion of Dr Massaad and his associates if it is not limited to illegal activities, I do not think that follows. This Issue is limited to the engagement of Mr Forlit about whom it is alleged that he was in the business of hacking data. The Defendants accepted that the hacking of Dr Massaad would be relevant to Mr Azima's case and so it is not much of a stretch to include Dr Massaad in this Issue 5. I therefore rule in Mr Azima's favour on both points.

Issue 6

92. The parties had different versions of Issue 6 but the dispute was again around the Defendants' inclusion of the word "*illegal*" to qualify investigations by Mr Page. Mr Azima's version of Issue 6 is as follows:

> 6. To whom and in what terms were reports by Mr Page of or evidencing investigations into Dr Massaad and/or Mr Azima provided?
>
> What was the extent to which and reasons why such reports were destroyed?

93. Mr Tomlinson QC only wanted to attach the word "*illegal*" to investigations into Dr Massaad and his associates. He was content for it not to be so limited to the investigations into Mr Azima. But for the same reasons as set out above, I do not think it appropriate to limit this Issue further by the inclusion of the word "*illegal*" even to the investigations into Dr Massaad and in the light of my rejection of the broader Issue 3(b). It is limited enough by the references to Mr Page.

94. The Defendants also did not include the last sentence in relation to document destruction. Mr Tomlinson QC submitted that this is not a key issue and would in any event likely not yield any documents. It seems to me however that if there are documents that indicate a systematic destruction policy of documents related to investigations into Mr Azima that this could be potentially highly relevant. I will therefore order Issue 6 to be in the form suggested by Mr Azima.

Issue 13

95. This Issue is objected to in its entirety by the Defendants. It concerns what has been called the "*View from the Window*" document. This is a document that was sent by a Mr Andrew Frank at Karv Communications, which was a PR company working for RAKIA or RAK generally to Mr Gerrard. The document was prepared in December 2015 (and sent to Mr Gerrard on 4 January 2016) and it refers to the unearthing of a "*massive fraud*" that had taken place in RAK and elsewhere and specifically in relation to Mr Azima that he "*appears to have orchestrated, if not (fully) participated in numerous fraudulent activities*."

96. Mr Azima relies on the document in Section G of his Counterclaim, headed "*The "View from the Window" Document*". His case is that this document undermines RAKIA's case that it only discovered Mr Azima's hacked data on the internet some 9 months later in August 2016. RAKIA's defence is that Karv Communications is not

RAKIA, that the document was a draft and that there could be various interpretations of what it actually meant.

97. Mr Tomlinson QC also relied on the fact that the document featured in the first trial and Mr Gerrard was cross examined about it. However, Mr Lenon QC in his judgment found Mr Gerrard to have been "*confused*" about how the document had been produced and what it meant. And in any event this is a retrial in which the circumstances under which the document was prepared and what it disclosed will be subject to further scrutiny and cross examination.

98. Issue 13 is formulated as follows:

> 13. In what circumstances was the "*View from the Window*" document prepared and disseminated, including: (i) what was the basis for its contents, including the statements that matters set out had been "exposed as fact", and that "FA, a US citizen, appears to have orchestrated, if not (fully) participated in numerous fraudulent activities"; (ii) who was involved in its drafting, including in any discussions that may have contributed to it; (iii) for what reason was it prepared; (iv) who received it or was made aware of its contents; (v) were any further versions prepared; (vi) what action was taken in respect of it?

99. Mr Tomlinson QC appeared to accept that (i) was probably appropriate to include as a "*key issue*" but not the rest. I think that this is clearly an important document, given the date it was prepared, and that a fair resolution of its place in the story requires there to be extended disclosure as to how it came about. This will not be a disproportionate exercise for the Defendants and accordingly I direct Issue 13 to be included in the LOID in full and for there to be Model D disclosure in relation to it.

