HC-2016-002798

Neutral Citation Number: [2023] EWHC 2108 (Ch)

Case No: HC-2016-002798

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

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

Date: 21/08/2023

Before:

MR JUSTICE MICHAEL GREEN

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Between:

RAS AL KHAIMAH INVESTMENT AUTHORITY
Claimant and Defendant to Counterclaim

-and-

FARHAD AZIMA
Defendant and Counterclaimant

~~**-and-**~~

~~**STUART PAGE**~~
~~**First Additional Defendant to Counterclaim**~~

-and-

DAVID NEIL GERRARD
Second Additional Defendant to Counterclaim

-and-

DECHERT LLP
Third Additional Defendant to Counterclaim

-and-

JAMES EDWARD DENNISTON BUCHANAN
Fourth Additional Defendant to Counterclaim

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Tim Lord KC, Frederick Wilmot-Smith and Sophie Bird (instructed by **Burlingtons LLP**)
for the **Defendant and Counterclaimant**

Fionn Pilbrow KC and Aarushi Sahore (instructed by **Charles Fussell & Co LLP**) for the **Second Additional Defendant to the Counterclaim**
Tom Adam KC and Craig Morrison KC (instructed by **Enyo Law LLP)** for the **Third Additional Defendant to the Counterclaim**
Antony White KC and Ben Silverstone (instructed by **Kingsley Napely LLP**) for the **Fourth Additional Defendant to the Counterclaim**

Hearing dates: 27 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 21 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green:

Introduction

1. I am the assigned Judge in these proceedings and there are now two separate claims being brought by Mr Farhad Azima, the original Counterclaimant:

   (1) The "**Hacking Counterclaim**" which was tried by Mr Andrew Lenon QC, sitting as a deputy High Court Judge ([2020] EWHC 1327 (Ch) – the "**First Judgment**") but was remitted for retrial by the Court of Appeal ([2021] EWCA Civ 349). The Hacking Counterclaim is brought against the original Claimant, Ras Al Khaimah Investment Authority ("**RAKIA**") and the Additional Defendants: Mr Neil Gerrard, Dechert LLP and Mr James Buchanan.

   (2) The "**Set Aside Counterclaim**" which is a claim against RAKIA to set aside the First Judgment and Order of Mr Lenon QC and the Judgment and parts of the Order of the Court of Appeal on the grounds that they were procured by fraud. I permitted Mr Azima to bring the Set Aside Counterclaim ([2022] EWHC 2727 (Ch))[1] and the Court of Appeal dismissed the Additional Defendants' appeal ([2023] EWCA Civ 507).

2. Accordingly at the eight to ten week trial listed for May 2024, I was set to hear both Counterclaims. However, Mr Azima now seeks default judgments against RAKIA on the basis that RAKIA has decided not to participate in the proceedings since last June 2022 and is therefore in default of various Rules and Orders of the Court. If Mr Azima is entitled to enter judgment in default against RAKIA, it will bring to an end the Set Aside Counterclaim, to which RAKIA is the only Defendant. Two of the Additional Defendants, Dechert and Mr Gerrard, oppose the default judgment being granted on the Set Aside Counterclaim, even though they are not defendants to it. Mr Buchanan is neutral on that application. Nobody opposes default judgment on the Hacking Counterclaim which will, in any event, continue against and be defended by the Additional Defendants.

3. Therefore, on 27 July 2023, I heard the following applications:

   (1) Mr Azima's application for judgment in default of defence against RAKIA on the Set Aside Counterclaim;

   (2) Dechert's and Mr Gerrard's precautionary applications to set aside any judgment in default on the Set Aside Counterclaim; and

   (3) Mr Azima's application for an order striking out RAKIA's defence to the Hacking Counterclaim (alternatively for an unless order in relation to RAKIA's failure to provide disclosure); and consequential upon the striking out of RAKIA's defence, Mr Azima seeks default judgment against RAKIA.

4. RAKIA has not appeared and has not opposed either of Mr Azima's applications. Mr Tim Lord KC, appearing on this occasion along with Mr Frederick Wilmot-Smith and Ms Sophie Bird, on behalf of Mr Azima, says that this is therefore straightforward – RAKIA has not filed a defence to the Set Aside Counterclaim and Mr Azima is entitled

[1] I will adopt the same definitions and abbreviations as in this Judgment.

to judgment in default. He says that Dechert and Mr Gerrard have no standing to oppose this and in any event they are not entitled to rely on the First Judgment in their defence of the Hacking Counterclaim.

5. Mr Tom Adam KC, appearing with Mr Craig Morrison KC on behalf of Dechert and Mr Fionn Pilbrow KC appearing with Ms Aarushi Sahore on behalf of Mr Gerrard, submitted that their clients have standing to oppose the application and that they would have good reason to set aside such a default judgment because they rely on the First Judgment in their defence to the Hacking Counterclaim and because they are seeking to uphold the First Judgment on various grounds that appear in their pleadings. They argued that Mr Azima's application should be dismissed or alternatively, if default judgment is to be entered, that their applications to set aside any such default judgment be granted.

