Neutral Citation Number: [2022] EWHC 2980 (Ch)

Case No: **HC-2016-002798**

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

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: **22 November 2022**

Before :

Mr Justice Michael Green

- -

Between :

Ras Al Khaimah Investment Authority	**Claimant**
- and -	
Farhad Azima	**Defendant**
-and –	
(2) David Neil Gerrard	
(3) Dechert LLP	
(4) James Edward Denniston Buchanan	
Additional Defendants to Counterclaim	

- -
- -

Thomas Plewman KC and Frederick Wilmot-Smith (instructed by **Burlingtons Legal**) for the **Counterclaimant**
Fionn Pilbrow KC and **Aarushi Sahore** (instructed by **Charles Fussell & Co LLP**) for the **Second Additional Defendant to the Counterclaim**
Roger Masefield KC and Craig Morrison (instructed by **Enyo Law LLP**) for the **Third Additional Defendant to the Counterclaim**
Ben Silverstone (instructed by **Kingsley Napley LLP**) for the **Fourth Additional Defendant to the Counterclaim**

Hearing dates: **22nd November 2022**

- -

Mr Justice Michael Green **Tuesday, 22 November 2022**
(**15:44** pm)

Judgment by **MR JUSTICE MICHAEL GREEN**

1. This is the consequentials hearing following the handing down of my judgment on 1 November 2022 in which I decided to grant permission to Mr Azima to bring an additional counterclaim against RAKIA by which Mr Azima seeks to set aside for fraud the previous judgment of Deputy Judge Mr Andrew Lenon QC. My judgment has the neutral citation number [2022] EWHC 2727 (Ch) and I will use the same abbreviations and definitions as in that judgment. It followed a two-day hearing before me on 17 and 18 October. The full background is set out in that judgment and I will not repeat it here.
2. I am pleased to say that the parties have reached agreement on further directions and the costs of the applications. The only outstanding and contested matter is applications by all three additional defendants for permission to appeal to the Court of Appeal.
3. I should emphasise at the outset, as the additional defendants did too, that their application for permission to appeal and any appeal that may follow will not disrupt directions to trial that have been agreed between the parties. The trial is set down to commence in May 2024 and everyone understands that it is critical, particularly as this is a retrial taking place many years after the relevant events, that the trial date is kept, whatever the ultimate outcome of this application and appeal. Indeed, it is recognised that the permission that I have granted to bring the additional counterclaim will not add greatly to the evidence that would, in any event, have been given on the existing counterclaim at trial. It is really a legal argument as to whether the factual findings should additionally lead to the setting aside of the Deputy Judge's judgment in RAKIA's favour against Mr Azima. So it is in that context that I consider the applications for permission to appeal.
4. Whilst expressed in slightly different ways, the additional defendants are all essentially seeking to appeal on two broad grounds.

(1) First of all, that I lacked jurisdiction to enlarge the proceedings that had been remitted by the Court of Appeal and I was wrong to have concluded that I had jurisdiction to include the claim to set aside the Deputy Judge's judgment for fraud. That is the "jurisdiction issue".

(2) Second, that, even if I have jurisdiction, that I was wrong to conclude that the proposed additional counterclaim did not constitute an abuse of process. That is the "abuse of process issue".

5. It is important to note that none of the additional defendants are seeking permission to appeal on grounds relating to my finding that Mr Azima had a real prospect of establishing the Materiality Condition based on the new evidence that he has as to the extent of the alleged fraud practised on this court. Accordingly, they accept, for the purposes of this application, that Mr Azima has a real prospect of proving that there was "conscious and deliberate dishonesty" by or on behalf of RAKIA at the first trial and that this satisfied the Fraud Condition. They also accept that there is a real prospect of Mr Azima showing that the fraudulent evidence was an "operative cause" on the court's decision to grant judgment in RAKIA's favour, or that it would have entirely changed way in which the Deputy Judge approached and came to his decision.

6. But the additional defendants say that, despite Mr Azima having that real prospect of being able to set aside the judgment for fraud, I was wrong to conclude that he should be allowed to run that case in the light of the Court of Appeal judgment.

7. As is well known, but it is worth repeating, permission can only be given according to CPR 52.6 if the court considers that the appeal would have a real prospect of success or that there is some other compelling reason for the appeal to be heard.

