



Neutral Citation Number: **[2023] EWHC 693 (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: 2 March 2023

Before :

Mr Justice Michael Green

Between :

Ras Al Khaimah Investment Authority

Claimant

- and -

Farhad Azima

Defendant

Thomas Plewman KC, Hugo Leith and Frederick Wilmot-Smith instructed by **Burlingtons**
Legal for the **Defendant and Counterclaimant**

Tom Adam KC and Craig Morrison instructed by **Enyo Law LLP** for the **Third Additional**
Defendant to the Counterclaim

Antony White QC and Ben Silverstone instructed by **Kingsley Napley LLP** for the **Fourth**
Additional Defendant to the Counterclaim

Fionn Pilbrow QC and Aarushi Sahore instructed by **Charles Fussell & Co LLP** for the
Second Additional Defendant to the Counterclaim

Hearing dates: **2nd March 2023**

JUDGMENT

Mr Justice Michael Green
(14:27 pm)

Thursday, 02 March 2023

Judgment by **MR JUSTICE MICHAEL GREEN**

1. I have been asked to rule on whether there should be a split trial in this case.
2. On 24 February 2023 Mr Azima issued an application supported by a 62-paragraph witness statement from his solicitor Mr Holden. That was followed up by over 50 pages worth of skeleton arguments from all the parties on this subject and then we spent roughly three hours or so of this hearing on oral submissions.
3. This in my view is a disproportionate amount of time and effort on a relatively small issue in the overall context of these proceedings, but it does place quite some burden on judicial time required to deal with it. This CMC is also going to deal with, as I understand it, issues on disclosure and possibly expert evidence. I know it is an important case, but, as I said earlier, there seemed to be little recognition by the parties of the amount of court resources and judicial time that they are using in relation to this case.
4. And now Mr Azima, as a result of the defences that have been filed to his additional counterclaim that I permitted him to plead, seeks for there to be a further trial to be listed on top of the 8 to 10 week trial that he already has in the diary starting in May 2024. That is of course largely a retrial of the 14 day trial heard by Mr Lenon KC in 2020 and then ordered to be retried as to the hacking counterclaim by the Court of Appeal nearly two years ago now.
5. I do not need to go into any of the background, which is very familiar to all concerned and which I have set out in my previous judgments.
6. It is relevant to point out that I gave permission to appeal from my judgment of 1 November 2022 whereby I permitted Mr Azima to bring the additional counterclaim to set aside the judgment of Mr Lenon on the grounds that it was procured by fraud. The appeal from my decision is to be heard by the Court of Appeal next week.

7. But following my permission, Mr Azima served his Re-Re-Re-Amended Counterclaim on the 8 November 2022. RAKIA is of course now not participating in these proceedings and the set aside claim is only pleaded against it. The additional defendants have served and filed their Re-Amended Defences on 16 January 2023 and Mr Azima filed his Amended Reply on 16 February 2023.
8. In their Re-Amended Defences, the additional defendants plead, set out in a schedule to Dechert's Defence, the original allegations of fraudulent misrepresentation and unlawful conspiracy made by RAKIA in the first trial and which were upheld by the Court of Appeal. The additional defendants rely on those original allegations both by way of defence to the hacking claim and to the new set aside claim.
9. They say that if the hacked documents prove Mr Azima's fraudulent and dishonest conduct, there could have been no confidence or expectation of privacy in such documents - this is the so-called "iniquity defence". Furthermore, they say that Mr Azima would not be entitled to relief in relation to the hacking, because he does not come to equity with clean hands. In relation to the set aside claim, they say that the allegations are relevant to a consideration of the materiality condition.
10. 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.
11. The complication in this case arises, as Mr Adam KC for Dechert pointed out, because of the two claims that are being tried together. He accepted, I think, that if there was just a set aside claim, the underlying merits of the original allegations would not be retried in the course of the

hearing of that claim. That would only happen after the judgment is set aside and if RAKIA sought to bring a new claim. But we have a situation here where the set aside claim is being tried alongside the hacking counterclaim retrial where the original allegations may have to be proved in order for the additional defendants to substantiate their defences.