6. As this was the only contentious issue, I will deal with the default judgment on the Set Aside Counterclaim first. I will not set out any detailed background to these proceedings as this has been rehearsed now many times in my previous judgments and is very familiar to the parties.

Default judgment on Set Aside Counterclaim

(a) Entitlement to default judgment

7. As stated above, and despite the opposition of the Additional Defendants, Mr Azima has been allowed to bring the Set Aside Counterclaim against RAKIA. The Court of Appeal seemed to go further than I did in holding (at [114] of [2023] EWCA Civ 507) that if the Project Update Reports had been before the first Court of Appeal "*they would obviously have remitted both the hacking counterclaim and RAKIA's claims for retrial in the light of the real prospect of satisfaction of both Highland Conditions*."

8. The date for RAKIA to serve a defence to the Set Aside Counterclaim was 6 December 2022. It did not do so. By notice dated 6 June 2023, Mr Azima applied for judgment in default. Mr Lord KC told me that Mr Azima waited that long to see what the Court of Appeal ruled. By CPR 15.11(1), if Mr Azima had not applied for default judgment, then the Set Aside Counterclaim might have been stayed.

9. Under CPR 12.3(1), a claimant "*may obtain judgment in default*" if a defendant has not "*filed a defence to the claim (or any part of the claim)*" and the relevant time limit has expired. None of the exceptions in CPR 12.3(3) apply.

10. Mr Lord KC submitted that Mr Azima was "*entitled*" to judgment in default in these circumstances. However, as this is not a money claim, but is a "*claim for any other remedy*", Mr Azima must apply under CPR Part 23 to obtain judgment in default and cannot simply "*request*" it under CPR 12.4(1) (see CPR 12.4(3)). In such an application, by CPR 12.12: "*the court shall give such judgment as the claimant is entitled to on their statement of case*".

11. The Privy Council has recently had the opportunity of considering the proper approach to the grant of a default judgment where it is for a remedy other than money – *Lux Locations Ltd v Yida Zhang* [2023] UKPC 3 (the relevant rule in the Eastern Caribbean Civil Procedure Rules being modelled on CPR Part 12 – see [56]). Lord Leggatt, giving

the judgment of the Board, said that the court always retains a discretion as to whether to enter default judgment or not "*if the court considers that it would be unjust to do so*" – see [56]. And in [51] Lord Leggatt explained why an applicant such as Mr Azima has to apply to the court:

> "The underlying policy reason for requiring the safeguard of judicial scrutiny where a remedy other than money is claimed must be that granting such a remedy potentially involves greater interference with rights and freedoms of the defendant (and perhaps others) than entering a money judgment which the defendant can apply to set aside."

12. That seems to me to be particularly apposite where the default judgment being sought would result in the First Judgment and the Court of Appeal judgment upholding the First Judgment being set aside on the grounds that they were procured by fraud. The point of requiring Mr Azima to apply to the Court for such a default judgment is so that there can be judicial scrutiny as to whether, despite the default of the defendant, it is appropriate, fair and just to grant the relief at that time and in those circumstances. Lord Leggatt recognised that such a default judgment, even if the claimant is prima facie entitled to it, may interfere with the "*rights and freedoms*" of persons other than the defendant against whom the judgment would be entered.

13. In [72], Lord Leggatt set out what the Board considered to be the "*proper approach to an application for default judgment where the claim is for some other remedy*", and Mr Lord KC did not suggest that this did not apply to the applications before me. After stating that the Court needed first to determine if the relevant conditions were satisfied (there is no dispute as to this in this case), Lord Leggatt said as follows:

> "(ii) Even if the relevant conditions are satisfied, the court should not grant a default judgment if there is material before the court at the hearing of the application which would justify setting such a judgment aside.
>
> (iii) If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on the statement of claim. For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court."

14. Dechert and Mr Gerrard say that there is such "*material*" before the Court within subparagraph (ii) above and that they would be able successfully to set aside a default judgment entered against RAKIA. Mr Lord KC accepted that it is right to consider all such material at this stage and as part of the process of considering whether default judgment should be granted in the first place. However he said that there is no such material available to Dechert and Mr Gerrard and in any event they do not have standing both to oppose Mr Azima's application and/or to make any subsequent application to set aside default judgment. I therefore turn to that issue of standing.