8. As a preliminary, it is relevant to remember that Mr Azima only sought permission to bring the additional counterclaim against RAKIA and RAKIA itself has not opposed it. The judgment that he seeks to set aside was only in RAKIA's favour and the additional defendants were not

even parties at the trial or before the Court of Appeal. To a certain extent, they have opportunistically argued the jurisdiction and abuse of process issues when the permission does not really affect them, even in terms of the length and scale of the trial or on case management grounds. Having said that, the court has to act within its jurisdiction and will be concerned not to allow a claim to go forward if it constitutes an abuse of process.

9. At the core of these permission to appeal applications is the general point that Mr Azima is seeking to do what the Court of Appeal said he should not do and should not be able to do, namely, to overturn the judgment on RAKIA's claims against him. The additional defendants say that he has already had plenty of opportunities to persuade the court that the judgment in RAKIA's favour should be set aside, but each time the court has come back and said: no, that judgment will stand whatever else happens.

10. I decided that the Court of Appeal and the Supreme Court, and the additional defendants repeatedly pressed on me the point that the Supreme Court had refused permission to appeal, but that both those courts had not definitively ruled out a claim to set aside, so long as the new evidence is significant enough to satisfy the conditions for such an action. The additional defendants say that Mr Azima's case is still pretty much the same as it was before the Court of Appeal, just with a bit more evidence in support. I disagreed with that characterisation and interpreted the Court of Appeal judgment in a certain way. But it is true to say that the interpretation of the Court of Appeal judgment was very much in play.

Jurisdiction Issue

11. So turning to the specific grounds of appeal, I deal first with jurisdiction. The Court of Appeal remitted the hacking counterclaim to be retried but said that the main judgment on RAKIA's claims must stand, whatever the outcome of the hacking counterclaim.

12. Mr Masefield KC on behalf of Dechert submitted that it was always Mr Azima's case that RAKIA was responsible for the hacking and that its witnesses had lied about that to the court.

Mr Lord KC had presented the case to the Court of Appeal as being based on a "massive fraud" by RAKIA. The Court of Appeal assumed that that was so and still decided that the main judgment in RAKIA's favour could not be touched. Merely because Mr Azima has found some new evidence to support his case, Mr Masefield submitted, does not undermine the Court of Appeal's clearly calibrated order that nothing should affect the Deputy Judge's order against Mr Azima, particularly as he was found to have acted fraudulently and should not benefit from that, even if the documents required to prove that were obtained unlawfully.

13. Mr Masefield also submitted that, even if the new evidence is so critical, Mr Azima's only course is to apply for permission to appeal to the Supreme Court which he, of course, did and failed at, or to apply back to the Court of Appeal to re-open the appeal under CPR Rule 52.30.

14. Mr Silverstone, who appears for Mr Buchanan at this hearing, put the point slightly differently, arguing that the High Court was effectively *functus officio* and would only have jurisdiction within the bounds of what the Court of Appeal had remitted for a retrial.

15. I dealt with jurisdiction in paragraphs 88 to 101 of the judgment. In short, I held that the High Court has inherent jurisdiction to hear claims to set aside judgments for fraud, including to set aside orders of higher courts such as the Court of Appeal or Supreme Court. Therefore, Mr Azima could have started fresh proceedings against RAKIA to set aside the judgments for fraud and, as the additional defendants have now accepted that such an action would have a real prospect of success because Mr Azima can establish both conditions for such a claim, it is a little hard to see how such proceedings could be struck out for lack of jurisdiction.

16. I leave aside whether they could be struck out for abuse of process, but that would have to be an argument for RAKIA alone if fresh proceedings were started against it.

17. So given that fresh proceedings could not be struck out for lack of jurisdiction, I do not see that I lack jurisdiction to add such a claim to the existing counterclaim. There is no material difference and it makes sense from a case management and use of court's resources perspective.

18. Mr Masefield submitted that those hypothetical fresh proceedings should not have been relied upon by me as they would have faced considerable procedural hurdles, such as service out and sovereign immunity disputes, as well as abuse of process arguments, and that this was not what Mr Azima actually did. I do not understand that. It surely must be relevant in considering whether the High Court has jurisdiction to hear the claim what would have happened if the claim had been brought in fresh proceedings.

