Neutral Citation Number: [2024] EWCA Civ 28

Case No: CA-2023-001145 (and 001145-A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MR JUSTICE MURRAY
[2023] EWHC 795 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

- -

Between :

KARAM SALAH AL DIN AWNI AL SADEQ	**Claimant/ Appellant**
- and -	
(1) DECHERT LLP **(2) NEIL GERRARD** **(3) DAVID HUGHES** **(4) CAROLINE BLACK**	**Defendants/ Respondents**

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- -

Tamara Oppenheimer KC and **Simon Paul** (instructed by **Stokoe Partnership Solicitors**) for the **Appellant**
Philip Edey KC, Luke Pearce KC and **Sandy Phipps** (instructed by **Enyo Law LLP**) for the **First and Third Respondents**

Hearing dates : 11, 12 and 13 December 2023

- -

Approved Judgment

This judgment was handed down remotely at 2:00 pm on 24 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE POPPLEWELL:

Introduction

1. This appeal raises a number of important points of law about the scope of legal professional privilege, both litigation privilege and legal advice privilege, and the so called 'iniquity exception'. The appeal is from an order of Murray J dated 19 June 2023 following a judgment handed down on 5 April 2023. The Judge dismissed the claimant's application challenging assertions of legal professional privilege made by the defendants, save in one respect. The claimant appeals against that decision. The defendants cross appeal in relation to the one issue which was decided against them.

The parties

2. The claimant, Mr Al Sadeq, is a Jordanian citizen and a Jordanian qualified lawyer, now in his early 40s. In November 2008 he started working as legal adviser for the Ras Al Khaimah Investment Authority ('RAKIA'), the sovereign wealth fund of the Emirate of Ras Al Khaimah ('RAK'). RAK is one of the United Arab Emirates, and is ruled by a Sheikh. The current ruler is Sheikh Saud bin Saqr al-Qasimi ('the Ruler'), whose coronation took place in October 2010 following the death of his father, who had ruled for 62 years. Unlike some of the other Emirates, RAK does not have significant oil reserves, and has focussed on creating an economy with a significant industrial sector. The RAK government, and government-owned companies, have played a significant role in RAK's economy.

3. Mr Al Sadeq was promoted to group legal director of RAKIA in 2010 and became Deputy CEO in June 2011. He resigned from RAKIA in late 2012, moving to Dubai in or around December 2012, where he established an investment business. The Chairman and CEO of RAKIA from the date it was established in 2005 until 2012 was Dr Khater Massaad, a Swiss-Lebanese engineer.

4. RAKIA contends that in or about 2012, it discovered that Dr Massaad had perpetrated systematic and wide ranging frauds against RAKIA and associated entities; and that, together with a number of associates, he had been responsible for misappropriating funds and otherwise causing losses of hundreds of millions of dollars.

5. Mr Al Sadeq was arrested at his home in Dubai on 5 September 2014 and taken from Dubai to RAK, where he has been detained ever since. He was tried in RAK, convicted of fraud, and sentenced to imprisonment in a number of cases before the RAK courts. He contends that he is innocent of any wrongdoing and was wrongly convicted in politically motivated trials.

6. The first defendant, Dechert LLP ('Dechert UK'), is a law firm organised as a limited liability partnership registered in England and Wales and based in London. It is part of the international network of a large and well known global law firm operating under the business name 'Dechert', originally founded in Philadelphia, and operating there through a Pennsylvania limited liability partnership, the full legal name of which is also Dechert LLP ('Dechert US'). It has affiliated offices in a number of other locations worldwide, including Dubai. I shall refer to the global law firm as a whole as 'Dechert' save where it is necessary to identify the particular legal entity involved.

7. Dechert was engaged in 2013 to assist in an investigation of the activities of Dr Massaad and others in relation to what were said to be the suspected frauds. I shall return to the terms and scope of the engagement and the identity of Dechert's clients.

8. The second defendant, Mr Gerrard, was at the material times a partner of Dechert UK, having joined the firm in 2011 from the law firm DLA Piper. He retired as a partner of Dechert UK on 31 December 2020. He was the global co-head of Dechert's white collar and securities litigation practice, and was the lead partner involved in the investigation which forms the subject matter of the present proceedings. The third defendant, Mr Hughes, is also a former partner of Dechert UK, having joined the firm in mid-September 2014. He moved to another law firm in June 2017. The fourth defendant, Ms Black, joined Dechert UK as a senior associate some time in 2011, becoming a partner on 1 January 2015. She left Dechert UK in February 2023.

9. At the hearing before the Judge, all four defendants had single legal representation by Enyo Law LLP ('Enyo') and counsel. Mr Gerrard and Ms Black have subsequently become separately represented. They are respondents to the appeal, but have been content for the argument to be addressed by those representing Dechert and Mr Hughes, without themselves participating in the appeal hearing.

Dechert's engagement

10. Dechert was first appointed under the terms of a letter of engagement dated 5 June 2013 ('the 2013 Engagement Letter') addressed from Dechert US, through the local Dubai office, to the Investment and Development Office of the government of RAK ('RAK IDO'). It was countersigned by the director of legal affairs at RAK IDO. RAK IDO was established in 2004 and is the investment arm of the government of RAK. There was no evidence before the Judge, or before us, as to the constitutional position of RAK IDO within RAK, but it seems that it was not a separate legal entity and was simply an arm of the RAK government.

11. The 2013 Engagement Letter identified that Dechert had been asked to act "as legal counsel to [RAK IDO] in connection with an investigation into certain historical transactions carried out by subsidiary companies controlled by [RAKIA] on the instruction of Dr Khater Massaad, particularly in relation to activities and investments in Georgia and India, together with any other transactions that are identified by the task force appointed by [RAK IDO]". The letter said that instructions would be received from members of the "IDO task force". The letter identified that the Dechert team would be led by Mr Gerrard, who would be responsible for its overall supervision, and would include, amongst others, Ms Black, who was then a senior associate. The scope of work was defined in paragraph 3, which said that the initial scope of work would be as set out in Schedule 2. Schedule 2 has been wholly redacted in the copy of the 2013 Engagement Letter which has been disclosed. Paragraph 3 of the letter went on: "Though we will be providing strategic input and guidance in relation to the investigation, and providing legal professional privilege, please note that any specific legal advice we provide shall be limited to English, Georgian, UAE and US law. As the investigation progresses a more detailed scope of work will be discussed and agreed with you based on the findings during our initial work phase."

12. The curious reference to legal professional privilege as something that Dechert would be "providing" is explained by Mr Allen, the partner of Enyo with day to day responsibility

for the conduct of the proceedings, as infelicitous drafting, seeking to convey that the work Dechert would carry out would engage legal professional privilege**.**

13. In 2014 a further engagement letter was sent dated 12 October 2014 ('the 2014 Engagement Letter'). That was also sent by Dechert US through its Dubai office, this time addressed to the Ruler, and countersigned by him. It described itself as "Master Letter of Engagement – with effect from 1 September 2014". In its opening paragraph it recorded that "prior to the date of this letter our firm was providing legal services to various entities within the Government of Ras Al Khaimah in relation to corporate, restructuring, investigation and litigation matters. Following a decision of [the Ruler] responsibility for those matters has been transferred to Ras Al Khaimah Development LLC ('RAK Development')." RAKIA's pleadings in other proceedings state that RAK Development, which as its name suggests is a separate legal entity as a limited liability company under UAE law, was responsible for (amongst other things) the holding and managing of various assets such as shares, properties and loans which had previously been owned by RAKIA, including the assets which RAKIA alleges were the subject of significant frauds and other wrongdoing committed by Dr Massaad and associates of his.

14. The 2014 Engagement Letter said that its purpose was to confirm Dechert's continued instructions and to use the opportunity to "refresh and update both the description of the matters on which we have been and will continue to be working…". The letter continued: "We will prepare a common interest agreement to be entered into by RAK IDO and RAK Development that will address the issue of legal professional privilege and its preservation in the context of the transfers noted above (including in relation to pre transfer work undertaken by third party advisers). In particular the agreement will formally reflect and confirm the common interest privilege which exists in relation to all relevant RAK parties." There is no further evidence before the court about the existence or terms of such a common interest agreement.

15. The 2014 Engagement Letter identified at paragraph 2 the scope of work, which said that it should be as set out in Annex A subject to being extended by the client as necessary to include additional related work streams and/or new mandates. Annex A in the copy of the letter which has been disclosed is wholly redacted.

Identifying the lawyer, the client, and the scope of the engagement

16. Legal professional privilege usually arises in the context of the engagement of a provider of legal services ('the lawyer') by a person ('the client') for the provision of services within the scope of the engagement (although litigation privilege also applies to a litigant conducting or contemplating litigation without legal representation). It is important for the purposes of the issues in the appeal to identify who in this case constituted the lawyer and the client, and what was the scope of the work within the engagement.

Who was the lawyer?

17. The countersigned Engagement Letters were from Dechert US, but contemplated investigations and advice into activities in various parts of the world, with the team led by partners and staff from Dechert UK, which might be supplemented from time to time. Specific reference was made in the 2013 Engagement Letter to using attorneys in the Dubai and Tbilisi offices. It is tolerably clear that the engagement was of the global law firm known as Dechert, including as necessary all its constituent affiliated parts and local

offices, irrespective of any separate legal personality they might hold under local law. It also follows from the nature and terms of the engagement that the concept of legal advice for the purposes of legal advice privilege includes advice under whatever local system of law was considered to apply; and that for the purposes of litigation privilege, proceedings which were putatively in contemplation could include proceedings anywhere in the world in which the global law firm might be able to offer legal advice or assistance (although, as I shall explain, that may not be the limit of contemplated proceedings which may engage litigation privilege).

Who was the client?

18. Mr Allen explains that for the purposes of the disclosure exercise RAK IDO, RAK Development and RAKIA were treated as the client. Instructions were also taken at times from the Ruler, but he was not, the defendants contend, a client. We were told that RAKIA was considered a client because it "sat underneath" RAK IDO as the investment arm of the government. Although RAK IDO was an arm of the government, Dechert did not treat all emanations of government as its client, and the client did not include, for example the public prosecutor. Nevertheless the 2014 Engagement Letter refers to Dechert having provided legal services to various entities within the RAK government. On behalf of Mr Al Sadeq, it was submitted that Dechert's client comprised RAK IDO in 2013, and from 2014 RAK Development; and additionally, throughout the retainer, the Ruler.

19. It seems to me that the inclusion of RAKIA as a client could only potentially apply until 1 September 2014, after which RAKIA did not sit beneath the named client RAK Development. It is in the period after this date that all the events occurred which are relevant to the privilege issues which arise on the appeal. For present purposes, therefore, the client can be treated as limited to RAK Development during that period. The fact that the Ruler gave instructions (as it is clear from the evidence that he did) is not sufficient in itself to justify his being treated as the client; however it means, at least, that he was acting as the authorised agent of the client, RAK Development. Therefore insofar as the intentions or purposes of the client are relevant to the iniquity exception in legal professional privilege, the intentions and purposes of the Ruler can for present purposes be treated as the intentions and purposes of Dechert's client, RAK Development, for whom the Ruler was in this respect an authorised agent.

20. It is not clear exactly when Dechert's engagement came to an end, but it was prior to the disclosure exercise in these proceedings. Their former clients were represented by Allen & Overy LLP ('A&O') in the disclosure exercise for the purposes of ensuring that their privilege was protected. I shall refer to them as Dechert's clients rather than former clients simply as a convenient shorthand.

What was the scope of work?

21. The 2014 Engagement Letter referred to four areas in which services had been provided up to that time, namely "corporate, restructuring, investigation and litigation matters." The scope of work which the Letter identified was to be provided thereafter is unknown because of the redaction of Annex A. However, it is common ground that the scope of the engagement is to be identified not only by reference to the Engagement Letters, but also to the activities which in practice Dechert undertook from time to time. Aspects of

the work which Dechert performed call for further examination under the arguments about legal advice privilege and I shall address them there.

22. Whatever the precise confines of the scope of Dechert's role, there is little doubt that its involvement was substantial. Mr Allen states that the scale of the investigation was very significant, noting by way of illustration that between June 2013 and August 2016, some 24,000 time-entries were recorded across four matter files, and there were 146 fee earners working on the investigation from 15 Dechert offices worldwide. Moreover there were other law firms working on these matters including, so the defendants understood, Baker and McKenzie, instructed directly by RAKIA before Dechert's involvement to provide legal advice on one of the frauds allegedly perpetrated by Dr Massaad in what came to be known as the 'Leases Cases'. There were also a number of local law firms engaged to assist with various elements of the investigation, including in particular Al Tamimi, and Hadef and Partners, in RAK.

23. The investigation resulted in civil and criminal proceedings being brought in various jurisdictions, including RAK, Georgia, England, Italy, Switzerland and India, against the following in addition to Mr Al Sadeq, among others:

    (1) Dr Massaad, who left RAK in 2012, and was sentenced by the RAK courts to 30 years imprisonment in his absence;

    (2) Mr Jihad Quzmar, who worked for the government of RAK as a legal adviser and served as a judge and a member of the Supreme Judicial Council of RAK;

    (3) Mr Shahab Izadpanah, a Swiss-Iranian businessman, who had various business interests in RAK and was convicted by the RAK criminal courts in absentia for various acts of criminal conduct in relation to Dr Massaad's activities;

    (4) Mr Farhad Azima, a businessman specialising in the aviation sector, against whom proceedings have been brought in this country by RAKIA.

The present proceedings

Mr Al Sadeq's case in these proceedings

24. Mr Al Sadeq's case in these proceedings is set out in re-re-amended particulars of claim ('P/C') which bear a statement of truth, signed by Mr Tsiattalou, the partner of Stokoe Partnership Solicitors acting for Mr Al Sadeq. The statement of truth says that Mr Al Sadeq believes the facts stated in the document to be true and that Mr Tsiattalou is duly authorised by him to sign the statement of truth. Mr Al Sadeq's case is there summarised as being that Dechert UK, Mr Gerrard, Mr Hughes, and Ms Black violated Mr Al Sadeq's rights, by using threats and/or mistreatment and/or other unlawful methods, to force Mr Al Sadeq to give evidence, including false evidence, in an attempt to build a case against Dr Massaad and his alleged co-conspirators at the behest of the Ruler; and in the case of Mr Gerrard and Dechert, that they have continued to attempt to intimidate Mr Al Sadeq and those representing him since he commenced these proceedings. In doing so, and thereby directing and/or being complicit in Mr Al Sadeq's ill treatment and/or torture, they caused Mr Al Sadeq physical, emotional, psychological, moral and financial harm, loss and damage, for which compensation is sought in the proceedings.