(b) Standing

15. Dechert and Mr Gerrard say that they have standing as parties to the proceedings, even if they are not defendants to the Set Aside Counterclaim; alternatively they say that they

have standing as a non-party as they are "*directly affected*" by the default judgment and would therefore have standing under CPR 40.9 to apply to have it set aside under CPR 13.3. Mr Lord KC did not dispute that the appropriate test is whether they are "*directly affected*" but said that that is so whether the Court is considering their entitlement as parties to oppose Mr Azima's application under CPR 12.4 or their prospective applications under CPR 13.3 and 40.9.

16. There are a number of reasons why Dechert and Mr Gerrard say they have standing as parties to contest Mr Azima's application:

(1) Before the first Court of Appeal hearing, Mr Azima preferred that the hacking issues as set out in the Hacking Counterclaim be remitted to be retried in the existing proceedings rather than having to bring a fresh action. This was what the Court of Appeal ordered.

(2) Mr Azima then sought to join the Additional Defendants to the Hacking Counterclaim. When they were joined, they became parties to the existing proceedings.

(3) The Set Aside Counterclaim was brought by Mr Azima within the existing proceedings and he relies on it as part of his conspiracy argument in the Hacking Counterclaim.

(4) When Mr Azima sought permission to bring the Set Aside Counterclaim within the existing proceedings, there was no dispute that the Additional Defendants had standing to oppose such permission being granted. I said in granting permission at [21] that:

> "But because Mr Azima is seeking to bring the claim within the existing proceedings, they clearly do have standing, particularly in relation to consequential case management issues that might arise if permission is granted."

The Court of Appeal did not disagree – see [28] of Sir Julian Flaux C's judgment. Mr Lord KC submitted that this was purely because of the case management issues that might arise. However the Additional Defendants were allowed to argue substantive issues as to why permission should not be granted and the Court of Appeal did not limit their standing in any way.

(5) The Additional Defendants, in their defences to the Hacking Counterclaim, rely on the findings of fraud made by Mr Lenon QC in the First Judgment in support of their arguments as to "no privacy in iniquity" and "clean hands" under relevant pleaded US laws.

(6) The Additional Defendants have also pleaded to the Set Aside Counterclaim contesting whether Mr Azima can establish the fraud and/or the materiality conditions at trial. I recorded the fact that they would be doing this at [27] and [28] of my permission judgment. Mr Azima has not sought to strike out these parts of the defences.

(7) Mr Azima applied for a split trial but I refused the application – [2023] EWHC 693 (Ch) – largely on the basis that all the issues on both the Set Aside Counterclaim and the Hacking Counterclaim were too intertwined. I also referred to the fact that the Additional Defendants were challenging whether Mr Azima could establish the materiality condition on the Set Aside Counterclaim. At [20] and [21] of my ex tempore judgment I said as follows:

> "20. The additional defendants are entitled to do that, to test materiality by reference to, for instance, the documents that the deputy judge relied upon and whether the findings based on those documents would have been different in the light of the new evidence.
>
> 21. Furthermore, and in any event, because of the existing hacking claim being tried together, the allegations are relevant to the defences to the hacking claim, including whether Mr Azima comes to the court with clean hands."

17. In my view, as a pure matter of jurisdiction, Dechert and Mr Gerrard have standing, as parties to the proceedings, to contest Mr Azima's application for default judgment. The fact that Mr Azima is not seeking specific relief against them in the Set Aside Counterclaim does not affect whether they can contest an application in relation to the Set Aside Counterclaim which is part of the proceedings to which they are parties. I have already ruled that they have standing in relation to the Set Aside Counterclaim and they have contested its substance in their defences. Furthermore I take into account Mr Pilbrow KC's more general point that RAKIA has not been participating in these proceedings for over a year now and the parties have been conducting the litigation on the basis that the only substantive opposition to both Counterclaims is from the Additional Defendants.

18. Mr Lord KC submitted that whether Dechert and Mr Gerrard are treated as parties or not, the only real question on standing is the test of "*directly affected*" in CPR 40.9. I agree with him to this extent. The Court is only likely to consider not granting default judgment in the circumstances of this case if those opposing it can show that they are "*directly affected*" by such a judgment. In other words, it seems to me that this question is bound up with the issue of discretion and therefore does need to be determined at some point. This was the position taken by the Deputy Judge in *Tolmie v Taylor* [2019] EWHC 3424 at [44] and I agree that in the end it does not matter whether (and when) the person applying became a party because they will still have to show that they are prejudiced by the default judgment in some way.

19. The meaning of "*directly affected*" in CPR 40.9 has been considered both in relation to an application to set aside a default judgment under CPR 13.3 but also more recently in the context of injunctions against "*persons unknown*" who are protesting against something and other unrelated protestors apply to vary the injunctions as they are "*directly affected*" under CPR 40.9. The Courts have adopted a generous approach because of the fundamental rights involved – see eg *Shell UK v Persons Unknown* [2023] EWHC 1229 (KB). That is a very different situation to the present but it does show the flexibility of CPR 40.9.