Issues 17 and 18

100. I will deal with these Issues together as they both concern whether there should be Model D or E disclosure and both are related to the alleged discovery of Mr Azima's hacked data on the torrents sites. There is no dispute as to the wording of these Issues or whether they are "*key issues*". They are in the following terms:

> 17. When and how did each of the following persons become aware of the existence of each set of the Torrents containing Mr Azima's data or of websites or blogs publicising or linking to the Torrents:
>
> 1. RAKIA;
> 2. Mr Buchanan;
> 3. Mr Gerrard;
> 4. Mr Del Rosso / Vital;
> 5. Mr Page;
> 6. Mr Halabi;

7. Mr Forlit (and Insight/Gadot);

8. Mr Frank (and Karv);

9. Mr Handjani;

10. The Ruler;

18. Did Mr Page, Mr Halabi, Mr Gerrard, Mr Hughes, Mr Buchanan and Mr Forlit meet and agree on the creation of a false cover story for the 'discovery' of the torrents?

Did Mr Page, Mr Halabi, Mr Forlit and Mr Gerrard attend meetings in Switzerland and/or Cyprus? If so, did Mr Gerrard at that meeting/those meetings prepare Mr Page and Mr Halabi to give false evidence?

101. Mr Plewman QC submitted that these are critical Issues which justify Model E disclosure. Mr Lenon QC did not accept RAKIA's innocent discovery defence and concluded that "*the true facts as to how RAKIA came to know about the hacked material have not been disclosed*" [355]. Mr Azima's case is that the Defendants left a false trail of documents to suggest that they innocently discovered the torrents. And the meetings referred to in Issue 18 are said to have taken place so as to concoct a story about innocent discovery for the purposes of the first trial. Mr Plewman QC therefore submitted that the true picture of what happened might only emerge if train of inquiry disclosure is ordered.

102. Mr Tomlinson QC said in response that although he accepted that these were "*key issues*", they were not in the "*exceptional*" category justifying Model E over Model D. Furthermore Issue 17 is already framed very widely in relation to ten individuals and an even wider search-based disclosure would not only inevitably lead to there having to be an analysis of large numbers of wholly irrelevant documents but also would be unlikely to lead to any greater disclosure than under Model D. In relation to Issue 18, two of the named individuals are Defendants and so obliged to provide their own disclosure; and two of the other three are presently actively cooperating with Mr Azima in providing evidence and disclosure.

103. In my view, these Issues are not in the same category of "*exceptional*" as Issue 3(a), where I found that train of inquiry documentation would be necessary for Mr Azima to build his case on the central issue of responsibility for the hacking. Issues 17 and 18 come later in the story and while they are important in themselves and also for the credibility of the Defendants' alleged innocent discovery defence, I do not consider that they are as critical as Issue 3(a) so as to require Model E disclosure. I think that Model D disclosure on these Issues will be wide enough for documents to be searched for and disclosed that might support Mr Azima's case. I will therefore order Model D for both Issues 17 and 18.

Issue 19

104. This Issue concerns NTi, a company that was engaged to download Mr Azima's hacked data from the torrents. Once the torrents had been identified by whatever means, Mr Gerrard instructed Mr Del Rosso/Vital and they in turn, via a US attorney

called Mr Chris Swecker, instructed NTi to download the data. Mr Plewman QC showed me some emails relating to the difficulties that NTi had initially in downloading the data, but they contacted Mr Del Rosso and somehow were able to do it shortly thereafter.

105. In relation to Issue 19, Mr Azima seeks only Model C disclosure, recognising that this is not a central issue and no allegations have been pleaded against NTi. The Issue is in the following terms:

> 19. As to the engagement of NTi: (i) what instructions or information did NTi have about its engagement; (ii) what reports did it provide to those instructing it; (iii) what difficulties (if any) did NTi have in downloading the data, how did NTi report any difficulties, and what action was taken by NTi or by those instructing NTi to resolve any difficulties.

106. NTi do appear in the pleadings, but only really in passing when dealing with the alleged innocent discovery explanation of the Defendants. Furthermore the Defendants say that the two individuals from NTi, Mr Garcia and Ms Gray, put in witness statements at the first trial which Mr Azima accepted without cross examination.

107. It does seem to me that, certainly the instructions to NTi, are potentially important evidence in relation to the alleged innocent discovery defence. Mr Tomlinson QC, when pushed, accepted that (i) of the Issue could be a sufficiently "*key issue*" for disclosure and it seems to me that the rather limited terms of Issue 19 together with the proposed narrower Model C, mean that this is not an onerous exercise for the Defendants and there may be documentation helpful to Mr Azima's case on this Issue. Accordingly I will order Issue 19 on a Model C basis.