25. A summary of the wrongs allegedly committed against Mr Al Sadeq in RAK is given in paragraph 9 and 10 of the P/C, before being much more fully particularised thereafter. Those paragraphs state:

> "9. These wrongs, involving breaches of UAE criminal law and procedure, the UAE Constitution and which are in breach of Mr Al Sadeq's human rights as a matter of UAE and international law, give rise to actionable claims under UAE law, as pleaded at paragraphs 220 to 229 below, and include the following:
>
> 9.1 Kidnap and extraordinary rendition of Mr Al Sadeq from Dubai to RAK.
>
> 9.2 Unlawful detention of Mr Al Sadeq in RAK without arrest or charge.
>
> 9.3 Mr Al Sadeq's detention in solitary confinement for around 560 days between September 2014 and April 2016, first at the General Headquarters of State Security in RAK (the "**GHQ**") and subsequently in a camp run by the Ruler of RAK's private militia, under a false name, without any or any proper due process, no access to legal representation, in unsanitary and inhumane conditions, and without adequate medical attention, exercise or access to his family, who were refused information as to his whereabouts.
>
> 9.4 Interrogation of Mr Al Sadeq by Mr Gerrard and Ms. Black during the period he was detained in solitary confinement in the GHQ and by Mr Gerrard, Mr Hughes and Ms. Black during the period he was detained in solitary confinement in the said militia camp. Mr Gerrard and Mr Hughes made it apparent by their words and actions that they had the power to improve his inhumane conditions if he gave them sufficient "cooperation".
>
> 9.5 Threats by Mr Gerrard and Mr Hughes to Mr Al Sadeq against him, his wife and children at various times as more specifically particularised herein to force him to "cooperate" in building a case against Dr Massaad, Mr Jihad Quzmar, (the former Legal Advisor to the Ruler, and an advisor of long standing) ("**Mr Quzmar**"), Mr Farhad Azima (a US-Iranian businessman who had dealings with RAKIA) ("**Mr Azima**"), and Mr Gela Mikadze (former General Manager of RAKIA's Georgia operations) ("**Mr Mikadze**") and other alleged co-conspirators by giving false evidence, including threats that Mr Al Sadeq's wife would be arrested and imprisoned and that neither of them would ever see their children again.
>
> 9.6 Pressure applied by Mr Gerrard and Ms. Black and Mr Hughes at various times as more specifically particularised herein to Mr Al Sadeq's wife to persuade Mr Al Sadeq to "cooperate" by giving false evidence, including by threatening

> her directly with imprisonment and by telling her that if Mr Al Sadeq told them what they wanted he would be released from detention and the inhumane conditions in which he was being kept.
>
> 9.7 Forcing Mr Al Sadeq to make knowingly false confessions prepared by Mr Gerrard and Mr Hughes containing evidence which Mr Al Sadeq told them was untrue, in return for promises, subsequently reneged upon, said to have been given by the Ruler of RAK, that he would be released and pardoned if he made the false confessions.
>
> 9.8 Steps taken by and/or on the instructions of and/or with the involvement of the First and / or the Second Defendant since the beginning of these proceedings to attempt to compromise Mr Al Sadeq's legal representation, continuing a pattern of unlawful pressure, intimidation, and threats which have amounted to harm.
>
> 10. In summary, it is Mr Al Sadeq's case that Mr Gerrard and Mr Hughes and Ms. Black and Dechert were prepared to, and did, violate Mr Al Sadeq's rights, including by using threats and/or mistreatment and/or unlawful methods to force Mr Al Sadeq to give evidence and/or false evidence, as more specifically particularised below, in an attempt to build a case against Dr Massaad and his alleged co-conspirators at the behest of the ruler of RAK; and in the case of the First and/or Second Defendant have continued to attempt to intimidate Mr Al Sadeq and those representing him since he commenced these proceedings. In doing so, and thereby directing and/or being complicit in Mr Al Sadeq's ill treatment and/or torture, they caused Mr Al Sadeq physical, emotional, psychological, moral and financial harm, loss and damage for which compensation is sought in these proceedings."

26. Paragraphs 11 to 19 of the statement of case allege that the Ruler was engaged in a vendetta against Dr Massaad as a result of the Ruler's political struggle with his brothers. Mr Al Sadeq's case is that the strategy of the Ruler, which Dechert was itself involved in assisting, through Mr Gerrard, Mr Hughes and Ms Black, had as its aim the procuring of false evidence from Mr Al Sadeq and others in order to harm Dr Massaad and others; and that it was that impetus, to extract false information, which gave rise to the human rights abuses against Mr Al Sadeq which are alleged in the proceedings. Mr Al Sadeq was therefore effectively collateral damage in the Ruler's aim to bring down Dr Massaad.

The disclosure application

27. Following standard disclosure being given by the defendants, a number of challenges to their claims to privilege were advanced through solicitors' correspondence. On 8 January 2021 (prior to standard disclosure) Stewart J had ordered a two day hearing to be listed to deal with those anticipated challenges and any other disputed disclosure issues. Mr Allen made a third witness statement dated 21 May 2021 ('Allen 3') providing information

concerning the defendants' claims to privilege, which, following further correspondence, was supplemented by a fourth witness statement ('Allen 4'). Those witness statements explain in considerable detail the process by which Enyo went about determining what documents were disclosable, including whether the iniquity exception applied where the document would otherwise be privileged. Mr Allen explains that because it was realised early on that a large proportion of the disclosure was likely to engage legal professional privilege, an experienced review team was set up under his supervision, comprising five Enyo associates and one junior counsel. During the course of the review, the team held daily calls, during which specific issues were discussed, queries raised, and Mr Allen's input sought. Sometimes advice was sought from the wider counsel team, including leading counsel. The review process also involved A&O representing Dechert's clients and also RAKIA, for whom Dechert had acted on an earlier matter, these three entities being treated as the relevant privilege holders. Those clients wish to maintain their privilege. A&O's role in the review process was to ensure that privilege was not mistakenly waived.

28. Following further interlocutory activity, adjournments, and directions, the application was eventually listed to be heard on 20 and 21 December 2021. The application which then fell to be heard was contained in an application notice in which the relief was identified in the attached draft order ('the Draft Order'). The application was supported by the sixth witness statement of Mr Tsiattalou ('Tsiattalou 6'), and a second witness statement of Mr Al Haddad, Mr Al Sadeq's current UAE lawyer, whose background includes having been a police officer and public prosecutor in Dubai before going into private practice ('Al Haddad 2'). The evidence in response on behalf of the defendants came in Mr Allen's ninth witness statement ('Allen 9'). Reply evidence served two weeks before the hearing included a third witness statement from Mr Al Haddad ('Al Haddad 3').

The privilege issues in outline

29. The issues before the Judge arose in relation to litigation privilege and legal advice privilege, and to the iniquity exception applicable to both. Insofar as they remain live in this appeal, they were, in outline, as follows.

30. As to the iniquity exception, Allen 3, 4 and 9 confirmed that a careful review had been undertaken to consider whether documents fell within the iniquity exception by reference to eight possible iniquities. Mr Allen identified that the threshold test which had been applied to whether such iniquities existed was whether there was a strong prima facie case, in accordance with *Kuwait Airways Corporation v Iraqi Airways Co (No 6)* [2005] EWCA Civ 286 [2005] 1 WLR 2743; and that the relationship between the documents and the iniquity which had to be established so as to fall within the exception was that the documents were "*brought into existence for the purpose of furthering*" the iniquity, in accordance with *Barrowfen Properties v Patel & Ors* [2020] EWHC 2536 (Ch). Applying those criteria, no documents had been found to fall within the iniquity exception.

31. On behalf of Mr Al Sadeq it was contended that the wrong test had been applied at both stages. The threshold test which should have been applied was that of a prima facie case, not strong prima facie case. The three iniquities relied on in the application had been established to that threshold. For the purposes of the application not all of the iniquitous conduct alleged in the P/C was relied on, but only (1) Mr Al Sadeq's unlawful abduction from Dubai and unlawful detention in RAK; (2) the unlawful prison conditions in which he was held in RAK; and (3) the denial of access to legal representation in RAK. As to

the relationship test, it was formulated in a number of different ways by the end of oral argument before the Judge so as to include documents generated "*in furtherance of*" an iniquity including any document created "*as a result of*" or "*generated by*" or "*reporting on*" or "*concerning*" or "*relating to and/or prompted by*" the iniquity. It was contended that there were bound to be documents which had not been disclosed which satisfied the tests. Accordingly an order was sought in paragraph 1 of the Draft order in the following terms:

> 1. The Defendants shall not be entitled to withhold from inspection any documents or parts thereof which have been generated by or report on the following categories of conduct:
>
> 1.1 The detention of Mr Al Sadeq in Dubai on 5 September 2014, his rendition to Ras-Al-Khaimah and subsequent detention in the following locations (as defined in the Amended Particulars of Claim):
>
> (a) GHQ;
>
> (b) Al Barirat;
>
> (c) The Prison Villa;
>
> (d) RAK Central Prison.
>
> 1.2 The conditions in which Mr Al Sadeq was detained in the locations identified at paragraph 1.1 above;
>
> 1.3 Mr Al Sadeq's access to legal representation during his detention in Ras-Al-Khaimah.

32. As to litigation privilege, there were a number of further issues. Mr Allen had identified 11 different pieces of litigation which were said to have been in contemplation at various dates, which were set out in a table which went through several iterations, the final one being set out at [117] of Allen 9 ('the Litigation Privilege Table'). It described the litigation in each case and gave the date from which it was contemplated. The contemplation was said in Allen 4 to be that of both Dechert and its clients.

33. The litigation privilege issues were the following:

(1) Mr Al Sadeq contended that Mr Allen's evidence was insufficient to establish that the relevant litigation was in contemplation on the dates suggested in the Litigation Privilege Table. The defendants disputed this.

(2) Mr Al Sadeq also contended that five of the eleven pieces of litigation, which comprised criminal proceedings or extradition proceedings, could not qualify for the purposes of litigation privilege because Dechert's clients were not parties to such proceedings, but merely alleged victims. The defendants contended that provided the other ingredients of litigation privilege were fulfilled, there was no requirement that the contemplated proceedings be proceedings to which the clients were or would be a party. This came to be referred to as the non-party issue.

(3) Mr Al Sadeq further contended in relation to the proceedings against him, which were said to be in contemplation from 5 September 2014, that the date could not be justified; and that proceedings could not have been in contemplation before 19 February 2015 because the complaint was not accepted by the public prosecutor until then.

(4) A further issue arose by reference to the Court of Appeal decision in *Three Rivers District Council & others v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 [2003] QB 1556, which was concerned not with litigation privilege, but legal advice privilege. It was common ground that it was binding authority for the proposition that it was not all communications with representatives of the client which attracted legal advice privilege, but only those which took place with employees and representatives who were specifically authorised to seek and receive the advice. I shall refer to this as the *Three Rivers (No 5)* principle. The defendants contended that the *Three Rivers (No 5)* principle is wrong and ought to be reversed. They recognised, however, that that can only occur in the Supreme Court, and that the Judge was bound to apply it in relation to legal advice privilege. Mr Al Sadeq contended that the principle also applied to litigation privilege. The defendants disputed that it did so.

(5) These issues were reflected in the order sought at paragraphs 4 and 5 of the Draft Order which was:

> "4. The Defendants shall…..identify the persons who they contend were authorised to conduct the litigation on behalf of their clients, RAK Development LLC and RAK IDO (for the purposes of the litigations set out in the Litigation Privilege table…) and the reasons why they contend that the persons were so authorised.
>
> 5. The Defendants shall not be entitled to withhold from inspection on grounds of litigation privilege documents or parts thereof on the grounds that such communications:
>
> 5.1 Were created for the dominant purpose of the litigation(s) set out in the table at paragraph 36 of Allen 3 [an earlier iteration of the Litigation Privilege table].
>
> 5.2 Are communications between persons not identified as authorised representatives of Dechert's clients pursuant to paragraph 4 of this Order, and third parties.
>
> 5.3 [Alternative to para 5.1] Were created for the dominant purpose of actual or anticipated criminal proceedings in RAK or other jurisdictions;
>
> 5.4 [Alternative to para 5.1] Were created for the dominant purpose of RAK criminal proceedings against Mr Al Sadeq prior to 19 February 2015."

(6) Paragraph 7 of the Draft Order sought an order that there be a re-review of disclosure, to be conducted by counsel, insofar as any documents had been withheld where that was not permitted in accordance with paragraph 5.

34. In relation to legal advice privilege, Mr Allen explained that where a document had been identified as subject to litigation privilege it was not reviewed separately for legal advice privilege. This was a pragmatic decision to save the time and cost which a separate review

for legal advice privilege would have entailed. When the defendants gave their standard disclosure there were no additional documents which were withheld solely on grounds of legal advice privilege. When subsequent disclosure was given in response to specific disclosure requests, a few documents were withheld on grounds of legal advice privilege alone.

35. Before the Judge there were two issues in respect of legal advice privilege:

(1) The defendants contended that the *Three Rivers (No 5)* principle was wrong, whilst accepting that the Judge was bound by it. The point was taken in order to preserve it in the event of an appeal to the Supreme Court.

(2) Mr Al Sadeq contended that legal advice privilege could not attach to the investigatory work conducted by Dechert because this was not of a legal nature. This was disputed.

(3) These issues were reflected in the orders sought at paragraphs 2 and 3 of the Draft Order:

> "2. The Defendants shall …….identify the persons whom they contend were authorised at the material times to seek or receive legal advice on behalf of their clients, RAK Development LLC and RAK IDO, and the reasons why they contend those persons were so authorised.
>
> 3. The Defendants shall not be entitled to withhold from inspection any documents or parts thereof on grounds of legal advice privilege, which involve:
>
> > 3.1 Communications created for the dominant purpose of the Defendants' investigatory work;
> >
> > 3.2 Communications between the Defendants and representatives of their clients who are not authorised to seek or receive legal advice;
>
> Save that the Defendants shall be entitled to withhold from inspection on grounds of legal advice privilege documents or parts of documents which comprise secondary evidence of separate communications which are themselves subject to legal advice privilege."

(4) Paragraph 7 of the Draft Order sought an order that there be a re-review of disclosure, to be conducted by counsel, insofar as any documents had been withheld where that was not permitted in accordance with paragraphs 2 and 3.

The Judgment

36. For reasons which remain largely unknown to us, the judgment was not delivered until some 15 months after the two day hearing of the application, which took place on 20 and 21 December 2021. Save for the *Three Rivers (No 5)* principle applicable to legal advice privilege, by which it was accepted the Judge was bound, he rejected the entirety of the application.

37. The Judge set out the principles applicable to privilege generally and the iniquity exception at paragraphs [39]-[76]. His conclusions on the various issues were as follows.

38. On the iniquity exception:

(1) Amongst the propositions he treated as not appearing to be in dispute he included that the iniquity exception applies to a document if it is "…intended to further a purpose that is criminal, fraudulent or otherwise iniquitous." (at [105(i)(b)]; and "legal professional privilege is of fundamental importance. The iniquity exception will only be applied in an exceptional case." (at [105(5)]." He accepted the defendants' submission that Mr Allen had taken the correct approach to the "in furtherance of" test; and rejected the formulation put forward on behalf of Mr Al Sadeq as set out in paragraph 1 of the Draft Order ("generate[d] by or report[ing] on" the alleged iniquitous conduct) as too wide (at [112]-[113).

(2) That was sufficient in itself for the iniquity exception part of the application to fail, and it was not necessary to establish what standard of evidential burden must be met as to the existence of the iniquity, nor whether it was met on the facts of the case (at [114]).

(3) Had it been necessary, he would have applied the threshold of "at least a strong prima facie case, if not a very strong prima facie case" (at [114]); and would have held that with one exception conceded by the defendants, the standard was not met on the evidence (at [115]). His reasoning was expressed to be by way of adoption of the arguments of Mr Edey KC on behalf of the defendants which he had summarised at [101]-[103]. Those paragraphs were relatively brief. There was no analysis of the quite extensive evidence before him, to which I shall return below, perhaps because he did not consider that the point had to be decided in the light of his conclusion on the "in furtherance of" aspect of the exception.

(4) The one exception conceded by the defendants was a reference to the evidence in Allen 9 in relation to a visit by Dr Mitchell to Al Barirat on 29 October 2015 described at [73]-[74]. Dr Mitchell, who is a recognised prisons expert, was instructed to inspect the conditions in Al Barirat in which Mr Al Sadeq and Mr Quzmar were being held, for the purposes of his evidence being put before the Italian Courts in support of an application for the extradition of Mr Izadpanah to RAK. Dr Mitchell found that the conditions were in breach of article 3 of the European Convention on Human Rights ('ECHR'). A note which has been disclosed of his discussions with a Dechert partner recorded that he had been told by the guards at Al Barirat that Mr Al Sadeq and Mr Quzmar were effectively in solitary confinement, were not let out of their cell every day, had no newspapers or books, and had no source of natural light because it was blocked. He concluded there was a clear breach of article 3. Article 3 provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." It is not possible to tell what aspect of article 3 was considered to be breached because of a redaction. Dr Michell's conclusion was that for the purposes of Italian extradition no one could properly be extradited to the facility. It was agreed he would not write a report. A handwritten "post it" on the note suggested that Mr Hughes "has a similar note on paper" and that Mr Buchanan (one of Dechert's instructing contacts at RAK Development) "may want this removed from file". The concession is not recorded in Mr Allen's witness statements but the terms in which it was made, at least as reflected in the skeleton argument in this court, was that this evidence justified a finding that the iniquity threshold was reached in relation to conditions at Al Barirat "at or around 29 October 2015" (the date of Dr Mitchell's visit), but that Mr

Allen had confirmed that there were no documents created as part of or in furtherance of "that breach".