20. In relation to the setting aside of default judgments, there are two relevant cases: *Latif v Imaan Inc* [2007] EWHC 3179 (Ch) ("***Latif***"), a decision of Briggs J, as he then was; and *Abdelmamoud v The Egyptian Association in Great Britain Limited* [2015] Bus LR

928, a decision of Mr Edward Murray, as he then was, sitting as a deputy High Court Judge and [2018] Bus LR 1354, in the Court of Appeal ("***Abdelmamoud***"). Mr Lord KC also relied on the garnishee cases, such as *Employers' Liability Ass. Corp. v Sedgwick, Collins & Co* [1927] AC 95*,* in which garnishees have been held not to have standing to challenge the default judgment, but this is, as Mr Adam KC submitted, a tripartite situation where the garnishee has no interest in the judgment debt.

21. The classic cases where persons are "*directly affected*" by a judgment is where those persons have a proprietary or other substantive interest affected by the judgment or where they are entitled to be subrogated to the judgment debtor's rights, such as an insurer.

22. In *Latif*, there was a relevant proprietary interest, but Briggs J held that it was really a potential inconsistency that gave rise to the right to apply to set aside the default judgment. Lexi Holdings plc ("**Lexi**") was the claimant in proceedings in the Chancery Division alleging fraud against one of its directors, a Mr Luqman and his associated companies which included Imaan Inc. It was part of Lexi's case that a charge that had been granted by Imaan to "Hamra Financial Associates" ("**Hamra**") over a property in Knightsbridge to secure a supposed loan was ineffective and a sham. Briggs J gave judgment against Imaan and granted Lexi a general equitable charge against its assets, including the Knightsbridge property, for the purpose of enforcing the judgment against Imaan.

23. However, shortly before this, Hamra had brought its own proceedings in the Queen's Bench Division claiming against Imaan for repayment of the "loan". As Imaan did not defend the claim, Hamra obtained judgment in default (and then a third-party debt order requiring rents to be paid to it and not Imaan). Lexi therefore applied under CPR 40.9 to set aside the default judgment.

24. Hamra argued that only someone with *"a proprietary interest in a judgment relating to property"* or an insurer of the defendant to the default judgment could be "*directly affected*" for these purposes. Briggs J however held that because Lexi was contesting the validity of the loan in its proceedings in the Chancery Division, it was "*directly affected*" by the default judgment entered in the Queen's Bench Division because that judgment *"effectively purports to recognise"* the validity of the loan – see [13]. He rejected a submission that this was not so because the default judgment was not on the merits and thus created no issue estoppel.

25. Mr Lord KC submitted that *Latif* was decided on the basis that there were competing charges over the same property. I do not think that is right. It seems to me that Briggs J set aside the default judgment because of the potential inconsistency between the default judgment and Lexi's claim in its litigation that the underlying basis for such a default judgment was false in that the loan and charge were shams. Lexi's interest in being able to pursue its case that they were shams would be undermined by the default judgment which had already effectively decided that same issue. That interpretation of *Latif* seems to have been accepted by Newey LJ in *Abdelmamoud*, at [26] of the Court of Appeal judgment. Newey LJ continued in [27] to explain how the width of CPR 40.9 is restricted by the "*directly affected*" requirement and said:

> "Further it could hardly be appropriate to allow a third party to apply to have a judgment set aside unless he would then be in a position either to defend the claim on the defendant's behalf or to put forward a defence of his own."

26. Mr Adam KC and Mr Pilbrow KC argued that Dechert's and Mr Gerrard's interests would be significantly impaired by a default judgment on the Set Aside Counterclaim. They do seek effectively to defend the Set Aside Counterclaim on RAKIA's behalf, principally by pleading and alleging that the materiality condition cannot be satisfied. Furthermore they submit that they will be deprived of one part of their defences to the Hacking Counterclaim in which they rely on the findings of fraud made against Mr Azima in the First Judgment.

27. In my view these are sufficient interests for Dechert and Mr Gerrard to say that they have standing by virtue of being "*directly affected*" within the meaning of CPR 40.9 by any default judgment that may be granted on the Set Aside Counterclaim. But as Mr Lord KC said, while that is a necessary condition for the Additional Defendants to be able to oppose the default judgment, they still have to show a "*good reason*" under CPR 13.3(1)(b) as to why default judgment should not be granted.

(c) Is there a "good reason" why default judgment should not be granted?

28. The question is framed in that way because that would be the issue on an application to set aside default judgment by Dechert and Mr Gerrard under CPR 13.3(1)(b) and CPR 40.9. Following the approach in *Lux Locations*, as all interested parties are now before the Court, it is necessary to consider whether "*there is material before the court ... which would justify setting such a judgment aside*". In other words, both the issues that arise on Mr Azima's application for default judgment and Dechert's and Mr Gerrard's applications to set aside any such default judgment should be considered at the same time, as they all go to whether default judgment should be granted. A number of matters were raised by both Mr Azima and Dechert and Mr Gerrard which I deal with below.