Issue 20

108. Issue 20 concerns payments by the Defendants to Mr Del Rosso/Vital and the person(s) to whom Mr Del Rosso/Vital's invoices were addressed. Although they recognise that this is an important Issue, the Defendants say that it is unnecessary because it is duplicative of other Issues that they have agreed should be included, namely Issues 21 and 24.

109. Issue 20 is in these terms:

> What payments were made by or on behalf of any of the Defendants to Mr Del Rosso / Vital (including the nature, amount or dates of any payments), to whom did Vital and Mr Del Rosso raise invoices, and by which entities they were paid?

110. Issue 21 concerns the engagement of CyberRoot which Mr Azima says is a "*hack-for-hire*" firm. It seeks disclosure relating to the engagement of CyberRoot by Mr Del Rosso/Vital, what payments were made to them by Mr Del Rosso/Vital and "*the source of the funds used*". Issue 24 concerns another company, Cyber Defence and Analytics, and the same questions are asked in relation to their engagement by Mr Del Rosso/Vital, including the "*source of the funds used*" by Mr Del Rosso/Vital to pay them.

111. I can see that there is potentially a small overlap with Issue 20 insofar as the source of funds is identified as one or other of the Defendants. However, there may be a potential dispute about whether it is the ultimate or immediate source of the funds that has to be disclosed under Issues 21 and 24; and in any event Issue 20 is looking at all payments by or on behalf of any of the Defendants to Mr Del Rosso/Vital and is not dependent on what they were used for or limited to CyberRoot or Cyber Defence and Analytics. Therefore I do not think that the duplication argument is a good one and it does not matter if there turns out to be a small amount of duplication anyway.

112. Accordingly Issue 20 should be in the LOID with Model D disclosure.

Issue 24

113. This is again an issue about the inclusion of Dr Massaad and, if so, whether it should be limited to unlawful work. I have already said that this Issue is about Mr Del Rosso/Vital's engagement of Cyber Defence and Analytics, which is a company operated by Mr Aditya Jain. The Issue is specifically confined to the engagement of a specific company that Mr Azima alleges was in the business of hacking data. For the same reasons as set out above in relation to Issues 3, 5 and 6, I think Issue 24 is narrow enough to justify the inclusion of Dr Massaad without any qualification as the implication is that such a company would be engaged to hack data, which makes it relevant to Mr Azima's case.

114. I will therefore include Issue 24 on the terms set out by Mr Azima and on a Model D basis. There was a suggestion in correspondence that the Defendants wanted to limit Issue 24 to Model C but this was not developed by Mr Tomlinson QC, whether in writing or orally, and I think, in any event, that Model D is appropriate.

Issues 27 and 28

115. Both of these Issues concern Mr Del Rosso and his engagement of a Mr Paul Robinson. They really concern whether Mr Del Rosso's evidence at the first trial that he was not involved in any investigation into Mr Azima was true or not. The Defendants object to these Issues on the grounds that they are not "*key issues*" as they only relate to the credibility of a witness, not even a party to the proceedings.

116. The Issues are in the following terms:

> 27. Did Mr Del Rosso engage Mr Robinson (and/or companies associated with him) to gather information regarding Mr Azima?
>
> 28. Did Mr Del Rosso destroy or sanitise evidence, or direct others (including Mr Grayson and Mr Robinson) to do so?

117. Mr Azima alleges in the Counterclaim that Mr Del Rosso instructed Mr Robinson to gather information about Mr Azima. He also alleges that in June 2020, Mr Del Rosso directed Mr Robinson, via a Mr Patrick Grayson, to destroy and/or sanitise materials connecting Mr Del Rosso to the historic investigations. He seeks only Model C disclosure on these Issues with a narrow scope.

118. Nevertheless I find it difficult to see that these are sufficiently "*key issues*" to justify extended disclosure. I imagine that insofar as Mr Azima is seeking documentation in relation to investigations into Mr Azima that it will essentially be covered by the wide wording I have ordered in relation to Issue 3(a). But there are no specific allegations against Mr Robinson and there is no evidence that he was engaged in wrongdoing towards Mr Azima. His involvement only emerged in other proceedings after the first trial. I do not consider that this Issue is necessary for Mr Azima to have his Counterclaim fairly determined.