39. In relation to litigation privilege, the Judge held:

(1) Mr Allen's evidence was sufficient to establish that the relevant litigation was in contemplation on the dates suggested in the Litigation Privilege Table: [184]-[186].

(2) Mr Al Sadeq failed on the non-party issue. The Judge described this as the most interesting and difficult issue and addressed it at [187] to [214]. In doing so he made reference to victims of crimes having a "sufficient interest" in the contemplated criminal proceedings to justify the privilege.

(3) In relation to the *Three Rivers (No 5)* point, he said that it was not necessary to make the order sought in paragraph 4 of the Draft Order because the persons authorised to conduct litigation had been resolved in correspondence. He did not address the order sought in para 5.2 of the Draft Order, which required resolution of the dispute as to whether the *Three Rivers (No 5)* principle extended to litigation privilege.

(4) In relation to the point as to the date when proceedings against Mr Al Sadeq were contemplated, he rejected the submission that they could not have been contemplated before the complaint was accepted by the public prosecutor on 19 February 2015 because what mattered was the contemplation of Dechert's clients, and they contemplated proceedings against Mr Al Sadeq from shortly after his arrest.

40. In relation to legal advice privilege he held that:

(1) he was bound by the *Three Rivers (No 5)* principle, as the defendants accepted; and

(2) all the work was undertaken by Dechert "in a relevant legal context" so as potentially to engage legal advice privilege.

Grounds of Appeal

41. Mr Al Sadeq appeals, with leave, on grounds which challenge the Judge's conclusions on all the issues I have identified which were decided adversely, save that they do not include a challenge to his conclusion that the appropriate merits threshold to apply to the iniquity exception is a strong prima facie case. I shall have to return to this. The Respondents cross-appeal on the *Three Rivers (No 5)* point in relation to legal advice privilege, recognising that this court is bound by the decision, as was the Judge, but again in order to preserve the position for an appeal to the Supreme Court.

The Further Evidence Applications

42. On 29 June 2023 Mr Al Sadeq applied to adduce further evidence in support of the appeal. The further evidence was:

(1) material exhibited to Mr Tsiattalou's 18th witness statement ('the T18 material') comprising;

(a) an affidavit of a private investigator Mr Page, who was engaged by the Ruler to investigate Dr Massaad in January 2015; and

(b) documents referred to compendiously as 'RAK Projects Reports' which Mr Al Sadeq contends provide evidence of unlawful hacking activities by those engaged by Mr Page and evidence of the fruits of that unlawful hacking;

(2) further documents referred to in Mr Tsiattalou's 20th witness statement ('the T20 material').

43. The T18 material was not available to Mr Al Sadeq at the time of the hearing before the Judge but became available well before he gave judgment. The T20 material became available after his judgment was handed down.

44. The further evidence application was listed for hearing separately and in advance of the appeal, and was argued over half a day before Underhill V-P on 3 November 2023. He decided that it was arguable that the T18 and T20 documents should be admitted and that the better course was to defer the decision to the full hearing. We have allowed the parties to refer to the material *de bene esse*, indicating that we would rule on admissibility when giving judgment.

THE INIQUITY EXCEPTION

The three iniquities defined

45. As Mr Edey submitted, it is necessary at the outset to identify what Mr Al Sadeq seeks to establish as constituting the iniquities for the purposes of the privilege dispute, which is not identical to that which he seeks to establish in the pursuit of his claim. I shall refer to them as 'the iniquities' rather than 'alleged iniquities' for convenience; I do not, of course, intend to convey by that shorthand any final conclusion about whether they took place; that is a matter to be determined at trial.

46. Allen 4 explained how the iniquity exception to litigation privilege had been addressed in the disclosure exercise, and identified the eight categories of conduct which had been examined for that purpose in the following passage:

> "49. I addressed the question of the iniquity exception in Allen 3:
>
> > "The iniquity exception broadly states that privilege may not be asserted in relation to documents which were brought into existence for the purpose of furthering a criminal or fraudulent purpose (see *Barrowfen Properties v Patel & Ors*). 'Fraud' in this context is to be interpreted in a relatively wide sense (*Barclays Bank plc v Eustice*). If the alleged wrongdoing is in relation to issues to be tried, there must be a strong prima face case of criminal or fraudulent conduct before the iniquity principle will be engaged (*Kuwait Airways Corporation v Iraqi Airways Company*).
>
> The disclosure review team were specifically briefed on this and have been particularly vigilant to ensure that if there are any otherwise privileged documents to which the iniquity exception applies they should be disclosed.
>
> However, there are no documents in relation to which the disclosure review team considered the iniquity exception applies."

50. The Claimant is not content with this explanation, and now seeks a direction that:

> "The Defendant shall, by 4pm 30 July 2021, provide in writing to the Claimants' solicitors a further explanation of the approach taken during the Defendants' standard disclosure review regarding the issue of whether documents or communications are subject to the crime fraud or iniquity exception to legal professional privilege. In particular, in providing such further explanation the Defendants shall confirm:

a. The categories of conduct alleged in the Particulars of Claim which the Defendants treated as sufficient to engage the iniquity exception; and

b. In considering the requisite iniquitous purpose, the natural person or persons whose purpose the Defendants considered in assessing whether the iniquity exception applied to documents in the Defendants' standard disclosure."

51. It is not clear to me that the Claimant is entitled to this information…..

52. Nonetheless, in order to try to resolve the issue without troubling the court, I list out the categories of conduct which arise out of the Claimant's allegations which would engage the iniquity exception if documents were brought into existence for the furtherance of this purpose:

(1) Kidnapping and extraordinary rendition.

(2) Unlawful detention.

(3) Torture and inhumane treatment.

(4) Denial of legal representation.

(5) Threats to the Claimant and his family.

(6) Extracting false confession statements.

(7) Unlawful search of the Claimant's home and offices.

(8) Attempts to hamper the preparation of the Al Sadeq Proceedings.

53. The second limb of the Claimant's request relates to the natural person or persons whose purpose the Defendants considered in assessing whether the iniquity exception applies. Again, it is not entirely clear where this takes matters. However, I can confirm that in assessing whether the documents were brought into existence for the purposes set out above, the disclosure review team considered the purpose of both Dechert's Clients and the Defendants."

47. In relation to the part of the application concerned with the iniquity exception, contained in paragraph 1 of the Draft Order, Mr Tsiattalou said that Mr Al Sadeq took no issue with the test which Allen 3 and 4 said had been applied, and emphasised two aspects of the principle. The first was that the relevant iniquity was that of the client and there was no need for the solicitor to be involved in the iniquity: the exception applied where the

solicitor was innocent or ignorant of the iniquity and was being used as a tool for the client's iniquitous purpose. The second and related point made was that:

> "50….it is important to note that this application is not concerned with the Defendant's culpability or level of knowledge or involvement in the categories of iniquity relied on. Although Mr Al Sadeq does allege as his case against them in these proceedings that they were sufficiently implicated in those matters to make them liable to him in UAE law, that is immaterial for the purposes of this application, which is not concerned with the Defendants' conduct. For the purposes of this application, what Mr Al Sadeq invites the Court to find established to the relevant standard, are the following matters:
>
> > 50.1 That the privilege holder, or a third party using the privilege holder as an "innocent tool", possessed the relevant iniquitous purpose; and
> >
> > 50.2 That the categories of document over which inspection is sought were generated in "furtherance of" that purpose (in the broad sense I explain below).
>
> 51. As to the latter point, whilst this will be a matter for submissions in due course, I note that the test for whether documents were generated in furtherance of an iniquitous purpose is a relatively broad one. The category of documents to which the exception applies includes those that were created as a result of, or reporting on, the relevant iniquitous conduct.
>
> 52. In light of the above, the Court need not be concerned that in engaging with this analysis it is being asked to take a preliminary view on issues of liability that will arise at the trial of these proceedings. Instead, it is being asked to find (by reference to matters which are either largely unchallenged, or are common ground, as I explain further below) that the wrongdoing to which Mr Al Sadeq was subjected amounted to an iniquitous purpose *(irrespective of the Defendants' knowledge of or involvement in that wrongdoing)*, and that documents were created in furtherance of that purpose (in the sense I have described above) over which privilege has been claimed." (my emphasis)

48. Having referred to the eight categories of iniquity which Mr Allen had identified at [52] of Allen 4, quoted above, Mr Tsiattalou confirmed [56] of Tsiattalou 6 hat Mr Al Sadeq does not address all those categories in his application, and that the matters which form part of the application were the categories of iniquity which were addressed in detail thereafter, which were the three categories identified in paragraph 1 of the Draft Order and were essentially the first four of Mr Allen's eight categories. The other four of Mr Allen's categories clearly involved having to establish conduct in which it was alleged that Dechert was itself knowingly involved. This was obviously a tactical decision for the purposes of the application, so as to seek to limit the need for the court to inquire into, or form a view on, Dechert's knowledge and the propriety of its conduct, for the purpose of establishing iniquity exceptions to the relevant merits threshold.

49. It follows that for the purposes of the arguments on this appeal, the conduct said to amount to iniquitous conduct must be approached on the assumption that Dechert had no knowledge or involvement in it, in the language used in [52] of Tsiattalou 6 which I have highlighted above. Moreover, and importantly, the iniquities relied on for this application

do not include that identified at paragraph 52(6) of Allen 4, namely extracting false confessions, whether or not with Dechert's knowledge or involvement. This is important because Ms Oppenheimer KC submitted that the three iniquities had to be seen as part of the wider iniquitous purpose of seeking to obtain from Mr Al Sadeq false evidence against Dr Massaad and others. This wider context was invoked to justify a number of her submissions, and she criticised the Judge for not approaching them in this way. The criticism is, in my view, unfounded. The application was carefully and deliberately not framed by reference to iniquity in seeking to obtain false evidence, although that is, of course, one of the allegations for trial. It did not need to be because even if the purpose of Mr Al Sadeq's arrest, detention and questioning was simply that he was suspected of fraud, for which he was subsequently convicted and imprisoned, that would not justify unlawful arrest, rendition or detention in the respects alleged in the three iniquities, if made out.

50. Against that background the issues which arise on this appeal in respect of the iniquity exception may be framed as follows:

(1) Has Mr Al Sadeq established the existence of the three iniquities to the required evidential standard, which I shall call the merits threshold (Issue 1)?

(2) If so, what is the legal test for the relationship between the communication and the iniquity which must be established in order to bring the exception into play (Issue 2)?

(3) Are there documents which the defendants have failed to disclose which they ought to have done in the light of the answer to Issues 1 and 2 (Issue 3)?

51. Issue 1 raises the question as to what the merits threshold is. There appeared to be common ground on that, namely that it was 'a strong prima facie case'. There was no appeal from that aspect of the Judge's decision, and no issue on the skeleton arguments on appeal. However it was apparent from the course of the argument that the parties had very different ideas of what that means in practice. Ms Oppenheimer said at one point that it required a real prospect of success. This is the test for strike out or summary judgment, and requires only a degree of probability or conviction which makes it more than fanciful. Mr Edey, on the other hand, suggested that prima facie case means that the iniquity has to be established as more likely than not. At one stage he suggested that strong prima facie case means it must be much more likely than not, and very strong prima facie case means it must be very much more likely than not; but his ultimate submission, as I understood it, was that the difference between prima facie and strong or very strong prima facie was a matter of emphasis of the clarity of the evidence needed, so that strong and very strong here meant clearly and very clearly established on the balance of probabilities. Issue 1 therefore involves two questions:

(a) What is the merits threshold test (Issue 1(a))? and

(b) Is that test met in relation to the three iniquities (Issue 1(b))?

Issue 1(a): what is the merits threshold test?

The uncontroversial aspects of the iniquity exception

52. I start with a number of uncontroversial aspects of the iniquity exception. As is well-known, legal professional privilege encompasses both legal advice privilege and litigation privilege. Broadly speaking, legal advice privilege applies to communications between a lawyer and its client for the sole or dominant purpose of giving or receiving legal advice, and documents which would reveal the contents of such communications; litigation privilege attaches to communications between a lawyer and its client or third parties which are brought into existence for the sole or dominant purpose of use in the conduct of existing or contemplated adversarial litigation: *R v Central Criminal Court, ex pte Francis & Francis* [1989] AC 346; *Three Rivers District Council & others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48 [2005] 1 AC 610. Where legal professional privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing interests in disclosure of the communications: *R v Derby Magistrates Court Ex pte B* [1996] AC 487; *Three Rivers (No 6)* at [25]. Legal professional privilege was described by Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 18 [2003] 1 AC 563 at [7] as a fundamental human right, which the European Court of Human Rights has held is part of the right to privacy protected by article 8 ECHR.

53. There is a principle that privilege does not exist if the document comes into existence in relation to a fraud, crime or other iniquity. The principle finds its modern authoritative origin in *R v Cox and Railton* (1884) 14 QBD 153, and was referred to by Lord Sumner in *O'Rourke v Darbishire* [1920] AC 581 at p.613 as being that a claim for legal professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud. I shall have to examine some aspects of the parameters of the principle in greater detail to determine the issues in the appeal, but by way of introduction, the following aspects of the exception were not controversial.

54. The exception applies to criminal cases, as in *Cox and Railton*, and civil cases, as in *O'Rourke v Darbishire*. It applies equally to legal advice privilege and litigation privilege: *Kuwait Airways (No 6)*.

55. The principle is not confined to fraudulent or criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice: *Williams v Quebrada* [1895] 2 Ch 751, 755; *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 554, 565; *Barclays Bank v Eustice* [1995] 1 WLR 1238, 1249; and *BBGP v Babcock & Brown* [2010] EWHC 2176 (Ch) [2011] Ch 296 at [62]. In *Ventouris v Mountain* [1991] 1 WLR 607 Bingham LJ used the expression "iniquity", reflecting the language used in early formulations of the principle (see *Garside v Outram* (1857) 26 LJ (Ch) 113 and *Cox and Railton* per Stephen J at 171). Whilst formerly often referred to as the fraud exception, it is now most commonly referred to as the iniquity exception.

56. It is not confined to cases in which the legal adviser is party to, or aware of, the iniquity. The relevant iniquitous purpose is that of the client, or if the client is being used as a tool

for the iniquity by a third party, that of the third party: *Cox and Railton, R v Central Criminal Court ex pte Francis* [1989] 1 AC 346.

57. The principled juridical basis for the exception is that it is a necessary ingredient of legal professional privilege that the communication should be confidential; and that the iniquity exception applies where and because the iniquity deprives the communication of the necessary quality of confidence: see the authorities considered in *JSC BTA Bank v Ablyazov (No 13)* [2014] EWHC 2788 (Comm) [2014] 2 CLC 263 at [76]-[92]. It is therefore an exception in the sense of something which prevents the privilege arising in the first place, not an exception in the sense of a disapplication of existing privilege.

58. Communications between a lawyer and client, or with third parties, are confidential if they take place in the usual course of the professional engagement of such a lawyer, notwithstanding that the engagement may concern an iniquity. This is why the iniquity exception does not apply to what Glidewell LJ referred to as the "ordinary run of cases" in *R v Snaresbrook Crown Court Ex pte DPP* [1988] QB 532 at pp. 537-8. Such privilege is not prevented from attaching merely because the solicitor is engaged to conduct litigation by putting forward an account of events which the client knows to be untrue, and which therefore involves a deliberate strategy to mislead the other party and the court, and to commit perjury, as is clear from that case and *Francis*. Accordingly the touchstone in distinguishing such cases from those where the exception applies is whether the iniquity puts the conduct outside the normal scope of such professional engagement or is an abuse of the relationship which falls within the ordinary course of such engagement. This was the conclusion reached from the analysis of the authorities at [93] in *Ablyazov*, cited with approval and applied by this court in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103 [2022] 4 WLR 84 at [70]-[71], [82]-[83]. This was common ground on the current appeal.