(1) Unjust for Mr Azima to be forced to a trial on the merits

29. This was Mr Lord KC's main overarching point. He submitted that the CPR provides two methods for the disposal of litigation: either a full trial on the merits after pleadings, disclosure and witness statements are served and there is cross examination where appropriate; or without a trial, where a party has a statement of case struck out or obtains summary judgment or judgment in default of defence is granted. The latter is not a judgment on the merits. That can only be obtained at a trial if all the procedural stages prescribed by the CPR are followed, with all its inbuilt protections, and which ensures that there can be a proper and fair trial on the merits.

30. Mr Lord KC submitted that Dechert and Mr Gerrard are advocating for a hybrid third way in which Mr Azima is forced to go to trial on the Set Aside Counterclaim without the defendant, RAKIA, being there or putting in a defence or providing disclosure and without the ordinary benefits of all the procedural mechanisms designed to ensure a fair trial on the merits. Because RAKIA has not filed a defence to the Set Aside Counterclaim, it has not had to admit or deny the key parts of Mr Azima's case. Furthermore it has not given disclosure and Mr Lord KC submitted that it may have documents relevant to the fraud and materiality conditions that would help Mr Azima prove his case. Mr Azima cannot interrogate RAKIA's defence by making Part 18

requests; nor will he be able to test that defence through cross examination of RAKIA's witnesses.

31. Mr Lord KC submitted that Dechert and Mr Gerrard will bear none of these burdens and can simply put Mr Azima to proof of his claim. And it appears that Mr Azima may have some difficulty getting disclosure from Dechert, for example, as Allen & Overy, which for all intents and purposes appears to represent RAKIA, has said that RAKIA does not consent to certain documents held by third parties being provided to Dechert for the purposes of disclosure. Basically, Mr Azima is suggesting that he cannot have a fair trial on the merits of his Set Aside Counterclaim.

32. Mr Adam KC said that this was totally overblown and that there was no question that Mr Azima would have a fair trial on the merits even without RAKIA being present and having engaged in the proceedings. He went through the various elements relied on by Mr Azima as follows:

(a) As to the lack of a pleading from RAKIA, he said that there are full defences from the Additional Defendants and that Mr Buchanan was effectively RAKIA at the time and was its main witness at the first trial; and Mr Gerrard was also a witness at the trial and was RAKIA's leading advisor;

(b) As to disclosure, Mr Adam KC said that there has already been extensive disclosure with Dechert having collected over 1 million documents for review; there is potentially further documentation from the devices that have emerged (I am dealing with these devices in separate applications in these and other proceedings); and Mr Azima himself has his own documents as a result of his investigation and also appears to have access to the documents of those witnesses, such as Mr Page and Mr Halabi, who are now on his side;

(c) In relation to RAKIA's disclosure, Mr Adam KC said that the documents that are held by RAKIA's former solicitors, Stewarts, are potentially available to Mr Azima because of an Order I made on or around 9 August 2022 requiring Stewarts to retain such documentation; Mr Lord KC did not deny that these documents are available to Mr Azima but he said that they had not yet applied for access to them;

(d) As to the witness evidence, Mr Adam KC said that Mr Buchanan and Mr Gerrard, who were the main witnesses at the first trial, will be giving evidence at the trial; it appears that Mr Azima has Mr Page and Mr Halabi on his side to give evidence; but in any event, a party cannot rely on certain witnesses giving evidence at a trial – there is always a risk that they will not be called; furthermore if witnesses are not called by RAKIA, adverse inferences could potentially be drawn against RAKIA.

33. Mr Lord KC also submitted, in reliance on *Tinkler v Esken Limited* [2023] EWCA Civ 655, that if default judgment is granted now there will be a more orderly trial that complies with what the Court of Appeal suggested is the correct approach to considering claims to set aside judgments for fraud. But that seems to me to confuse what the Court of Appeal was dealing with in *Tinkler*, which was only a claim to set aside a judgment on the grounds that it was procured by fraud and therefore where the facts of the underlying cause of action would only be reconsidered if the judgment was set aside, whereas this is a case in which, as I decided at the split trial application, the trial will be considering the facts relied on by RAKIA in the first trial to support the

Additional Defendants' defences to the Hacking Counterclaim. I have already decided that there can be an orderly trial of both those matters and I agree with Mr Adam KC that this is essentially a re-running of the arguments that failed before me on the split trial application.