12. Essentially, what Mr Plewman KC on behalf of Mr Azima is seeking to do in this application is to hive off those allegations of fraud against him, the ones that were originally made by RAKIA and found to be true by the deputy judge, to a separate trial and that the trial fixed for May 2024 should only deal with Mr Azima's claims. I'm afraid that I rather agree with the additional defendants' submissions that it looks as though Mr Azima is seeking to avoid any scrutiny of his own conduct from the trial next year.
13. In my view it is clear and obvious that there should be no split trial and all issues should be tried in one go. There is no problem with the time available to do so and a further week can be added to the trial estimate, if necessary, as I have indicated during the course of the hearing. But in any event, this was a very generous time estimate in the first place, given that the original trial occupied 14 sitting days and RAKIA are no longer participating in the proceedings.
14. It avoids any practical problems about identifying where the split falls and the need for witnesses to give evidence twice and possible inconsistencies. Mr White KC on behalf of Mr Buchanan, showed me some possible inconsistencies in the proposed split and there may be substantial difficulties in working out exactly where the line falls. There are also potential difficulties in the split between legal and factual issues.
15. It also means that the proposed second trial would not be kicked into the long grass and avoid all the difficulties around appeals in relation to the first trial and the like. It is much neater, more efficient and practical to have all issues decided together and that is from the court's perspective also when so much court resources have already been expended on this case.

16. Mr Plewman urged on me that there may be considerable savings in that a second trial may not be necessary. But that seems to me to be a somewhat odd thing for him to be submitting, because it is predicated either on Mr Azima failing on his set aside claim, or succeeding on his US law points that the defences being run by Dechert and Mr Gerrard to the hacking counterclaim are not available to them on the facts of this case.
17. In order to strengthen his case on this, he has clarified -- the additional defendants would say he has actually amended his case for tactical reasons -- that those documents that were relied upon by RAKIA to prove Mr Azima's fraudulent conduct in the first trial, the so-called "iniquity documents", are outside his present hacking claim. Mr Plewman said that this was done to avoid them being a distraction because the vast majority of the hacked documents were not within that category. There is a debate between the parties as to what each side's definition of "iniquity document" was or is and whether Mr Azima has properly pleaded his case in this respect. In my view this is irrelevant to the split trial issue. Even if Mr Azima is not relying on those documents, the additional defendants will do so in relation to establishing their defences under US and English law.
18. Mr Plewman, relied on what Lord Justice Aikens held in *RBS v Highland Partners* [2013] 1 CLC 596, that the allegations of Mr Azima's wrongdoing do not need to be tried in order to determine whether the original judgment should be set aside. That would be to confuse the function of the court on a set aside claim. The court only needs to decide materiality and that would be by reference to the findings in the original judgment. If the court decides to set aside the judgment, the original winner, RAKIA, then has the choice as to whether to bring a new case based on the old allegations and seek to prove them again.
19. Mr Plewman said that the additional defendants are conflating those two stages and basically want to try the allegations that would only normally be tried after the judgment has been set aside. However, the additional defendants say that materiality cannot be properly assessed

without reference to the findings of fraud that are seeking to be overturned in the set aside claim.

It is necessary, as demonstrated in the *Tinkler* case that Mr Adam referred me to, where Mr Justice Leech went through all the allegations with care, to test whether the new evidence established materiality or not. That exercise was also made clear by Lord Justice Aikens in the *RBS* case at paragraph 106.

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.
22. In my view, the allegations are too intertwined with the issues that will need to be decided at the trial, both on the set aside claim and the hacking claim. I can see that materiality requires the court to examine the findings that were made by the deputy judge and whether they would have been different with the new evidence now available. It is a difficult dividing line between how far one needs to go in assessing the evidence otherwise available to the deputy judge, such that the new evidence would not have affected it. I therefore think it is much safer to try all the allegations in the pleadings that go to this issue at the same time.
23. It is of course open to Mr Azima to apply to strike out the allegations on the grounds of irrelevance and that is something that has been threatened. But Mr Plewman tells me there is a problem in relation to the precise extent of US law which will affect a decision to make such an application. But while the allegations therefore remain on the pleadings, it seems to me that the best and obvious course is for them to be tried together.
24. It is mainly the practical considerations and the efficient case management and use of court resources that have persuaded me that there should be no split trial. As Mr Plewman conceded,

there are potentially serious difficulties with intervening appeals and there will be duplication of witnesses, all of which will be avoided if it is all heard in one go.

25. I see no great advantage in hiving off the schedule 1 issues to another trial and as I believe it can be adequately accommodated within the existing trial, and I am prepared, as I have already indicated, to direct that there can be an extension to the start of the trial window at the beginning by one week, and knowing how extremely well-resourced and sophisticated the legal teams involved in this case are, that the inevitable complexity about managing the issues at trial can be worked out in a sensible and practical way.
26. I do also take into account Mr Pilbrow's point about the extra strain on individual defendants if this matter is dragged out unnecessarily for many more years.
27. I am therefore going to dismiss Mr Azima's application for a split trial.