59. *Kuwait Airways (No 6)* was an example of conduct falling on the abusive side of the line, such that the iniquity exception applied. That litigation had a tortuous procedural history involving a number of trials and appeals. The disclosure ordered was for the purposes of an imminent trial (the so called Perjury II trial) in which Kuwait Airways was seeking to set aside an earlier judgment on the grounds that findings on which it was based, namely that Iraqi Airways' conduct attracted state immunity from a particular date, had been procured by fraudulently perjured oral evidence and the manufacturing of forged documents and deliberate suppression of genuine documents. Such iniquitous conduct on the part of Iraqi Airways had already been proved in the so called Perjury I trial. David Steel J ordered disclosure of categories of documents (both in the hands of the solicitors, and held internally) relating to the preparations for the oral evidence of six witnesses, and the activity to conceal relevant documents, including those relating to the disclosure process. The Court of Appeal upheld the decision. Longmore LJ, with whom Ward LJ agreed, said at [39] :

> "… no privilege can exist in communications between Iraqi Airways Co and their previous English solicitors (let alone Iraqi Airways Co's internal documentation) in relation to the tactics of and the evidence given in the main action or in the Perjury I action where the fraud was established."

And at [40]:

> "...The present case is far from the ordinary run of cases envisaged by Glidewell LJ and is much more than a mere case where, in the words of Lord Goff [in *Francis*]

> a client gives wrong information to his solicitor which "if acted upon would lead to the commission of perjury". Here there was a widespread conspiracy to deceive the English court which was acted upon and has been proved to have led not only to perjury but to forgery and the perversion of justice on a remarkable and almost unprecedented scale."

The Kuwait Airways (No 6) test

60. In *Kuwait Airways (No 6)*, Longmore LJ expressed his conclusions at [42] in these terms:

> "42. I would therefore summarise the position thus: (1) the fraud exception can apply where there is a claim to litigation privilege as much as where there is a claim to legal advice privilege; (2) nevertheless it can only be used in cases where there is a strong (I would myself use the words "very strong") prima facie case of fraud, as there was in *Dubai Aluminium Co Ltd v Al-Alawi* [1999] 1 WLR 1964 and there was not in *Chandler v Church* 137 NLJ 451; where the issue of fraud is not one of the issues in the action, a prima facie case of fraud may be enough as in the *Hallinan* case [2005] 1 WLR 766."

61. As I shall explain, I have some difficulty with the second limb of this formulation, but even if an accurate statement of the law, it leaves room for uncertainty about what is meant by the expressions 'prima facie case', 'strong prima facie case' or 'very strong prima facie case', as the rival submissions in this appeal vividly demonstrate. What is the threshold in terms of the possibility or probability of iniquity which must be established to amount to a prima facie case, a strong prima facie case or a very strong prima facie case?

62. It is highly desirable for the efficient conduct of both civil and criminal litigation, to both of which the iniquity exception applies, that the parties and their legal advisers who are involved in disclosure should be provided with as much clarity as possible on this question. In other interlocutory contexts, expressions have been used on which authoritative guidance has been given. In summary judgment applications it is "real prospect of success" on which there is plentiful authority: see e g *Easyair Ltd v Opal Telecom* Ltd [2009] EWHC 339 (Ch) at [15]. In the interim injunctions jurisprudence there must be a serious issue to be tried as to the merits. In jurisdictional disputes there must be a serious issue to be tried on the merits and a good arguable case as to whether the claim comes within one of the jurisdictional gateways, both of which expressions have received extensive judicial interpretation: see e.g. *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC [2012] 1 WLR 1804 at [71], *Brownlie v Four Seasons Holdings Inc.* [2017] UKSC 80 [2018] 1 WLR 192 at [4]-[8].

63. I have reached the conclusion that save in exceptional cases, the merits threshold for the iniquity exception is a balance of probabilities test: the existence of the iniquity must be more likely than not on the material available to the decision maker, whether that be the party or legal adviser determining whether to give or withhold disclosure, or the court on any application in which the issue arises; and that in an interlocutory context there is no distinction to be drawn between cases in which the iniquity is one of the issues in the proceedings and those where it is not. This, in my view, is what the cases speaking of a prima facie case have had in mind, and what is meant by a prima facie case in this context (whatever it may mean in other contexts).

64. That conclusion is dictated by principle and consistent with, and to some extent supported by, the authorities at appellate level, other than *Kuwait Airways (No 6*). I will address first considerations of principle, and then the authorities.

Principle

65. Application of the iniquity exception involves the balance of two competing public policy considerations. On the one hand, there are the policy considerations which underlie the existence of legal professional privilege. It is not here necessary to define them exhaustively. Three quotations will suffice. In *Ventouris v Mountain* Bingham LJ said at p. 611C-D:

> "The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision. To this end it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision."

66. In *Derby Magistrates Court ex pte B* Lord Taylor CJ said at p. 507C-D:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

67. In *Three Rivers (No 6)* Lord Rodger said at [52]:

> "Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or the jury determining the winner. In such a system, each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations."

68. On the other hand there is a strong public interest in iniquity being uncovered. In *Cox and Railton* at p. 170 Stephen J cited with approval the words of Sir Wiliam Page Wood V-C in *Gartside v Outram*:

> "If [the lawyer] is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of society to destroy the public welfare."

69. In the context of litigation, this is reinforced by the imperative of the parties being able to adduce before the court all relevant evidence so that the dispute is determined fairly and correctly. If relevant evidence is concealed, there is a risk of injustice. In *Three Rivers (No 6)* Lord Carswell described this at [86] as one of the two opposing imperatives, which had to be balanced with the policy underlying the existence for the privilege to determine the bounds of privilege. This is not sufficient of itself to outweigh the policy underlying legal professional privilege which, where it applies, is inviolate from other public policy factors in favour of disclosure. But it is engaged where the iniquity exception applies, where the policy is that the client/lawyer relationship must not be used abusively to conceal iniquity; and that where it is, the lawyer holds a higher duty to disclose it. As Kekewich J put it in *Williams v Quebrada Railway, Land and Copper Company* [1895] 2 Ch 751 at p. 755 such an iniquitous transaction should be "disclosed in all its nakedness to the court." The concept of abuse was captured by Cardozo J in the US Supreme Court decision of *Clark v United States of America* (1933) 289 US 1 at 15:

> "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."

70. Consideration of whether the iniquity exception applies will usually have to take place without the decision maker being able to assess all the evidence which will subsequently be available on the issue. Where the iniquity is an issue in the proceedings, its existence or otherwise will only be determined at trial, often with the benefit of oral evidence. The party making the decision when giving disclosure, or more often in practice its legal adviser, has access to limited material; and often, so far as its opponent's case is concerned, no more than allegations in a statement of case. The Court determining a disclosure application may have evidence of each party's case, but it will rarely be feasible or appropriate to conduct a mini trial on the issue for the purposes of disclosure. Where the iniquity is not an issue in the proceedings, it may sometimes be possible to try the issue of whether the iniquity exists for the purposes of disclosure in the proceedings, but case management considerations and the need to avoid satellite litigation are likely to render this very much the exception. Usually the court will be in the same position as where it is an issue in the proceedings, namely having to assess such evidence as the parties put before the court for that purpose, without oral evidence on disputed issues.

71. The party, or legal adviser or court is therefore usually required to decide the issue on a provisional basis which may turn out to be wrong. If the iniquity is treated as sufficiently established to require disclosure, the communication will be made available; if it should subsequently be held, or appear, that the iniquity did not take place, the privilege will have been wrongly invaded in a way which cannot be reversed. If, on the other hand, the iniquity is not treated as sufficiently established but does in fact exist, the party to whom disclosure ought to have been made will have been deprived of relevant evidence to which it was entitled in advancing its case, with the consequent adverse impact on its prospects of success.

72. That being so, a test of anything less than a balance of probabilities would be inconsistent with principle. If the test were real prospect of success, serious issue to be tried, good arguable case, or any other test involving a degree of probability of less than 50%, that would involve the party being required to disclose communications which on the material

available were more likely than not to be privileged. Since privilege, where it exists, is inviolable, and its loss irremediable, and as it has been described as a fundamental human right, that cannot be a satisfactory test. The test should therefore be whether the iniquity exists on the balance of probabilities on the material available to the decision maker, whether party, legal adviser or court, at the time the decision is made, save in exceptional circumstances. That may require a reconsideration, and a different decision, should further material become available, which may occur after the initial decision is taken when conducting standard disclosure or a decision by the court. But that is something which may arise wherever the merits threshold is set.

73. I add the proviso "save in exceptional circumstances" as a result of considerations which arise in other procedural fields in which, for interlocutory purposes, the court has to reach a provisional conclusion on incomplete evidence, which may result in harm in either direction if it turns out to be wrong. In the case of interim injunctions this has been addressed by adopting a relatively low merits threshold (serious issue to be tried) but then deciding whether to grant relief by reference to what causes the least irremediable prejudice, balancing on the one hand the harm to the claimant if the injunction is wrongly refused against that to the defendant if it is wrongly granted; the merits of the claim can come in again to play a part in this balancing of harm exercise: see *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16 [2009] 1 WLR 1405.

74. Hoffmann J applied this familiar concept of the balance of prejudice to the iniquity exception in refusing disclosure of one class of documents in *Chandler v Church*. Vinelott J suggested a similar approach in *Derby & Co v Weldon (No 7)* [1990] 1 WLR 1157 at 1173A-F, where after reviewing the authorities to date, he rejected a merits test of the balance of probabilities as too high in all cases, and concluded that no simple formula could express the strength of the case the plaintiff had to show, which would depend upon the circumstances of each individual case, including the balance of harm.

75. Whilst adopting such an approach to the application of the iniquity exception has some attractions, I do not regard it as satisfactory, for two reasons. First, in many cases the balance of prejudice test will be impossible to apply. The competing public policies I have identified are of equal weight: see Lord Carswell in *Three Rivers (No 6)* at [86]-[87]. On one side of the balance will be the effect of wrongly destroying privilege if it should turn out that there was no iniquity. That will be the same in almost all cases: it is the loss of confidentiality in communications which should remain confidential because of the public interest, not just for that client but all potential clients, in communications involving legal advice or gathering of evidence for proceedings. It would be difficult to know how to weigh such harm in the light of the principle that where privilege exists it is inviolate and cannot be outweighed by other forms of public interest in disclosure; it is in Lord Hoffmann's words in *Morgan Grenfell* a fundamental human right. On the other side of the balance will be the effect of wrongly permitting the assertion of privilege if it should turn out that the iniquity occurred. It will usually be difficult for a court to assess the effect because the court will not usually see the content of the withheld communication, or all the other evidence available to the party seeking disclosure; and even if it sees the document, it will usually be unable to judge to what extent the withheld communication would assist the case of the party seeking disclosure in the light of all the other evidence available to that party.

76. Secondly, it is important to have a test which is as simple and practicable as possible for parties and their legal advisers conducting the disclosure exercise in litigation. Whilst a

court may occasionally be more readily able to apply a balance of prejudice test, it is an unhelpfully uncertain and imprecise guide for a solicitor conducting the disclosure process, involving as it would an evaluative assessment on a document by document basis of the effect on the ability of the opponent to conduct its case by reference to disclosing or withholding that particular document. Since the solicitor will not usually know the evidence which the opponent has to support its case, at the time they are conducting the disclosure exercise, that will usually involve an impossible evaluative assessment.

77. I would therefore endorse the approach of seeking to identify a generally applicable merits threshold, which was the approach in *Kuwait Airways (No 6)*, subject to the proviso that there may exceptionally be cases which on their particular facts dictate that a balance of harm exercise may have a part to play, where such an exercise is possible. I cannot envisage any circumstances in which that exception will be applicable to a decision taken by a party or its lawyer when conducting disclosure, but it may possibly arise when a court is adjudicating on disclosure. I do not attempt to identify what those circumstances might be, and there are none in the current case. However, I do not wish to be understood as saying that a consideration of the balance of harm can never be relevant. I do, however, emphasise that it will only be in an exceptional case that it might do so, and that generally the answer is to be found in the application of a merits test of the balance of probabilities.

The authorities

78. Apart from *Kuwait Airways (No 6)* there are five authorities which require consideration.

79. In *Cox and Railton* Munster obtained a judgment against Railton, and sought execution against Railton's assets. Cox claimed to own the property pursuant to a bill of sale executed by Railton after Munster had obtained judgment. Cox and Railton had been in partnership, and at the trial of the interpleader issue as to whether the goods belonged to Cox pursuant to the bill of sale, Cox produced a copy of the partnership deed which bore an endorsement purporting to be a memorandum of dissolution of the partnership before Munster commenced his claim. Cox and Railton were prosecuted for conspiracy to defraud, the prosecution case being that the bill of sale was a fraudulent bill of sale of partnership assets, entered into by Railton and Cox whilst they were still partners, for the purposes of depriving Munster of the fruits of his judgment; and that the memorandum of dissolution had been falsely backdated at a time after Munster had obtained judgment. At trial, the judge allowed the prosecution to adduce evidence from a solicitor, Goodman, who testified that, after Munster had obtained judgment, Railton and Cox had consulted him and asked whether anything could be done to prevent the property being seized, and in particular whether it could be disposed of by a bill of sale to Cox. They were told they could not do so because the property constituted a partnership asset. Railton asked whether anyone knew about the partnership apart from Goodman and his clerks, and was told not. There was no mention of the partnership having been dissolved. Cox and Railton were convicted, and a case stated by way of appeal as to whether the evidence, over which privilege was claimed, should have been admitted.

80. The judgment of the court comprising ten judges of the Queen's Bench Division sitting *en banc* was given by Stephen J, upholding the conviction on the grounds that the communications fell within the iniquity exception.

81. The question of the appropriate merits threshold for establishing the relevant iniquity was not directly addressed because the iniquity in question was treated as established by the verdict of the jury. At p. 165 Stephen J said:

> "We must take it, after the verdict of the jury, that so far as the two defendants, Railton and Cox, were concerned, their communication with Mr Goodman was a step preparatory to the commission of a criminal offence, namely, a conspiracy to defraud."

82. However, of relevance to the current issue is what he said at p. 175, the court having been pressed with the argument that the exception would greatly diminish the privilege if the "secret must be told in order to see if it ought to be kept"; and pressed to give guidance on how to avoid that consequence. He continued:

> "The only thing we feel authorised to say on this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence *whether it seems probable* that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it." (my emphasis)

83. The emphasised wording in this passage provides support for a balance of probabilities merits test, which is not undermined by the use of the word "may" which follows.

84. In *O'Rourke v Darbishire* [1920] AC 581, a testator appointed Christie, his wife and Darbishire as trustees and executors, Darbishire being his solicitor. By a will and four codicils various parts of his property were bequeathed to the trustees and executors absolutely. Subsequently O'Rourke (as representative of the heiress at law and one of the testator's two next of kin) challenged the validity of the will and codicils. Amongst the grounds of challenge was an allegation in paragraph 12 of the statement of claim that "the form in which the testamentary dispositions of the testator was arranged or settled by [Christie and Darbishire] was a mere fraudulent device or scheme for appropriating to the use of [the testator's] executors a very large proportion of the testator's estate…" (see p.585). Particulars were provided under that paragraph stating that the fraud was in devising and carrying out the scheme embodied in the will and codicils, whereby the testator was left in the belief that his wishes as to the residue of his estate would be carried out, whereas they intended to appropriate the greater part of the testator's estate for their own use (see p. 600). The defendants withheld a number of documents on the grounds of legal advice privilege. O'Rourke sought disclosure of the documents, one ground being that the iniquity exception applied. The House of Lords rejected the argument that the iniquity exception was made out.