119. As to Issue 28, this refers to three non-parties to the proceedings and steps that were allegedly taken after the first trial and some four years after the hacking of Mr Azima's data. I think this is plainly not a "*key issue*" for disclosure. I will therefore exclude both Issues 27 and 28 from the LOID.

Issue 30

120. This is an Issue that goes the other way, where the Defendants are principally seeking disclosure from Mr Azima in relation to whether he has threatened, paid or otherwise induced certain individuals to assist his case by providing information or evidence of their involvement in the hacking of Mr Azima's data. Mr Azima accepts that this is a "*key issue*" on which he should provide Model D disclosure but wants it limited to one individual, Mr Vikash Pandey, a former CyberRoot employee, and not extended to Mr Jonas Rey, an investigator and Mr Aditya Jain of Cyber Defence and Analytics.

121. Issue 30 is in the following terms (with the extra individuals underlined):

> 30. Has Mr Azima or anyone associated with Mr Azima threatened, paid (or made agreements to pay), or otherwise induced Mr Pandey, <u>Mr Page, Mr Jain or Mr Rey</u> to provide information and/or to assist in relation to these proceedings and/or to assist with investigations into the alleged hacking of Mr Azima's data? If so, how much were these individuals paid (or promised to be paid) and/or what were the terms of the agreements?

122. Mr Plewman QC submitted that Mr Page is effectively dealt with specifically under Issue 37 and so should not be included in this Issue. I did not understand that to be disputed and I will therefore remove Mr Page.

123. Mr Plewman QC has accepted Mr Pandey in this Issue because RAKIA has made a specific allegation in [22.2] of its Defence to Counterclaim that Mr Pandey had provided his evidence to Mr Rey under circumstances that involved threats, payments and a Consultancy Agreement. No such allegations have been made in relation to Mr Jain or Mr Rey and so it is said not to be a "*key issue*". There is a slight element of Mr Azima applying different tests for his disclosure than for the Defendants'. But in any event, I do not think it is right in the circumstances to distinguish between Mr Pandey and Mr Jain and Mr Rey. Both Mr Pandey and Mr Jain were sources of Mr Rey and what they had told Mr Rey was relied upon by Mr Azima in the Court of Appeal when seeking this retrial. If there were similar threats and/or payments made to Mr Jain and/or Mr Rey, that would plainly be relevant in the same way that they are in relation to Mr Pandey.

124. Ms Newton, in particular, argued this point. She referred me to correspondence between Mr Azima's solicitors and RAKIA's solicitors where questions were being asked about whether any agreements had been reached between Mr Azima and Mr Jain whereby he would be paid for providing information and/or assistance in relation to the hacking allegations. By a letter dated 15 October 2021, Mr Azima's solicitors declined to provide answers to the questions at that stage, saying that disclosure and witness statements, presumably dealing with the questions, would follow in due course. As to whether any payments had been made to Mr Jain, they said: "*The history of his involvement will be addressed in his evidence in due course, and that is self-evidently a matter that you will be able to raise with Mr Jain at trial. Your client is not entitled to require information or disclosure in relation to those matters now.*" There is no guarantee however that Mr Jain will actually be a witness at the trial.

125. With that stance being taken by Mr Azima's solicitors, it is a little surprising that Mr Azima is now seeking to exclude Mr Jain from the Issue. There seemed to be a tacit acceptance that this material would have to be disclosed at some point and that as things stand at present Mr Azima is intending to call Mr Jain as a witness. Accordingly I do not think it would be fair or right to limit this Issue to Mr Pandey, and I will direct that Mr Jain and Mr Rey should also be included.

Issue 31

126. This Issue concerned the accidental deletion of Mr Buchanan's emails in the Apple Store in October 2016. The allegations were explored in the first trial and Mr Lenon QC largely accepted Mr Buchanan's evidence in relation to this. There has already been quite substantial disclosure on this matter but Mr Azima is specifically after documentation between Mr Buchanan or persons on his behalf and Apple's Genius Bar as to how the data loss was dealt with.