34. I also agree with Mr Adam KC that there is no serious risk of Mr Azima being forced to prove his case at a trial that will be unfair because there has been no engagement from RAKIA in the process and he has been denied the benefits of the protections in the CPR to ensure a fair trial. There will be plenty of disclosure (and more is available to Mr Azima from Stewarts) and most of the main witnesses with relevant evidence will be witnesses at the trial. While there are no formal admissions from RAKIA, the fact that it is not appearing will make Mr Azima's task of proving the facts against it that much easier. As I said in the split trial judgment, the facts in relation to the alleged fraud practised on the Court and in relation to RAKIA's and the Additional Defendants' responsibility and knowledge of the hacking of Mr Azima's data are intertwined and will be thoroughly examined with all available evidence at the trial next year.

35. I think it is also important to balance any potential unfairness to the parties against each other and I therefore turn to look at the reasons why Dechert and Mr Gerrard say that default judgment should not be granted.

(2) The impact on the Hacking Counterclaim

36. Both Dechert and Mr Gerrard plead that unless and until the First Judgment is set aside, it is binding on Mr Azima, he is estopped from contending otherwise and he cannot dispute its findings or advance a case that is inconsistent with or seeks to reopen those findings. They rely on the fraud findings against Mr Azima to support their "no privacy in iniquity" and "clean hands" defences to the Hacking Counterclaim. In Schedule 1 to Dechert's Re-Amended Defence, those original allegations of fraud are pleaded and relied upon by Dechert (and this has been adopted by Mr Gerrard) if the Set Aside Counterclaim succeeds and the First Judgment is overturned. Therefore, they have two ways of proving the facts necessary to establish their defences: either they can simply rely on the First Judgment; or, if that is set aside, they will endeavour to prove the facts in the same way RAKIA did in the original trial. If default judgment is granted, the first of those two routes will not be available to them and they say that that would be unfair. It is unfair, they say, because Mr Azima will gain a legal advantage against them without having to prove at trial that a fraud was perpetrated against the Court.

37. At the hearing of Mr Azima's split trial application, Mr Plewman KC, then appearing for Mr Azima, appeared to concede that the Additional Defendants are entitled to rely on the First Judgment in this way. However, Mr Lord KC submitted that no such concession was made and, if it was, it had been mistakenly made and was now withdrawn. I did however record in my judgment on the split trial application at [10] that:

> "The reason why this has been pleaded by the additional defendants is that they were always running those defences to the hacking claim - namely no privacy because of fraudulent conduct being revealed and clean hands - but before the set aside claim they could rely in support of those defences the unimpeached judgment of Mr Lenon. Now they face the prospect of that being set aside, in which case they

> cannot rely on the judgment and may have to establish the alleged fraudulent conduct themselves."

Mr Lord KC said that there was no discussion at that hearing of the authorities on issue estoppel and whether the Additional Defendants were entitled to rely on the First Judgment in this way.

38. Indeed Mr Lord KC mounted a full scale attack on the Additional Defendants' estoppel argument, despite Mr Azima never having sought to strike it out. He relied on the well known authorities on whether Dechert and Mr Gerrard had privity of interest with RAKIA at the time of the First Judgment, which he described as the "*previous litigation*". The authorities are: *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853; and *Gleeson v J. Wippell & Co Ltd.* [1977] 1 WLR 510. Mr Lord KC submitted that Dechert and Mr Gerrard had no interest at all in RAKIA's original allegations against Mr Azima: there was no suggestion of any breach of any duty owed to Dechert or Mr Gerrard; and their only involvement was as RAKIA's previous legal advisors, and in the case of Mr Gerrard, merely as a witness for RAKIA.

39. Mr Adam KC responded to these points by saying first that the Additional Defendants' estoppel argument has not been struck out from their pleadings and it should therefore be assumed for these purposes that it has a real prospect of success. Second he said that the First Judgment was not "*previous litigation*"; it is the very same proceedings that are being tried next year, the Hacking Counterclaim having been remitted by the Court of Appeal. Therefore the Additional Defendants are parties to the same litigation in which the First Judgment was delivered and are entitled to rely on an estoppel against Mr Azima. Mr Adam KC conceded that there is no English authority supporting this argument that a party joined later to proceedings is deemed a party in relation to an earlier judgment; but he said that there is no authority against the proposition. It would therefore be entirely inappropriate to determine at this stage summarily that the argument is untenable.

40. Mr Adam KC's third point is also pertinent. This is based on abuse of process and collateral attack and he referred to the summary of the relevant principles in *Michael Wilson & Partners Ltd v Sinclair and ors* [2017] 1 WLR 2646 at [48] in Simon LJ's judgment. Mr Adam KC submitted that this is really very straightforward because, if one assumes that Mr Azima fails on his Set Aside Counterclaim, he will be bound by the First Judgment and the findings of fraud made against him. In that eventuality, it is obvious that Mr Azima could not claim as against the Additional Defendants that he is not bound by the findings in the First Judgment as that would be a collateral attack on a judgment that had just been upheld (again).