85. Each of the four members of the Judicial Committee gave his own judgment. Viscount Finlay said at p. 604:

> "(c) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud.
>
> This is clear law, and, if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. But it is

> not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, *not merely an allegation* that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give *colour to the charge*. The statement must be made *in clear and definite terms*, and there must *further be some prima facie evidence* that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of *merely by making a charge of fraud*. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly *and with sufficient probability of its truth* to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such *a prima facie case* as would make it right to treat the claim of professional privilege as unfounded." (my emphasis)

86. Lord Sumner said at p. 613:

> "(1) …. No one doubts again that you can neither try out the issue in the action on a mere interlocutory proceeding, nor require the claimant to carry the issue raised to a successful trial before he can obtain production of documents which are only relevant to that issue and only sought for the purpose of proving it. I am, however, sure that it is equally clear in principle that no *mere allegation* of a fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege, properly formulated." (my emphasis)

87. He went on at p. 614:

> "It is therefore the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by *establishing a prima facie case of fraud in fact*. Evidence, admission, inference from circumstances which are common ground, or "what not," as Lord Halsbury says, may serve for this purpose. I do not pretend to define what material may and what may not be used. The imperfections of his pleadings or the dubious character of his procedure in the action may militate against the claimant's case. The fact that a motion to strike out his pleading has been made and has failed, does not establish that he has a sufficient prima facie case for this purpose. The stage in the action is only an interlocutory one, and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. *On such materials the Court must judge whether the claim of privilege is displaced or not*." (my emphasis)

88. Lord Parmoor said at p. 623:

> "Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish *a prima facie case of definite fraud*, either by allegation, affidavit, or in some other way, will depend on the special facts in each case… (my emphasis)

> …
>
> I desire to add that the refusal of the Court to strike out the statement of claim, on the application of the defendants, does not of itself establish any case of prima facie fraud, or make the case other than one of mere surmise and conjecture."

89. Lord Wrenbury said at p. 632

> "Further, as regards documents which, upon the principle above stated, are open to inspection the plaintiff must, in asking for them, go at any rate so far as to satisfy the Court that his allegations of fraud are *not merely the bold assertions* of a reckless pleader, but are such as to be regarded seriously *as constituting prima facie a case of fraud resting on solid grounds*." (my emphasis)

90. The decision establishes that a mere allegation of iniquity in a pleading which is not evidence is insufficient to meet the merits threshold, even if it could not be struck out. All four law lords use the expression *prima facie case*, with additional epithets about the strength or cogency of the material. Viscount Finlay's formulation required sufficient probability of the truth of the allegation to make it right to disallow the privilege. Lord Sumner's statement that "On such materials the Court must judge whether the claim of privilege is displaced or not" is suggestive of a determination on the balance of probabilities on the material available.

91. In *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1981] Q.B. 223, a claim was made to displace legal professional privilege in reliance on the iniquity exception. Lord Denning MR, having described the scope of the privilege, and before turning to examine the categories of documents in which privilege had been claimed, said, at p. 246:

> "No privilege can be invoked so as to cover up fraud or iniquity. But this principle must not be carried too far. No person faced with an allegation of fraud could safely ask for legal advice. To do away with the privilege—at the discovery stage—there must be strong evidence of fraud—such that the court can say: 'This is such an obvious fraud that he should not be allowed to shelter behind the cloak of privilege.'"

92. Donaldson LJ cited a passage of McNeill J in the court below where he described the allegations of fraud as "no more than the key to an intended fishing operation, to be carried out in the hope that discovery of otherwise privileged documents will produce some peg on which the defendants could seek to justify and to sustain the counterclaim." He added, at p. 252:

> "I respectfully agree and find it unnecessary to express any view on how strong a prima facie case of fraud is necessary to defeat a claim for disclosure based upon legal professional privilege, but something exceptional is called for."

93. *R v Gibbins* was a decision of the Court of Appeal Criminal Division on an appeal from a ruling on admissibility of evidence at a preliminary hearing during a trial. Gibbins and others were charged with committing an advance fee fraud. The police were in possession of draft annotated instructions to counsel, prepared by Gibbins' solicitor and annotated by Gibbins, seeking legal advice on the legality of the scheme. One of the answers advanced by the prosecution to Gibbins' claim for legal advice privilege was that the

instructions were prepared, and if not prepared annotated, for the fraudulent purpose of obtaining advice from counsel on a false or incomplete basis in order to use any favourable opinion in furtherance of the fraud.

94. Before the trial judge, Field J, the Crown accepted that it had to show a strong prima facie case, which it equated with the civil balance of probabilities test. "Strong prima facie case" had been the epithet used to describe evidence which had been found to be sufficient in *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 and *Dubai Bank v Al-Alawi* [1999] 1 WLR 196, although in both cases simply as descriptive of the evidence rather than by way of formulating a test, and inferentially in the passage in Donaldson LJ's judgment in *Buttes Gas* quoted above. On behalf of Gibbins it was contended that a criminal standard of beyond reasonable doubt was required. The Judge rejected the criminal standard, and held that the fraud exception was established to the civil standard on the evidence. The Court of Appeal upheld the decision.

95. Potter LJ, giving the judgment of the Court, cited the passage I have quoted above from Stephen J's judgment in *Cox and Railton* at p. 175 and went on at [37]:

> "This passage clearly anticipates that the existence of the fraud exception should be decided upon the test of 'probabilities'. However it seems clear that in subsequent decisions the question "whether it seems probable" has been interpreted as meaning whether the judge is satisfied that there is a prima facie case."

96. The paragraphs which follow make clear that the subsequent decisions being referred to included primarily the passages in *O'Rourke v Darbishire* which I have quoted. At [44] Potter LJ repeated that the test from *Cox and Railton* was one of probability "which test the courts have subsequently refined as the need to demonstrate a prima facie case."

97. At [47]-[50] he said

> "47. While the question for determination by the judge is whether a particular document ostensibly seeking advice was or was not created as part, or for the purposes, of a fraud, the answer is unlikely to be immediately apparent from the terms of the document alone and its admissibility will frequently (indeed usually) require consideration of its contents in the wider context of the fraud of which it is itself alleged to be evidence. When a judge, prior to the trial of the issue of whether that fraud has in fact been established (which in criminal proceedings will ultimately be a question for the jury on the basis of proof beyond reasonable doubt) is faced with the question whether or not to require production of the disputed document with a view to its being used in evidence, his *decision is one which has to be reached upon the facts as they then appear* i.e. prior to the trial at which the nature and existence of the fraud and the probative value of the document will finally be determined by the jury. *Effectively, the judge is only in a position to reach a conclusion upon a provisional or ' prima facie' basis, rather than one of certainty.*(my emphasis)
>
> …
>
> 49. We return to the practicalities of the matter. In the context of a civil or criminal case, where the cause of action pleaded or the charge to be determined at trial is that of fraud, the existence of which is in issue and will only be finally determined

> at trial, the judge who is required at the interlocutory stage to determine the question whether or not a document is disclosable for the purpose of admission in evidence at trial under the fraud exception, is in no position finally to determine that question. Such final determination will only be possible at trial in the light of all the evidence, including the oral evidence of the parties and, in particular, that of the defendant if called. Meanwhile, the judge can only realistically cope with the matter *on the basis of the prima facie position i.e. that which appears to be the position at the time of consideration in the absence of further explanation*. Neither policy nor practicality require more than that the judge should be satisfied (i) that a prima facie case of fraud exists and (ii) that, considered in that context, a prima facie case also exists that the document concerned came into existence as part of the fraud. (my emphasis)
>
> 50. In this respect, bearing in mind the nature of the proceedings, the importance of the doctrine of LPP, the room for ambiguity and the possibility of innocent explanation, it has been stated (in *Cox and Railton*) that the judge should consider it 'probable' that the document was part of the fraud and (in *Derby v Weldon*) that a 'strong' prima facie case is required (the standard adopted by the judge in this case). We consider that these observations rightly emphasise the need for the judge to be clear in his view that a prima facie case of fraudulent purpose exists. However, we *do not think that any gloss upon the requirement of a prima facie case is desirable either in respect of the charge contained in the indictment or in respect of the purpose behind the document of which disclosure is sought.* (my emphasis)

98. *Gibbins* is therefore authority for the proposition that the test of prima facie case is a test of the balance of probabilities, to be conducted on the basis of the material available at the interlocutory stage at which the decision falls to be made; and that there is no useful purpose in glossing prima facie case with the epithet strong when so understood. A prima facie case is a case which allows a conclusion on a provisional (i.e. prima facie) basis that the iniquity exists. That is a conclusion to be reached on the civil standard of proof of the balance of probabilities.

99. In *R (Hallinan Blackburn Gittings & Nott (a firm)) v Crown Court at Middlesex Guildhall* [2004] EWHC 2726 (Admin) [2005] 1 WLR 766, P was arrested and charged with possession of cocaine with intent to supply, and possession of a stun gun. Hallinan, the firm of solicitors which he instructed, had taken a statement from K who claimed she was present at P's arrest. K's employers told the police that she was in the office at the time she claimed to have been present at the arrest, and the police found evidence supporting that position, including material supporting a clear inference that she had made a false entry in a computer diary as to where she was. There were also e-mails passing between K and M, a junior clerk in barrister's chambers, supporting the case that what K was proposing to say was false. P, K and M were then charged with conspiracy to pervert the course of justice. The police found a folder at K's office with correspondence from the firm and an unsigned copy of her witness statement (stating she was present at the arrest and observed officers planting the drugs). The police required the firm, P's solicitors, to produce K's witness statement, and other material pertaining to K, for the purpose of P's trial on the drugs and gun charges; the firm refused to do so, claiming privilege, and the police applied to the Crown Court for a production order. The judge held that there were reasonable grounds for believing K was party to a conspiracy to pervert the course of justice and that the material was held "with the intention of furthering a criminal purpose".

P's trial on the drugs and gun offences was adjourned pending judicial review of the judge's decision. Rose LJ, giving the judgment of the Divisional Court upholding the judge's decision, concluded:

> "[25] It is a truism that whether material is legally privileged depends on the circumstances of the particular case. In order to defeat a claim to legal professional privilege, it will not be appropriate, for example in a case where an alibi has been raised, to seek to analyse the issues which are likely to arise in the criminal investigation or trial which gives rise to the initial privilege. To do so, as it seems to me, would be to put the cart, in the form of analysis of the issues, before the horse, that is the trial. Where, however, there is evidence of specific agreement to pervert the course of justice, which is freestanding and independent, in the sense that it does not require any judgment to be reached in relation to the issues to be tried, the court may well be in a position to evaluate whether what has occurred falls within or outwith the protection of legal professional privilege as explained in Cox and Railton.
>
> [26] In the present case, as it seems to me, the judge was fully entitled to conclude that the material here sought had reached the entirely innocent claimants from his client and/or others, whose intention, it could be inferred, was to further their continuing purpose of perverting the course of justice."

100. Although the judge in that case had been satisfied that there were "reasonable grounds for believing" that the material was in furtherance of iniquity, the Divisional Court's reasoning at [26] was implicitly that he had been entitled to reach that conclusion on the material before him. The decision is, therefore, an example of the application of a balance of probability test on the available material.

101. I do not find what was said at [25] entirely easy to follow. Insofar as the first part might suggest that the iniquity can never destroy the privilege where the issue as to the existence of the iniquity is an issue in the proceedings, it would be insupportable in principle and out of line with the authorities where disclosure has been ordered on the basis of the iniquity exception in such circumstances. Indeed, *Hallinan* was itself a case in which the existence of the iniquity was going to be an issue in the relevant proceedings, namely P's trial on the drugs and gun charges, albeit not the iniquity with which he was charged. It was going to be an issue at P's trial whether K was present at the arrest and saw the police plant the drugs, as it appeared she was going to say in evidence, or whether she was elsewhere, as her employers stated and other evidence supported: the question whether she was conspiring to pervert the course of justice by lying about where she was constituted both an issue in the proceedings and the alleged iniquity which destroyed the privilege being claimed. It was an ex tempore judgment, and it may be that its meaning can only be unlocked by a fuller understanding of the argument reflected in [22] where Rose LJ said:

> "As to alibi cases, an example canvassed in the course of argument on both sides, Mr Mitchell submitted that it is unlikely until the trial has taken place that there would be material sufficient to justify an application for a Special Procedure Order. But where, as here, there is freestanding independent material, the police in pursuance of their general duty in relation to the prevention of crime cannot be expected to stand by."

102. I return finally to *Kuwait Airways (No 6)*, in which what Longmore LJ said was obiter because on the facts of that case the perjury met the threshold of more probable than not, having been established in a previous judicial decision. The three aspects of his formulation with which I find myself unable to agree are first (at [37]), that if all one has is a disputed version of events it will be difficult to say that there is even a prima facie case of fraud; secondly, that a different threshold applies where the iniquity is in issue in the proceedings from that where it is not; and thirdly, that there are degrees of prima facie case from 'prima facie' simpliciter through to 'very strong prima facie', which import different standards as to the degree of probability of the existence of the iniquity or the strength of the evidence required in support.

103. As to the first, if one has a disputed version of events, there may be established a prima facie case of iniquity, in the sense in which that expression is used in this context. What matters is the quality of the disputed evidence on either side, at the time the issue falls to be resolved, which in the present context will usually be at an interlocutory stage. The quality of the evidence can be assessed to determine whether it meets the necessary threshold, whatever that threshold be in terms of probability or plausibility.

104. As to the second, I find it difficult to see any justifiable reason for the distinction between cases in which the iniquity is in issue in the proceedings and those where it is not. The balance of harm will generally be the same in either case. Of course, where the existence of the iniquity is not one of the issues in the proceedings, it may sometimes be possible to have a greater evidential inquiry, without procedural unfairness, perhaps occasionally a full trial on the issue. But that will be a rare case, and accordingly the court will usually have to take a provisional view on the available material, whether or not the iniquity is an issue in the proceedings. This will also be the position of the party or its solicitor in deciding whether to give or withhold disclosure.

105. Moreover, Longmore LJ's formulation is in this respect inconsistent with *O'Rourke v Darbishire* in which the iniquity was an issue in the proceedings, and all four judgments in the House of Lords expressed the test in terms of a prima facie case. Longmore LJ did not refer to those formulations, or to *O'Rourke* at all in the context of this issue.

106. At [29] and [37] Longmore LJ treated the distinction as justified by what was said at [25] of *Hallinan*. He said at [29]:

> "This authority … shows that the exception may not apply if what is in issue is merely an issue in the proceedings e.g. a denial of having committed a crime or (as discussed in the Hallinan case) an assertion of an alibi or telling a lie to a solicitor about the side of the road on which one is driving. The fraud exception is more likely to apply if the evidence of criminality is "free-standing and independent".

I do not myself regard [25] of *Hallinan* as establishing any such proposition. In the posited examples the exception may not apply because there is not the abusive relationship which takes it out of the ordinary run of cases. It is not, however, something which depends upon whether the iniquity is an issue in the proceedings. In any event, I do not understand how a statement as to the circumstances in which the exception does not apply at all can provide guidance as to the merits threshold where it does apply, as Longmore LJ did in his summary at [42].

107. As to the third, prima facie case is to be equated with a balance of probabilities test, as was held in *Gibbins*. I agree that it is unhelpful to gloss it with the epithets strong or very strong when used in this sense. Those are terms which have been used descriptively of the evidence in particular cases but not as terms defining the test. There seems no justification for a test which imposes a higher burden than the balance of probabilities. Such a conclusion would be contrary to principle: the policy in favour of privilege is not weightier than the policy in favour of the exception. If the epithets strong or very strong are intended to apply to the clarity of the evidence required, as Mr Edey suggested, they are to my mind unhelpful and apt to mislead. Any allegation of fraud or criminality needs to be particularised, and evidence of it cogent, if it is to be taken into account, and this applies as much to the iniquity exception as in other areas of the law. However the test remains simply whether on all the evidence there is a prima facie case.

Conclusion on issue 1(a)

108. The merits threshold for the existence of an iniquity which prevents legal professional privilege arising, whether legal advice privilege or litigation privilege, is a prima facie case, which means that on an assessment of the material available to the decision maker, whether that be the party or its legal adviser conducting disclosure, or the court, it appears more likely than not on a balance of probabilities that such iniquity exists. In an interlocutory context there is no distinction to be drawn between cases in which the iniquity is one of the issues in the proceedings and those where it is not. This is subject to the proviso that there might exist exceptional circumstances which could justify a court taking the view that a balance of harm analysis has a part to play.

Issue 1b Are the iniquities made out on the material before the court?

109. I shall first address this question on the basis of the evidence before the Judge and without reference to the further evidence on which Mr Al Sadeq wishes to rely.

110. The detail of Mr Al Sadeq's account in the P/C, so far as the three iniquities are concerned, includes the following.