127. I am pleased to say that by the end of the hearing there was agreement or near agreement between the parties on this Issue. As against RAKIA, Mr Azima is not now pursuing this Issue. As against Dechert and Mr Gerrard, I understand that Mr Azima has been content to accept a form of wording and for there to be disclosure by them on a Model C basis. And as against Mr Buchanan, Mr White QC said that a proposal had gone to Mr Azima as to appropriate wording for this Issue and Mr Plewman QC in his reply submissions confirmed that they were indeed close to agreement on this. I was asked not to rule on it in those circumstances and am happy not to do so.

Issue 32

128. This Issue concerns the evidence that Mr Gerrard gave in relation to his interviews of a detainee in RAK called Mr Karam Al Sadeq. I refused to strike out these allegations at the earlier March hearing. But I think there is some confusion on Mr Azima's side as to what they are seeking disclosure of and what it relates to.

129. Issue 32 is formulated as follows:

> 32. Did Mr Gerrard knowingly give false evidence in respect of his dealings with Mr and Mrs Al Sadeq?

130. Mr Plewman QC said that the disclosure that is sought is limited to whether Mr Gerrard knowingly gave false evidence at the first trial. He gave evidence in January 2020 at the first trial and he was cross examined, unexpectedly, on his dealings with Mr and Mrs Al Sadeq. He gave answers which were incorrect and, after publication of Mr Lenon QC's judgment, Mr Gerrard filed a "*corrective*" witness statement, that admitted a number of false statements that he had made under cross examination. Mr Lenon QC handed down an Addendum Judgment dated 30 June 2020 in which he decided not to reopen any of the issues or allow further cross examination of Mr Gerrard.

131. There are separate proceedings brought by Mr Al Sadeq against Mr Gerrard and two other then-partners of Dechert concerning violation of their rights by using threats, mistreatment and/or unlawful methods to give evidence or false evidence against Dr Massaad. Mr Plewman QC accepted that he could not and was not seeking to obtain on disclosure material in relation to the conduct of Mr Gerrard and his dealings with Mr Al Sadeq. What Mr Azima wanted was the material that would show that Mr Gerrard "*knowingly*" gave false evidence about this.

132. But as Ms Newton pointed out, Mr Azima has agreed a date range for this issue of 1 January 2020 until 5 June 2020, which is basically the period from service of the Al Sadeq claim and Mr Gerrard's cross examination at the first trial to the date of his corrective witness statement. Mr Plewman QC seemed to confirm that that was so and that he was therefore seeking the material that was available to Mr Gerrard when he prepared his corrective witness statement. Mr Plewman QC suggested that that could be his daybooks, interview notes, diaries and other materials, all of which are the contemporaneous records relevant to the substance of the case brought by Mr Al Sadeq but which were certainly not created in 2020. Therefore, it is unclear how those documents would be disclosable pursuant to Issue 32 by reference to the agreed date range. The fact that Mr Gerrard may have looked at those documents during 2020 when preparing his corrective witness statement does not bring them within the date range.

133. The confusion that I referred to earlier stems from the fact that the only documents that were likely to have been created in the date range for the purpose of preparing the corrective witness statement would probably be privileged. And in any event, the documents used for the purpose of preparing the corrective witness statement cannot be relevant to what Mr Gerrard knew before being cross examined on the issue in January 2020. Yet the Issue is directed at Mr Gerrard's state of mind when he was cross examined on this unexpectedly at the first trial. Mr Azima does not allege that the corrective witness statement itself was false, let alone knowingly false.

134. Accordingly I do not think that this Issue should be included. It goes to credit predominantly and I think that the disclosure that is sought is not actually directed at the Issue as formulated.

Issue 37

135. The final Issue was one that was only suggested the week before the hearing by Mr Buchanan's solicitors and it concerns the circumstances under which Mr Page came to settle the proceedings as against him and to agree to provide witness evidence for Mr Azima. I am pleased to say that Mr White QC confirmed that this Issue may be

premature before the Defendants have seen Mr Azima's Reply to their allegation in this respect and that they were therefore content to park this Issue until later when hopefully terms can be agreed. Mr Plewman QC did not object to that.

Conclusion

136. I hope that this covers all the disputed issues on the LOID that were argued before me on this occasion. I would ask the parties to agree a form of order that reflects my various rulings explained above, probably in the form of a schedule with the directed wording set out together with the appropriate Model for disclosure.

137. If there are any consequential matters that cannot be agreed, they can be dealt with at the next hearing, if there is time available.