41. Mr Lord KC's response to this was that an argument as to abuse of process and/or collateral attack cannot be used to prevent the First Judgment from being set aside for fraud. Otherwise, he submitted, it would not be possible to set aside a judgment for fraud because it necessarily involves a collateral attack on it.

42. I think that misunderstands the point that Mr Adam KC was making. He relies on his estoppel/abuse of process arguments in the Hacking Counterclaim if the First Judgment is not set aside. But at this stage, he says that the Court should not grant default judgment because it will immediately deprive the Additional Defendants of that plank

of their defence. I only need to be satisfied that there is a serious issue to be tried in relation to such a defence and, if I am so satisfied, it means that this should weigh in the balance in deciding whether default judgment should be granted.

43. I do think that there is a serious issue to be tried in that respect and accordingly it is a factor that I must take into account in deciding whether there is a "*good reason*" for not granting default judgment.

(3) The impact on the defences to the Set Aside Counterclaim

44. Both Dechert and Mr Gerrard have pleaded defences to the Set Aside Counterclaim. In particular at [194.2] of Dechert's Re-Amended Defence, Dechert argues that the new evidence that Mr Azima relies upon is not sufficiently material to justify setting aside the First Judgment. That is principally based on the allegation that the Deputy Judge relied on the overwhelming documentary evidence to find that Mr Azima had committed fraud.

45. I am not sure that that is wholly correct as the Deputy Judge also heard and was apparently influenced by the oral evidence, which may be undermined by the new evidence that Mr Azima has uncovered. But in any event, Dechert and Mr Gerrard have pleaded their defences and Mr Azima has not sought to strike them out. Furthermore at [20] of my split trial judgment (quoted in [16(7)] above) I held that the Additional Defendants were entitled to test the materiality condition.

46. I therefore think that it is a material factor to take into account that a default judgment would deprive Dechert and Mr Gerrard of running a defence that is available to them.

(4) Risk of inconsistency

47. Mr Pilbrow KC sought to develop an argument as to a risk of inconsistency between a default judgment granted now and a judgment on the merits after the trial next year. Building on the interpretation of *Latif* that it is based on avoiding inconsistency and referring also to *Fox v Wiggins* [2019] EWHC 2713 (QB), he submitted that such a risk might arise where Mr Gerrard is found not to have acted fraudulently and given false evidence at the first trial which would be inconsistent with the underlying basis of the default judgment being that a fraud was practised on this Court.

48. While I can see that the Court should avoid such an inconsistency arising if possible and it is not unfair or unjust to the parties to do so, I do not think it is a particularly strong point in the circumstances of this case. A default judgment is not a judgment on the merits and, if Mr Gerrard does succeed in establishing his innocence at the trial, then he will not be liable and he has not been prejudiced by the default judgment which cannot be used against him.

(5) Form of relief and seriousness of underlying allegations

49. Mr Pilbrow KC argued that Mr Azima was in reality seeking declarations from the Court and that as such this was a serious "*judicial act*" that should not generally be done by default without evidence and submissions. He said that declarations affect not just the parties but the whole world. I think that that is a somewhat dramatic way to put it and Mr Azima is not actually seeking declarations.

50. But I do agree with Mr Pilbrow KC, and Mr Adam KC who also made submissions to this effect, that these are very serious allegations about deception of the Court and misuse of the Court's apparatus. As such, the Court must consider carefully whether it is appropriate to set aside the First Judgment and the Court of Appeal judgment upholding the First Judgment on a default basis and without applying the sort of scrutiny that such allegations would ordinarily receive if they were being defended by the party against whom they are made. This unique case is precisely why the CPR requires such an application to be subject to judicial scrutiny.

(d) Conclusion on Mr Azima's application for default judgment

51. In my judgment, the unfairness to Dechert and Mr Gerrard in relation to their defences in both the Hacking Counterclaim and the Set Aside Counterclaim if default judgment is granted clearly outweighs any unfairness (if any) that Mr Azima might suffer from not being granted default judgment. I think the Court should be cautious about setting aside judgments at both first instance and in the Court of Appeal without consideration of the merits, particularly where defences have been pleaded to those claims. I do not think Mr Azima is prejudiced by the fact that RAKIA is not participating in the proceedings. Nor do I consider that there is any real risk that Mr Azima will not get a fair trial.

52. Accordingly I dismiss Mr Azima's application for default judgment against RAKIA on the Set Aside Counterclaim.

The Application for default judgment on the Hacking Counterclaim

53. Mr Azima's application for default judgment against RAKIA on the Hacking Counterclaim is necessarily predicated on the striking out of RAKIA's defence. That is itself based on RAKIA's failure to provide disclosure in breach of various Court orders requiring it to do so. None of those steps towards default judgment and the application for default judgment itself are opposed by any of the Additional Defendants as they consider that it does not prejudice their position or defences to the Hacking Counterclaim. I can therefore take this relatively shortly.