(1) As Mr Al Sadeq and his wife returned to their home in Dubai from a social engagement at about 1 am on 5 September, the occupants of a vehicle at their home approached Mr Al Sadeq in his car and pulled him from the vehicle. One of the men showed Mr Al Sadeq an identity card stating he was from RAK state security investigations. The captors said they were going to take him to their headquarters in RAK. Mr Al Sadeq was then forcibly restrained, manhandled into their vehicle and driven out of Dubai to the GHQ in RAK. This, it is alleged, amounted to unlawful kidnap and rendition, in the absence of any request being made to the UAE Federal or Dubai authorities by the RAK authorities for the arrest or extradition of Mr Al Sadeq as required by UAE law.

(2) On arrival at the GHQ, Mr Al Sadeq was placed in custody in solitary confinement in a small, damp cell without adequate ventilation or sanitation. He was not arrested and was not told what if any charges or allegations were being laid against him. He was kept in the same cell in solitary confinement between 5 September 2014 and 10 September 2014 without being presented to the prosecutorial authorities for questioning or investigation. That is alleged to have been in violation of section 47 of the UAE Law of Criminal Procedure which provides that the police are obliged to interrogate the accused within 24 hours of apprehension and either arrest or order the

release of the subject; and must present a suspect to the public prosecution service within 48 hours of apprehension. During that period between 5 and 10 September 2014, he was visited by Hamad Al Awadhi, a security/police attaché from the Ruler's court, who told him he was representing the Ruler, who threatened him that if he did not cooperate he would never see the light of day again, or words to that effect. The expected "cooperation" was explained to be that he should provide evidence and testify against Dr Massaad and Mr Quzmar. On 8 September 2014, in the middle of the night, Mr Al Sadeq was interrogated by Mr Gerrard and Ms Black in GHQ. His request for legal representation was refused and at this point he had still not been arrested. He was blindfolded and his hands were tied behind his back during this interrogation. Mr Gerrard began by telling Mr Al Sadeq that he needed to cooperate, that he was in control of Mr Al Sadeq's fate, and that if Mr Al Sadeq did not cooperate he would never be released. Mr Gerrard threatened to have Mrs Al Sadeq arrested.

(3) On or around 10 September Mr Al-Sadeq was formally arrested for the first time and taken to the public prosecutor in the middle of the night with his head covered with a black bag and shackled by the wrists and ankles. He was there interrogated by the public prosecutor for several hours. Despite his repeated requests he was again prevented from contacting or being represented by a lawyer at that hearing. He was then returned to solitary confinement in the RAK general police headquarters where he was held, at all times in a solitary confinement cell until around early October 2014.

(4) In around early October, during the middle of the night, Mr Al Sadeq was transferred to Al Barirat Camp in Al Ashkar in RAK. Mr Al Sadeq's case is that this is a camp for the Ruler's private militia and not an official prison within the RAK criminal justice system. On behalf of the respondents it is said that it is an accommodation facility for local guards, who assist local police with various of their duties. It appears to be common ground that it is not an official prison, and that it was not used at the material time to house prisoners other than Mr Al Sadeq and Mr Quzima.

(5) During the transfer from GHQ to Al Barirat, Mr Al Sadeq was blindfolded with a hood over his head. He was placed in a cell attached to the camp in solitary confinement. The cell measured about 2 metres by 2.5 metres and although it had a window, that had been covered so as to allow no natural sunlight to enter. Mr Al Sadeq was detained in this cell for around 560 days. During the first part of Mr Al Sadeq's detention in Al Barirat he was not allowed clean clothes, he was permitted to wash only rarely, his cell was not cleaned regularly, and initially he was not allowed to leave the cell to use the toilet and was forced to relieve himself in his cell. During the first seven months of his detention he was prevented from walking, exercising or seeing the sun. After a hunger strike he was permitted to walk outside albeit only for short periods and only a couple of times per week. He was repeatedly denied access to medical attention to treat conditions caused by the circumstances of his detention.

(6) He was denied access to a lawyer throughout the period up to August 2015, despite his desire for one. His wife had engaged a lawyer on his behalf, Dr Al Shamsi, who repeatedly tried to gain access to him but was refused. Dr Al Shamsi was never allowed any proper access to Mr Al Sadeq until around August 2015. Although he was given power of attorney over Mr Al Sadeq's affairs in April 2015 and acted for him in public hearings from that date, he was never allowed to receive any instructions from Mr Al Sadeq at that time. The only time Dr Al Shamsi met Mr Al Sadeq was during his court appearances and even then he was prevented from talking to him alone or in any

effective or adequate manner as between a lawyer and client. Dr Al Shamsi was not allowed to see any of the papers pertaining to any of the cases being brought against Mr Al Sadeq at any time. He was therefore unable effectively to represent Mr Al Sadeq at any of the court hearings which he attended and he ultimately ceased to act for this reason.

(7) Ultimately as a result of his treatment, threats and pressure being applied to him and to his wife, and as a result of promises that he would be released and pardoned if he cooperated, Mr Al Sadeq finally agreed in principle by about the third quarter of 2015 that he would cooperate by making a false confession and giving false evidence against Dr Massaad and his alleged co-conspirators including Mr Quzmar, Mr Mikadze and Mr Azima so long as he had sufficient binding assurances that he would be released and pardoned.

(8) On 28 October 2015 the RAK court of first instance passed a sentence of eight years' imprisonment against Mr Al Sadeq. In the same case Dr Massaad received a sentence of 30 years in absentia, and Mr Quzmar was also sentenced to 30 years imprisonment.

(9) After that conviction, Mr Al Sadeq signed false confessions as a result of promises for his release. His appeal was unsuccessful. In mid-April 2016 Mr Al Sadeq was transferred to RAK central prison. Shortly thereafter he was transferred to the second floor of a two storey villa in RAK where he was detained until around August 2016. He was then returned to RAK central prison, where he remains to this day.

Iniquity 1: The detention of Mr Al Sadeq in Dubai on 5 September 2014, his rendition to RAK, and subsequent detention there

111. In my view the material clearly establishes a prima facie case (in the sense required) of this iniquity. The principal reasons for that conclusion are as follows.

112. Mr Al Sadeq's account in the P/C constitutes evidence supported by a statement of truth, and is summarised in Mr Tsiattalou's evidence. It is not contradicted or disputed by any factual evidence adduced on behalf of the respondents. Allen 9 states that the defendants do not know what happened at Mr Al Sadeq's arrest, in circumstances in which they were not present, and have not discussed it with those who were. However, there is no obvious reason why they should not have had such discussions with their former clients about the truth of Mr Al Sadeq's evidence for the purposes of resisting the disclosure application, in which the existence of this and the other iniquities was put in issue. Had the arrest been lawful, and occurred in a way other than that described by Mr Al Sadeq's P/C and Mr Tsiattalou's evidence, it would have been in the interests of their former clients to say so. There was ready access to A & O, who were representing their former clients in the disclosure process, as a channel of communication. All Mr Allen says is that there have been no discussions *with those present*; he does not say that there have been no discussions with those responsible for the events. The result is that Mr Al Sadeq's evidence is uncontradicted in circumstances in which there was an opportunity to answer it.

113. It is common ground on the pleadings that, as a matter of UAE law, a lawful arrest in Dubai would require a written extradition request to be made. The uncontradicted evidence in Al Haddad 3 is that had such an extradition request been made:

(1) it would have been presented to Mr Al Sadeeq when he was arrested; whereas his uncontradicted account of the arrest is that that is not what occurred;

(2) it would have been referred to in the file concerning the criminal proceedings against Mr Al Sadeq; Mr Al Haddad was provided by the public prosecutor with what was stated to be the full file, and it contains no such reference; on the contrary, the file contains documents in which reference to an extradition request would be expected to appear, had one been made, but which include no such reference;

(3) had such an extradition request been made it would have been referred to during interrogations of Mr Al Sadeq; whereas there is no suggestion that it was;

(4) had such an extradition request been made it would have been recorded by the Public Prosecutor and the Court; whereas there is no such record;

(5) on the last page of the public prosecutor's report of the interrogation of Mr Al Sadeq on 11 September 2014, it is recorded that an order was made for his arrest for 7 days; if an extradition request had been made at an earlier stage the public prosecutor would not have made such an order.

114. Mr Edey suggested that the file might not be complete, and pointed to complaints which Mr Al Sadeq's legal team had themselves made about missing documents. However it would not have been in the interests of the RAK authorities to remove an extradition request from the file had one been made. Moreover, the possibility that it existed and had been removed from the file is met by the uncontradicted evidence of Mr Al Haddad, summarised in the previous paragraph, which contradicts such possibility.

115. It was also common ground that, if an extradition request had been made it would be the receiving state, Dubai, which would carry out the arrest, as one would expect. In the respondent's pleading it is asserted that they understood that Mr Al Sadeq was apprehended by the Dubai police. That is not contained in Mr Allen's evidence and no source for the understanding is identified in the pleading. There is therefore no evidence to contradict Mr Al Sadeq's account that the captors were from RAK: one of the men showed Mr Al Sadeq an identity card stating he was from RAK state security investigations, and the captors said they were going to take him to *their* headquarters in RAK.

116. There has also been disclosed a document in Ms Black's handwriting made on 5 September 2014, the day of the arrest stating "Karam Sadeq arrested in Dubai and shipped to RAK". The word "shipped" is not a natural one for a lawyer to use about a process of lawful extradition.

117. If Mr Al Sadeq's arrest and rendition were unlawful, it follows that there is a prima facie case that his subsequent detention in RAK was unlawful, at least until his conviction. Apart from this, he also relies on further unlawful aspects of that detention in its early stages, separately from the conditions in which he was held which form the subject matter of Iniquity 2. The uncontradicted evidence in Al Haddad 2 is that:

(1) the RAK Criminal Procedure Code requires a subpoena or arrest warrant to be issued to justify detention of a suspect; and

(2) the RAK Criminal Procedure Code requires that a judicial police officer must hear the accused's deposition immediately on his arrest; and if he does not submit proof of his innocence he must be sent to the competent public prosecutor within 48 hours, who must then interrogate him within 24 hours and order his arrest or release.

118. The evidence suggests a breach of both these requirements in respect of the period from 5 to 10 September 2014. An arrest order was not made until 11 September 2104. In the meantime Mr Al Sadeq had not been questioned by either a judicial police officer or the public prosecutor; rather he had been interviewed by Hamad Al-Awahdi, a security delegate in the Ruler's court, and thereafter by Mr Gerrard and Ms Black. He was not interviewed by the public prosecutor until 11 September 2014.

Iniquity 2: the conditions in which Mr Al Sadeq was held in detention

119. In my view the material also clearly establishes a prima facie case (in the sense required) of this iniquity. The principal reasons for that conclusion are as follows.

120. Mr Al Sadeq's account in the P/C constitutes evidence supported by a statement of truth. It is not contradicted or disputed by any factual evidence adduced on behalf of the respondents. The only evidence adduced through Mr Allen about the conditions in which Mr Al Sadeq was being kept is to the effect that the Dechert fee-earners never saw where Mr Al Sadeq was being kept, all meetings being conducted at offices at Al Barirat; and that Mr Al Sadeq did not raise with any of them anything about the conditions in which he was being detained. The remainder of the evidence addresses whether the Dechert personnel were complicit in any detention in unlawful conditions which might have occurred. It would have been open to the respondents to seek and adduce evidence from their former clients to deny that the conditions at the detention locations were as described by him, but they have not sought to do so. As with Iniquity 1, the result is that Mr Al Sadeq's evidence is uncontradicted in circumstances in which there was an opportunity to answer it.

121. There is further support for Al Sadeq's evidence in contemporaneous documentation.

122. A heavily redacted note of a meeting between Mr Gerrard and Al Tamimi, whose date is unclear, records Mr Gerrard saying that Mr Al Sadeq was "sometimes in shackles". Mr Allen's evidence is that the latter is understood to be a reference to the first meeting between Mr Gerrard and Mr Al Sadeq at GHQ to which Mr Al Sadeq was brought in handcuffs, where Mr Gerrard asked for them to be removed, which they were.

123. There is a note of a meeting between Mr Hughes and Mr Al Sadeq on 7 October 2015 in which Mr Al Sadeq is recorded as saying that he has been in solitary confinement for 13 months, detained in a military prison in a cell about 3m x 1.5m, which he got Mr Hughes to pace out. Another note suggests that Dr Mitchell was told by the Attorney General during his visit a week later that the maximum allowed period for solitary confinement was 7 days.

124. The note of Dr Mitchell's visit on 29 October 2015 is clear evidence that the conditions in which he was being held were in breach of article 3 ECHR, as the respondents accept. That is unlikely to have been a snapshot of conditions which were worse than those in which he was held at the same location, Al Barirat, before or after October 2015. Mr Al Sadeq's evidence is that, on the contrary, the authorities had sought to improve the

physical conditions for the purposes of his visit. But in any event, there is no reason to suppose that the conditions were worse on the occasion of Dr Mitchell's visit, and no evidence from the respondents to that effect. There is, to my mind, no justification in the material before the court for treating that as iniquitous conduct limited to conditions "at or around 29 October 2015". It is supportive evidence of the unlawfulness of the conditions in which Mr Al Sadeq was being held throughout his detention at Al Barirat.

125. A number of contemporaneous letters written by Mr Al Sadeq also support his evidence about his conditions of detention. One dated 14 November 2014 refers to his being forbidden to go to the washroom without permission and chains, and being in solitary confinement. One dated 6 December 2014 refers to his having been in solitary confinement for 3 months during which he had been allowed only one visit.

126. Mr Al Sadeq also relies on a number of reports from respected bodies such as Amnesty International and the UN High Commissioner for Human Rights asserting breaches of human rights generally by those in authority in RAK, including holding prisoners incommunicado in solitary confinement, as well as human rights abuses in the UAE which are not specific to a particular emirate. These do not take the matter much further, but they are sufficient, at least, to establish that the allegations by Mr Al Sadeq, uncontradicted as they are by evidence from the RAK authorities, are not to be treated as inherently incredible or unlikely.

Iniquity 3 lack of access to legal representation during Mr Al Sadeq's detention

127. In my view the material also clearly establishes a prima facie case (in the sense required) of this iniquity. The principal reasons for that conclusion are as follows.

128. Mr Al Sadeq's evidence in the P/C, as summarised above, is that Dr Al Shamsi was appointed to represent him shortly after his arrest in September 2014, but he was denied access to his client, despite repeated requests from Mr Al Sadeq, until at least April 2015, when Dr Al Shamsi was appointed as his lawyer for the conduct of proceedings as required under RAK law; and that thereafter access to Dr Al Shamsi was restricted in a way such as to preclude effective representation.

129. The evidence of the defendants in Allen 9 is that in respect of the period between September 2014 and April 2015, so far as Mr Gerrard and Ms Black were aware, no steps were taken by any lawyer to represent Mr Al Sadeq; Mr Gerrard and Ms Black believed that Mr Al Sadeq was unrepresented on a voluntary basis, since he was a lawyer and able to represent himself; if it were the case that Dr Al Shamsi had been appointed but denied access to his client, Mr Gerrard and Ms Black were unaware of this. This understanding was reflected in one of the media briefing papers produced by Bell Pottinger in March 2015.

130. In relation to the period from April 2015, when the first hearing took place in the Leases Case, Allen 9 states:

(1) Mr Gerrard and Ms Black did take steps to check that Mr Al Sadeq had legal representation, since they were aware that under local law the court should appoint a lawyer at this stage, if the defendant had not already appointed one. In the event, Mr Al Sadeq had around this time instructed Dr Al Shamsi.

(2) Contrary to the evidence on behalf of Mr Al Sadeq, Dr Al Shamsi appears from the contemporaneous documents to have been actively engaged representing Mr Al Sadeq in various hearings in the Leases Case and conducting settlement negotiations on his behalf. Various documents were identified, which do indeed reflect Dr Al Shamsi representing Mr Al Sadeq in the proceedings and settlement negotiations.