19. The procedural points in relation to CPR 52.30 I dealt with in the judgment, but, in any event, do not deprive the High Court of jurisdiction. It seems fairly obvious to me that, if there is jurisdiction to bring a fresh claim, there must be jurisdiction for that to be tried by the same judge hearing the remitted claim, for all sound case management reasons.

20. I, therefore, think there is no real prospect of persuading the Court of Appeal that I was wrong on jurisdiction and I refuse permission to appeal on that ground.

Abuse of Process Issue

21. Turning to abuse of process, the additional defendants attack my findings in relation to both limbs of the argument, namely, relitigation and collateral attack. As to relitigation, the argument is that I did not give sufficient weight to the fact that Mr Azima had tried to argue these points before the Court of Appeal and the Supreme Court and failed both times. He had therefore had, in the words of Lady Justice Arden in the *Koshy* case: "... ample opportunity to have the allegations made the subject of judicial determination."

22. The additional defendants continue to stress that Mr Azima is making the same case now as he was making to the Court of Appeal and the Supreme Court and there is not really much more evidence available to him, certainly by comparison with what he sought to put before the Supreme Court. However, the acceptance of my judgment in relation to the Materiality Condition involves a recognition that the new evidence actually supports an allegation of dishonesty in relation to, not only the hacking and RAKIA's responsibility for it, but also the

fraudulent misrepresentation and conspiracy claims that were the foundation of the judgment against Mr Azima.

23. As Mr Plewman KC submitted, the new evidence is on a quite different scale to that which was before the Court of Appeal and which the Court of Appeal characterised as “collateral” to the main claim and which was, therefore, not to affect it.

24. Having said that, I recognise that my judgment involves a particular interpretation of the Court of Appeal judgment, the extent of the assumptions that it was making in paragraph 40 and whether the Court of Appeal contemplated this sort of evidence emerging and, if so, what it would have done about it. This was particularly a submission of Mr Pilbrow KC on behalf of Mr Gerrard, but also adopted by the other additional defendants, that I did refer in my judgment to my difficulty in understanding the meaning and effect of the Court of Appeal judgment in certain specific respects, particularly as to the choice between a remission of the claim and a fresh claim and that these conclusions did affect my ultimate decision.

25. Standing back, it could arguably appear as though I have permitted Mr Azima to challenge the original judgment of the Deputy Judge when the Court of Appeal was absolutely clear that that judgment must stand, whatever happens in the hacking counterclaim, whatever new evidence emerges and, furthermore, that the Supreme Court seems to have agreed with that approach in refusing permission to appeal.

26. Given that the whole argument in relation to abuse of process is focused on the Court of Appeal judgment and the extent to which it could be said to have ruled out any further challenges to the judgment in RAKIA's favour based on the same or similar evidence coming to light, it would be appropriate for the Court of Appeal itself to determine if that is truly what it did decide and whether my interpretation of its judgment was wrong.

27. I firmly believe that the new evidence is potentially strong enough to establish the sort of pervasive dishonesty around the obtaining of the first judgment such that it could well have

affected the findings that were made in relation to RAKIA's claim against Mr Azima. The fraud unravels all principle, therefore, succeeded over the finality principle in my judgment. But I can also see that the Court of Appeal might think otherwise, and think that the additional defendants should have the opportunity of persuading it that I erred in relation to abuse of process.

28. Mr Plewman suggested that the Court of Appeal would not interfere in my broad merits-based judgment but I think, where the scope and effect of the Court of Appeal judgment is under scrutiny, it is probably best to leave it to the Court of Appeal to decide whether I was correct in the way I read its judgment.

29. Collateral attack seems to me now, as it did in my judgment, to add little to the argument on relitigation. They both involve an interpretation as to what the Court of Appeal actually decided.

30. Accordingly, I grant permission to appeal on the abuse of process grounds only.

31. I would urge the parties to get as early a date as possible, so that there can be as little disruption as possible to the trial process. Of course, the directions that have been agreed between the parties and in the order that I have approved remain in force and, as I said at the beginning, there can be no question of any slippage in the timetable as a result of this appeal going ahead.