54. Mr Lord KC submitted that RAKIA's disclosure at the original trial before Mr Lenon QC was seriously and materially deficient. I referred to these deficiencies in my judgment at [68] to [70] of [2022] EWHC 1295 (Ch) and the Court of Appeal at [114] of its recent judgment at [2023] EWCA Civ 507 (quoted above at [7]) found the recently discovered Project Update Reports, that RAKIA should have disclosed long ago, to be highly significant.

55. On 27 May 2022 I made various orders for Extended Disclosure against RAKIA and the Additional Defendants. The date for Extended Disclosure was originally 14 October 2022 but following various agreed extensions (albeit not by RAKIA), the final date for RAKIA to provide Extended Disclosure was 2 June 2023.

56. In fact since 22 June 2022, RAKIA has taken no part in the proceedings, its then solicitors, Stewarts, having come off the record by Order of Leech J dated 21 June 2022. On 16 June 2022, Stewarts had written to Mr Azima's solicitors making an open offer

on behalf of RAKIA in full and final settlement of the Hacking Counterclaim against it and Mr Buchanan for $1 million plus costs to date. This was rejected by Mr Azima. On 22 June 2022, when RAKIA was acting in person, it wrote to the Court stating that: "*RAKIA has decided to take no further part in [the] proceedings*"; and that "*RAKIA is content for judgment to be entered against it, for damages to be assessed*". The letter stated that RAKIA would "*take all necessary steps to ensure that such a judgment is satisfied*".

57. Mr Antony White KC, appearing with Mr Ben Silverstone on behalf of Mr Buchanan queried why Mr Azima had taken so long to issue this application, given that RAKIA was content over a year ago to have judgment entered against it and Mr Azima was even then asserting that RAKIA was in flagrant breach of the Rules. Mr Lord KC submitted that the delay is irrelevant and in any event he is relying on the breach of the latest deadline for disclosure, which was 2 June 2023.

58. I do not think the delay is material to whether I should grant the relief sought by Mr Azima. It could have been relevant to whether I should make an order that RAKIA should pay the costs of the past year all the way up to the issue of the application on 3 July 2023, which is what Mr Azima is seeking, but it is only the costs in relation to Mr Azima's claim against RAKIA and those should clearly be paid by RAKIA.

59. Mr White KC also questioned whether there should be any order for costs at this time as Mr Azima might not beat RAKIA's open offer or any Part 36 offer that I do not know anything about. However I think the latter point is really one which ought to be made by RAKIA, not by a party that is not even opposing the relief being granted.

60. So there is no doubt that RAKIA is in breach of its duty to provide Extended Disclosure and I accept Mr Lord KC's submission that that breach is contumacious in that RAKIA has clearly signalled its intention to disregard all Court-imposed duties. Furthermore, as referred to above, Allen & Overy effectively on behalf of RAKIA have sought to interfere in Dechert's disclosure. So RAKIA itself is not providing disclosure and it is exacerbating the situation for Mr Azima by refusing to consent to disclosure by others.

61. I am therefore persuaded that the breaches of Court Orders are serious enough to justify the striking out of RAKIA's defence to the Hacking Counterclaim. This is pursuant to the power in CPR 3.4(2)(c) as bolstered by the overriding objective including the importance of "*enforcing compliance with rules, practice directions and orders*": CPR 1.1(2)(f).

62. By way of an alternative, Mr Lord KC submitted that I could instead make an unless Order requiring RAKIA to provide disclosure by a certain date following which the defence will be automatically struck out. However, it is obvious now that RAKIA will not comply with any such extension of time and it is therefore pointless to delay any further the striking out of the defence.

63. As the defence is hereby struck out, the Court is empowered under CPR 3.4(3) and PD 3A para 4.2 to make consequential orders and to enter such judgment for the other party as that party appears entitled to. By CPR 12.3(1), Mr Azima is entitled to judgment in default of defence and this is not opposed by anyone. Indeed it appears to be what RAKIA wanted over a year ago.

64. Accordingly I will grant Mr Azima judgment in default of defence on the Hacking Counterclaim against RAKIA, having first of all struck out that defence. I am prepared to make the Orders sought in this respect as set out in a draft Composite Order including that the costs be paid on an indemnity basis together with interest at 1% above the Bank of England base rate to the time of this Order; and at a rate of 8% per annum thereafter. Those costs will have to be subject to detailed assessment but I will make an Order for an interim payment on account of such costs at 75% of Mr Azima's total estimated costs of the Hacking Counterclaim, within 28 days of the Order.

65. I hope that a suitable Order can be provided incorporating all my findings as set out above.