131. In relation to the first period there is some contemporaneous support for Mr Al-Sadeq's case:

(1) a note by Ms Black of 17 September 2014 recorded Mr Al Sadeq saying that his wife had got a lawyer who was not permitted to see him;

(2) a note of a meeting between Mr Gerrard and Bell Pottinger on 23 February 2015 appears to record Mr Gerrard referring to the two people arrested (Mr Al Sadeq and Mr Quzmar) being in a "brutal legal system" and having "no access to legal advice and not charged"; followed by "not here to talk about the rights + wrongs of legal system";

(3) a letter of 4 April 2015 from Mr Al Sadeq to the Ruler stated that he had asked the public prosecutor to appoint a lawyer for him but received no response.

132. The material advanced in the form of reports from Amnesty International and others about human rights abuses in RAK and UAE also includes instances of the denial of legal representation.

133. Moreover, insofar as one can assess the inherent probabilities, it strikes me as more probable than not that Mr Al Sadeq would have wanted legal representation in the circumstances in which he found himself (of which there is a prima facie case), and all the more so as someone with a background as a lawyer; and less probable that he would have wanted to dispense with legal representation so as to be content with representing himself.

134. As to the second period, none of the documents relied upon in Allen 9 meet Mr Al Sadeq's evidence that although Dr Shamsi did take part in proceedings and negotiations as his representative, he was denied access to his client in a way which precluded effective advice and representation. There is no evidence from those at Dechert's former clients to contradict Mr Al Sadeq's account in this respect.

The Judgment

135. Mr Edey submitted that the Judge's conclusion that the iniquities were not made out was an evaluative one on the factual evidence, and is therefore one with which the Court should be slow to interfere, relying on *Assicurazioni Generali v Arab Insurance Group* [2002] EWCA Civ 1642 [2003] 1 WLR 577 at [14]-[16] and *Re Sprintroom* [2019] EWCA Civ 932 [2019] BCC 1031 at [68]-[79].

136. The difficulty with this submission is that the Judgment does not suggest that the Judge engaged in an evaluative assessment of the evidence which I have identified as supporting each of the iniquities.

137. As to the first iniquity, the only reason given by the Judge for finding that the iniquity was not established to the standard he was applying was his acceptance of the argument of Mr Edey recorded at [101], that the fact that a copy of the extradition request was not

in the possession and control of the defendants does not mean that no such extradition request exists. That did not engage with the many other aspects of the evidence to which this provided no answer.

138. As to the second iniquity, the Judge addressed this issue by adopting Mr Edey's submission recorded at paragraph [102] of the Judgment. Apart from the concession in relation to Dr Mitchell's visit, that paragraph did not record any argument as to the detail of the evidence but merely the conclusory submission that the evidence did not meet the threshold.

139. As to the third iniquity, the arguments of Mr Edey recorded at [103] of the Judgment, which the Judge adopted, were (1) that from April 2015 it was clear that Mr Al Sadeq was represented by Dr Al Shamsi; (2) prior to that time it was Mr Gerrard's and Ms Black's understanding that he was unrepresented on a voluntary basis; and (3) there was no evidence from Dr Al Shamsi that he was denied access during that first period. Point (1) simply does not meet Mr Al Sadeq's case or his evidence about the factors which precluded effective representation. Point (2) ignores the fact that this is disputed; and does not engage with an evaluation of the evidence to which I have referred. Point (3) is valid, so far as it goes, although it was not a point made in Allen 9 or in oral or written argument on behalf of the respondents in the appeal. It is insufficient to outweigh the other considerations to which I have referred.

The further evidence application

140. It is convenient here to consider the further evidence application in the context of Mr Al Sadeq's reliance on the T18 and T20 material in support of the existence of the iniquities. It follows from my conclusions that the iniquities were made out to the relevant standard on the material before the Judge that Mr Al Sadeq does not need to rely upon the further evidence for this purpose. However, I should address the application, which raises at least one important point of principle.

141. This court has a discretion under CPR 52.21(2)(b) to receive evidence on appeal which was not before the lower court. The well-known test in *Ladd v Marshall* [1954] 1 WLR 1489 continues to provide important guidance as to the exercise of the discretion, although the discretion is not confined by it: evidence may be admitted where the test is not fulfilled, or not admitted where it is, if either is dictated by furtherance of the overriding objective (*Hertfordshire Investments Ltd v Bubb* [2000] EWCA Civ 3013 [2000] 1 WLR 2318, 2325E-H; *Yukong Line Ltd v Rendsburg Investments Corporation* [2000] EWCA Civ 358 [2001] 2 Lloyd's Rep 113 at 125; *Hamilton v Al-Fayed (No 2)* [2000] EWCA Civ 3012 [2001] EMLR 15 at [11]; *Terluk v Berezowsky* [2011] EWCA Civ 1534 at [32]).

142. The *Ladd v Marshall* test is that new evidence will be allowed on appeal if three conditions are fulfilled, namely: (1) the evidence could not have been obtained with reasonable diligence for use at first instance; (2) if given, the evidence would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence is such as is presumably to be believed.

143. The T18 material does not satisfy the first limb of the *Ladd v Marshall* test, as properly understood. Denning LJ's formulation of that limb referred to the availability of the evidence "for use at the trial". The T18 material was not, with reasonable diligence, available at the time of the hearing before the Judge in December 2021; it became

available piecemeal over the period between the conclusion of the hearing and the delivery of the Judgment. Evidence which becomes available after a hearing at any time before the order is made may, at the lower court's discretion, be admitted in evidence: *Re Barrell Enterprises* [1973] 1 WLR 19. Even at that very late stage (and a fortiori prior to circulation of a draft judgment), the approach to the admission of new evidence is likely to be more lenient than on appeal: see *Charlesworth v Relay Roads* [2000] 1 WLR 230, 237F-238D; *Vringo Infrastructure v ZTE* [2015] EWHC 214 (Pat) [2015] RPC 15 at [29] and [40].

144. As a matter of principle, having regard to the rationale of the *Ladd v Marshall* criteria, a party in that position who chooses not to seek to put the evidence before the first instance judge should not ordinarily be permitted to introduce the evidence for the first time on appeal. The clear rationale behind the first of the *Ladd v Marshall* criteria is that a party ought to put all the evidence on which it wishes to rely before the first instance judge. It cannot hold something back and see how things turn out at first instance, before seeking to take a different approach on appeal: *Imperial Chemical Industries v Montedison (UK) Ltd* [1995] RPC 449, 468. As it was put by Lewison LJ (in a different context) in his well-known judgment in *Fage UK v Chobani* [2014] EWCA Civ 5 at [114(ii)], the first instance hearing is not a dress rehearsal but the first and last night of the show.

145. Against that background, in the appeal context, the first limb of the *Ladd v Marshall* test is aimed at determining whether the further evidence could reasonably have been put before the first instance judge and considered as part of their final determination, in the form of an order. Put another way, the relevant first instance trial or hearing is to be regarded as complete, for the purposes of the first limb, only once the order against which the appeal is brought has been made.

146. Ms Oppenheimer submitted that this was inconsistent with the decision of this court in *Rawding v Seaga UK Ltd* [2015] EWCA Civ 113, in which this court accepted that the first limb of *Ladd v Marshall* was fulfilled in respect of evidence which had become available after the hearing but before the judgment, but which the first instance judge had refused in his discretion to admit on an application to rely upon it at that stage: see [44]. However, properly understood, the decision is consistent with the interpretation of *Ladd v Marshall* I have suggested. The material which was admitted as fresh evidence on appeal in fact included material which had become available after judgment and had not been available when the lower court refused to admit further evidence and gave judgment: see [30] and [34] to [37]. The question being addressed in [44], insofar as it related to that part of the material which was available when the lower court was asked to admit it, was whether that court had itself erred in treating it as failing to fulfil the first limb of the *Ladd v Marshall* test as part of the exercise of its discretion: see [29]. The decision was that it had. The decision is consistent with the position being that if fresh evidence becomes available after the hearing but before the order is made, the correct course is to apply to the lower court for its admission. At that stage the *Ladd v Marshall* principles will come into play before the lower court, such that if fulfilled the evidence may be admitted at that late stage. If, however, it is not admitted, despite the first limb of *Ladd v Marshall* being fulfilled, the unsuccessful application to admit in the lower court does not of itself prevent the material meeting the first limb of the *Ladd v Marshall* test if it is sought to be admitted on appeal. The position would be that the applicant had used reasonable diligence to adduce it "for use at the trial".

147. Ms Oppenheimer also submitted that such an approach was inconsistent with the decision of this court in *Wood v Gamlings* [1993] PIQR 76. I am unable to agree. That was a case in which the defendant took a new point at the trial which the claimant had not anticipated, and the claimant then applied on appeal to introduce further witness evidence to rebut the point, and sought a retrial. The Court of Appeal admitted the further evidence and ordered a retrial, holding that the claimant could not with reasonable diligence have anticipated the point in question, and that even though the claimant's legal team might have sought an adjournment of the trial, it was not at fault in failing to do so. The case has nothing to say about the situation where new documentary evidence emerges between the hearing and the judgment.

148. In this case all the T18 material had become available, and had been identified as material upon which Mr Al Sadeq wished to rely, in the unusually long period between the hearing and the Judgment being handed down. The proper course was to seek to rely upon it before the Judgment was finalised. This did not need to await the completion of the exercise of receipt and assessment of the material, which came in piecemeal; as soon as became apparent that it might be relied on, that should have been drawn to the attention of the Judge and the respondents, so that case management decisions could be taken as to how to address an application for its admission.

149. It follows that the T18 material does not meet the first limb of the *Ladd v Marshall* test. It was available "for use at the trial".

150. Nor, in my view, does either the T18 or T20 material fulfil the second limb, so far as relevant to the existence of the iniquities. The submission on behalf of Mr Al Sadeq was that the further evidence demonstrates the following.

(1) As part of the Investigation, Dechert's clients were engaged in widespread hacking of Dr Massaad and persons perceived to be associated with him.

(2) The product of that hacking was used by Dechert in the course of the Investigation (the RAK Project Reports having been delivered personally to Mr Gerrard at his home); Dechert contributed to the reports which summarised the product of the hacking for the benefit of Sheikh Saud.

(3) Much of that hacking activity appears not to have been motivated by concerns of fraudulent conduct by Dr Massaad, but rather by (i) concerns about Dr Massaad's current business activities, (ii) concerns about the publicisation of allegations of human rights abuses committed by the RAK Government/Dechert (including in respect of Mr Al Sadeq), and (iii) concerns about Dr Massaad's relationship with Sheikh Saud's brother, Sheikh Faisal.

(4) Dechert's clients and their representatives are understood to have had control over the conditions of Mr Al Sadeq's detention, to the extent that Mr Al Sadeq could be prevented from publicising allegations of human rights abuses by keeping him under "hermetic seal".

(5) Hacking or other unlawful evidence gathering activities were targeted at persons perceived to be associated with Mr Al Sadeq specifically, including his wife, and – strikingly – a "source" (which it is apparent from some of the RAK Projects Reports

is a euphemism for hacking or a successful target of hacking described as an "Advisor to Mr Al Sadeq's UK legal team").

151. This appeal is only concerned with the three iniquities for the purposes of application of the iniquity exception. It is not concerned with any alleged iniquity comprising hacking. The only potential aspect of the new material relevant to the existence of the three iniquities is that referred to under (4) above in respect of the conditions of Mr Al Sadeq's detention. An examination of the material relied on in that respect, however, shows that there is nothing in it which comes close to having an important influence over whether such iniquity existed.

152. There are no other circumstances which would make it just to receive the T18 or T20 material in evidence on appeal in furtherance of the overriding objective notwithstanding that it fails to fulfil the first limb of the *Ladd v Marshall* test (T18) and the second limb (T18 and T20). The circumstances of the Judgment taking so long to hand down were unusual, but not such as to differentiate this case from any other in which the timing of hand down of judgment is unknown at the time when the new material becomes available.

153. I would therefore refuse the application insofar as the fresh evidence is sought to be relied on in relation to the issue whether the iniquities exist. It is also relied on in the context of one of the arguments on legal advice privilege. I shall revisit the application to rely on the material for that purpose when addressing that argument.

Issue 2 What is the legal test for the relationship between the communication and the iniquity which must be established in order to bring the exception into play?

154. The principle recognised by the respondents when conducting disclosure, according to Mr Allen's evidence, was that the relationship between the documents and the iniquity which had to be established, so as to fall within the exception, was that the documents were "*brought into existence for the purpose of furthering*" the iniquity. In fact, however, the respondents did not have to apply that or any test to any of the documents in relation to the three iniquities in issue on this appeal, because the conclusion had been reached that none of the iniquities had been established to the relevant threshold (save as to prison conditions at the date of Dr Mitchell's visit, as to which there were no qualifying documents). The Judge concluded that the correct relationship test had been identified, and that he therefore did not need to decide whether the iniquities existed. Mr Edey urged the same approach upon us. In my view it is mistaken. If, as I have concluded, and contrary to the view taken by those conducting the disclosure exercise, there was sufficient evidence of the three iniquities to meet the relevant merits threshold, it was necessary to undertake an assessment as to whether there are any documents which satisfy the relationship test, so as to fall within the iniquity exception and be disclosed. That assessment has not occurred because of the erroneous approach to the existence of the iniquities. The documents will have to be reviewed afresh for that purpose. Issue 2 therefore determines what relationship test should be applied to that fresh exercise.

155. Ms Oppenheimer criticises the Judge for rejecting Mr Al Sadeq's case on the grounds that the correct test was not that formulated in paragraph 1 of the Draft Order ("*documents …which have been generated by or report on [the detention and rendition, the conditions of detention and access to legal representation]*"). I would accept that it is necessary to identify the correct test, and that an order may then be fashioned in different terms to give as much practical guidance as possible by reference to the individual circumstances of the

case. There remains, however, the dispute as to what that test is. Before the Judge, and before us, Ms Oppenheimer maintained that the correct test was reflected in the Draft Order.

156. Mr Edey submitted that the test was whether the document was one created *as part of or in furtherance of the iniquity*. In this formulation, he submitted, *as part of* covered documents which are iniquitous in themselves, which would also therefore come within the rubric of being in furtherance of the iniquity. This was said to be, in effect, the test which Mr Allen described as having been applied. It would not include, he submitted, documents which merely revealed the iniquity, at least in cases where the solicitor was being used as an innocent tool. So, for example, it would not cover a putative document recording the Ruler describing unlawful conditions in which Mr Al Sadeq was detained, if the respondents had such a document.

157. Ms Oppenheimer too was content to treat the test as being whether the document was one created *as part of or in furtherance of the iniquity*, but took a very different approach as to what was covered by the words *part of*. She submitted that it not only included all documents reporting on or evidencing the iniquity, but extended to all documents where the existence of the iniquity was the reason they existed, in substance a 'but for' test (subject, she submitted, to communications concerned with obtaining *bona fide* legal advice about past iniquitous conduct falling outside the scope of the exception as those would not satisfy the *Ablyazov* "touchstone": see [58 above).

Formulations in the authorities

158. There are a wide variety of different formulations in the authorities. In *Cox and Railton* Stephen J referred at p. 167 to "communications *criminal in themselves or intended to further* any criminal purpose" and communications "*in furtherance of"* such purpose. At p. 169 he approved the headnote of *Gartside v Outram* stating that confidential communications *involving fraud* are not privileged. At p. 171 he quoted Cockburn CJ in *R v Orton* who had said that the exception applies not only to a communication with the immediate object of carrying out the fraud but extends to a communication "which *affects the accomplishment of it* by making the attorney take greater care and use more diligence".

159. In *O'Rourke v Darbishire*, Viscount Finlay referred at p. 604 to communications made *in order to get advice for the purposes of carrying out a fraud*. Lord Sumner at p. 613, in a formulation often subsequently cited as descriptive of the exception, said it applied to communications "brought into existence *in the course of or in furtherance of* a fraud". Lord Parmoor referred at p. 621 to transactions and communications "for such purposes" the purposes being "*to take part in* the concoction of a fraud *or advise his client how to carry through* a fraud". Lord Wrenbury said at p. 632 that "documents *relating to the conception and carrying out* of the alleged fraud" are not protected.

160. In *Butler v Board of Trade* [1971] 1 Ch 680 at pp. 687B-D and 689C Goff J posited a test of whether the communication was made *in preparation for or in furtherance of or as part of* the iniquity. The words "in preparation for" echo the reference to the instruction of the solicitor in *Cox and Railton* being "preparatory" to the commission of the fraud in the passage at p. 165 quoted above.

161. In *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* (unreported 7 December 1977 Court of Appeal (Civil Division) Transcript No 777 of 1979, Templeman LJ said:

> "In the light of the existing evidence, and without knowing if, at the trial, that evidence will be disproved, we must, adopting the words of Stephen J [in *Cox & Railton*], determine whether it seems probable the defendants may have consulted their legal advisers before the commission of fraud and for the purpose of being guided and helped wittingly or unwittingly in committing the fraud. A fortiori, if the defendants embarked on a fraudulent activity, communications between the defendants and the solicitors, *made in the course of that activity*, cannot be entitled to privilege and must be disclosed so that, in the words of Kekewich J [in *Williams v Quebrada*], quoted by Goff LJ, 'the whole transaction shall be ripped up and disclosed in all its nakedness to the light of the court." (my emphasis)

162. In *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep 336, Parker LJ said at p. 337 that "legal professional privilege does not exist in respect of documents which are in themselves *part of* a criminal or unlawful fraudulent proceeding or, if it be different, communications made *in order to get advice for the purpose of carrying out* a fraud…."

163. In *Dubai Bank v Al-Alawi* Rix J said that "any documents *generated by or reporting on*" the iniquitous conduct fell outside the legitimate area of legal professional privilege. This is the formulation adopted in the Draft Order sought by Mr Al Sadeq.

164. In *Chandler v Church* Hoffmann said that privilege does not attach to a communication between a client and his legal adviser "intended *to facilitate or to guide the client in the commission of a crime or fraud*".

165. In other cases (e.g. *Gibbins* and *Kuwait (No 6)*) the exception has been described in terms which cover all "*communications between the lawyer and the client*". However, these were merely brief descriptors of the principle without seeking to address the nature of the documentation caught by it. The scope of the documentation caught by the exception, where it applies, is clearly not so limited, especially in the context of litigation privilege, but also for legal advice privilege.

The appropriate formulation

166. I would favour the formulation that where there is a prima facie case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence as part of or in furtherance of the iniquity. These are two categories, either of which is sufficient. *Part of* will include documents which report on or reveal the iniquitous conduct in question. I do not thereby intend to exclude documents brought into existence in preparation for the iniquity, which *Cox and Railton* indicates are covered by it, and which Goff J expressed in *Butler* as an additional category; they would also be part of the iniquity. This is based on the formulation *in the course of or in furtherance of*, expressed by Lord Sumner in *O'Rourke v Darbishire* at p. 613, and echoed by Templeman LJ in *Gamlen*; but I prefer the rubric *part of* to *in the course of*, for two reasons. First, *in the course of* might suggest some temporal limit, whereas documents revealing the iniquity may come into existence after it is complete and if so should be within the exception. Secondly, it might be interpreted to mean that any documents which would not exist but for the iniquity are caught, which was Ms Oppenheimer's submission (as summarised above at [157]). This is in my view too remote a connection to justify application of the exception.

167. This seems to me a principled solution because the rationale for the exception is that, where it applies, the iniquity should be revealed. That is reflected in the passages in Stephen J's judgment in *Cox and Railton* at p. 170 approving what was said in *Gartside v Outram* that "If [the lawyer] is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it….."; and his citation with approval at p. 172 of a passage in the judgment of Bovill CJ in *Tichborne v Lushington* that the exception means that the party has "no privilege whatever to close the lips of the attorney from stating the truth." It is reflected in the vivid expression of Kekewich J in *Williams v Quebrada*, cited with approval by Templeman LJ in *Gamlen*, that "the whole transaction shall be … disclosed in all its nakedness to the light of the court." Once the iniquity exception applies, the iniquity must be revealed, both as a matter of general public policy for the exposure and punishment of iniquity, and in furtherance of the policy that the court should have the fullest relevant evidence available where the claim to privilege arises out of an abuse of the lawyer/client relationship.

168. It is important to emphasise, however, that the abuse of the lawyer/client relationship is a prerequisite to the exception applying at all, and it may be important to distinguish on a document by document basis whether the exception applies in the first place. To take a hypothetical example in the context of the present case, suppose that Dechert held a document which recorded information about unlawful conditions in which Mr Al Sadeq was being or had been held. If that information came to be obtained simply as an incidental consequence of Dechert's general retainer in the investigation, it would be part of Dechert being an innocent tool in the course of their clients perpetrating an iniquity and the exception would apply. The document would be disclosable as being one created as part of, and revealing, the iniquity. If, on the other hand, the information were provided for the specific purpose of seeking Dechert's legal advice on whether the detention was or had been lawful, it would not be disclosable. This is not a function of the scope of documentation caught by the exception where it exists: such a document would just as much reveal an iniquity as in the previous example. The reason it would not fall to be disclosed is because the iniquity exception would not apply at all. The example given would fall within the "the ordinary run of cases" in which, so far as the specific document is concerned, the relationship was not an abusive one.

169. It follows that I would reject the approach taken by the respondents in disclosure, and the approach contended for by Mr Edey, as too narrow. The exception is not limited to documents created *in furtherance of* the iniquity, nor to those which are *part of* it if that expression is to be given the narrow meaning of communications iniquitous in themselves and therefore in furtherance of iniquity, as Mr Edey contended.

Issue 3 Are there documents which the defendants have failed to disclose by reason of an erroneous approach?

170. On behalf of Mr Al Sadeq, it was submitted that there were categories of documents which had wrongly been withheld as a result of the erroneous application of the iniquity exception. These were identified in part simply by references to categories of documents; and in part by inferences to be drawn from specific documents.

171. As to the former, these were identified at paragraphs 32.4, 33.3 and 34.3. of the skeleton argument. In relation to Iniquity 1, paragraph 32.4 sought "communications between Dechert and Sheikh Saud/Dechert's clients that evidenced Sheikh Saud's or Dechert's client's intention for Mr Al Sadeq to be detained in Dubai as part of the investigation";

and "communications between Dechert and Sheikh Saud/Dechert's client following Mr Al Sadeq's detention, concerning whether Mr Al Sadeq should continue to be detained"; and "communications between Dechert and Sheikh Saud/Dechert's clients about whether the information Mr Al Sadeq had provided to Mr Gerrard was sufficient to justify Mr Al Sadeq's continued detention or release." These are framed much too widely because it is not the fact, but the manner, of Mr Al Sadeq's arrest and detention which forms the relevant iniquity for the purposes of the present application. Whether there are relevant undisclosed documents within these categories which are part of or in furtherance of the iniquity depends upon whether that inference can be drawn from particular documents.

172. Paragraph 33.3(a) and (b) concerns documents describing the conditions in which Mr Al Sadeq was held, which Mr Edey and Mr Allen have confirmed have in fact been disclosed. Paragraph 38 of Allen 3 explained that records of Dechert's discussions with Mr Al Sadeq had not been treated as privileged because they were not confidential, and that "the same was equally true of records detailing the conditions in which the Claimant was kept in prison". Whilst the rationale given would not apply to documents casting light on the detention conditions from sources other than Dechert's own interviews, Mr Edey specifically confirmed on instructions from Mr Allen that that meant that all documents which described or recorded the conditions in which Mr Al Sadeq was held throughout the entire period had been disclosed.

173. In argument Males LJ posited a document recording a conversation with the Ruler which made no direct reference to the actual conditions of detention or whether they were lawful, but involved whether he had now said enough for his conditions to be improved, or whether he should continue to be detained in the same conditions which were designed to encourage further cooperation. Mr Edey submitted that such a document would not meet the "in furtherance of" test, but that depended upon his interpretation of the test, which I consider overly narrow. Such a document might cast light on whether he was being held in unlawful conditions without describing them or stating that they were unlawful, and if so it would fall within the iniquity exception. It is a matter of speculation, however, whether a document of this kind exists and is held by the respondents.

174. Paragraph 33.3(c) of the skeleton argument sought communications with Dr Mitchell, following his inspection, about the conditions of detention at Al Barirat. In oral argument the category was widened to communications with Dr Mitchell more generally. These were said to be bound to exist and to have been in furtherance of iniquity because Dr Mitchell was asked to produce a favourable report on the prison conditions to support the extradition application, but to have been unwilling to do so. It was suggested that Dr Mitchell had been sought to be used in a "white-washing exercise". This was not made good on the evidence, but in any event is not the iniquity which is engaged in the current appeal: the documents were said to be relevant to iniquitous conduct in seeking to extradite Mr Izadpanah to be held in unlawful conditions; whereas the relevant iniquity for the purposes of this appeal comprises the conditions in which Mr Al Sadeq was held. Given that the document which has been disclosed states that Dr Mitchell will not write a report, there are no grounds for inferring that there are any subsequent communications with him which shed light on the conditions of Mr Al Sadeq's detention.

175. Paragraph 34.3 of the skeleton argument sought "communications between Dechert and its client discussing the implications for the investigation of the absence of legal representation for Mr Al Sadeq"; and "communications which evidence the reasons why Mr Al Sadeq was denied legal representation." Insofar as these seek documents which

reveal whether Mr Al Sadeq was denied legal representation they would fall within the iniquity exception. Whether any such documents are held by the respondents and have been withheld from disclosure on the grounds of privilege depends upon inferences to be drawn from particular documents.

176. As to the inferences to be drawn from particular documents Ms Oppenheimer made a number of points.

177. The first arose from the document containing the note of Ms Black of 5 September 2014 recording that Mr Al Sadeq had been arrested in Dubai and shipped to RAK, which had otherwise been wholly redacted. She submitted that the redactions cannot have been properly made because it was very likely that the part disclosed "did not occur in isolation". I can see no basis for inferring that the remainder of the document was concerned with the same subject matter, namely the circumstances of his arrest and transfer to RAK, nor to any other aspect of the iniquities in issue on this appeal.

178. Ms Oppenheimer also relied on a note of Mr Gerrard's questioning of Mr Al Sadeq on 9 September 2014, which referred to the fact that he would need to go and discuss with the Ruler whether Mr Al Sadeq should be prosecuted. This was said to show that there must be records of those discussions which have wrongly been withheld from disclosure. Although I would accept the submission that the inference is that discussions with the Ruler took place, there is no basis for an inference either that they were recorded or reflected in a written document; or, if so, that they would reveal any of the three iniquities in issue in this application, which is a matter of speculation.

179. Ms Oppenheimer also relied on a heavily redacted email of 10 October 2104 from Lloyd Firth of Dechert to Mr Gerrard and Ms Black with a list of issues for them to raise with Mr Buchanan. One was that Mr Al Sadeq had arrived for interview on 1 October 2014 blindfolded. It was submitted that there must have been records of communications with Mr Buchanan as to the conditions in which he was being held. This inference is not supported by the mere reference to arriving blindfolded at an interview somewhere other than his cell, in what, on his case, was a military camp. Blindfolding does not form any part of Mr Al Sadeq's case as to the unlawful conditions of his detention. There is nothing to suggest any discussion of his detention conditions which form the subject matter of Iniquity 2. In any event the respondents have confirmed that all documents which record or describe the conditions in which Mr Al Sadeq was detained have been disclosed.

180. Ms Oppenheimer also submitted that there ought to be disclosed communications between Mr Gerrard and others at Dechert discussing the implications of material obtained by hacking for the case they were building against Mr Al Sadeq, based on documents in the T18 material which she suggested showed Mr Gerrard using one aspect of the fruits of the hacking in his questioning of Mr Al Sadeq. However the T18 material is not admissible as further evidence; and in any event the posited communications are in furtherance of an alleged iniquity comprising hacking, not one of the three iniquities which are engaged in the present appeal. Ms Oppenheimer submitted that a party giving disclosure should take account of any iniquity. However, on the present appeal Mr Al Sadeq has carefully confined the challenge to the three iniquities, and the issue at this stage of the analysis is whether there can be seen to have been a failure to disclose specific documents which fall within the iniquity exception by reference to those three iniquities. This supposed example does not do so.

181. The same is true of Ms Oppenheimer's reliance on the unredaction of a document which had been made in the light of the T18 and T20 material, being part of a note of Mr Hughes' meeting with the Ruler on 26 April 2016. This was said to show the existence of undisclosed documentation comprising "the fruits of the hacking". Mr Allen explains that the unredaction was made on the basis of the alleged iniquity of hacking. It does not justify any inference of a failure to make disclosure in relation to the three iniquities.

182. A number of other documents were relied on for this purpose in a written note handed up by Ms Oppenheimer on the second day of the hearing, but none gives rise to the inference that documents in relation to any of the iniquities have wrongly been withheld from disclosure by misapplication of the iniquity exception.

Conclusion on issue 3

183. The result of my conclusions on issues 1 and 2, if my Lords agree, will be that the disclosure exercise will have to be re-undertaken, unfortunate as that is for the already protracted progress of these proceedings. Whether that will involve disclosure of further documents is, on the material before the court, a matter of speculation. It is not possible to infer from that material that there are documents which have been wrongly withheld from disclosure by misapplication of the iniquity exception.

LITIGATION PRIVILEGE

184. The following issues arise in respect of litigation privilege:

(1) Is Mr Allen's evidence sufficient to establish that the relevant litigation was in contemplation on the dates identified in the Litigation Privilege Table (Issue 4)?

(2) Does litigation privilege extend to criminal proceedings or extradition proceedings, where Dechert's clients were not contemplated as parties to such proceedings, but merely alleged victims (Issue 5)?

(3) Does the *Three Rivers (No 5)* principle apply to litigation privilege (Issue 6)?

Issue 4 Is Mr Allen's evidence sufficient to establish that the relevant litigation was in contemplation on the dates identified in the Litigation Privilege Table?

185. The relevant principles were summarised by Hamblen J in *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) as follows:

> "11. The legal requirements of a claim to litigation privilege may be summarised as follows:
>
> (1) The burden of proof is on the party claiming privilege to establish it – see, for example, *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [50].
>
> (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved.

The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible – see, for example, *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* (14 February 2001) at [30] and [39] (Andrew Smith J); *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB) at [52] (Eder J).

(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation – see, for example, *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 at [68]; *Westminster International v Dornoch Ltd [2009] EWCA Civ 1323* at paras [19] – [20]. As Eder J stated in *Tchenguiz* at [48(iii)]: "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 589-590 (cited in *Tchenguiz* at [54]-[55]); *West London Pipeline and Storage Ltd v Total UK Ltd* at [52].

12. In relation to the Court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence "to "anxious scrutiny" in particular because of the difficulties in going behind that evidence" – per Eder J in *Tchenguiz* at [52]. "The Court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose" – *ibid.* 48(iv). Further, as Beatson J pointed out in the *West London Pipeline* case at [53], it is desirable that the party claiming such privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect".

13. As was further stated by Beatson J in the *West London Pipeline* case at [86]:

"(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority;*

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharane* (the Chief Constable's letter)*, Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co,* per A L Smith LJ;

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montivedeo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland*."

186. Ms Oppenheimer submits that the claim to litigation privilege fails to meet the evidential requirements there identified, because the evidence amounts to no more than an assertion of when the proceedings were contemplated as set out in the Litigation Privilege Table. She does not suggest that there is any reason to doubt that such proceedings were in contemplation at some stage; or, save in one respect, that there are any positive grounds for the challenging the dates advanced for such contemplation as being wrong or even open to doubt. She takes her stand simply on the insufficiency of the evidence in support, arguing that there are no contemporaneous documents relied on, and no detailed evidence from Dechert or their clients of the elements necessary to fulfil the requirements of the claim to privilege.

187. It is not right that the evidence is limited solely to the Litigation Privilege Table or that there is no further detail or supporting documentation in Mr Allen's evidence, which is to be found in, and referred to in, Allen 9. I need not burden this already lengthy judgment with an analysis of all the material. The short answer to the point is that Mr Allen has explained in his witness statements that it is not possible to give any further detail or supporting documentation without disclosing the very matters which the privilege is designed to protect; and there is no reason to doubt the accuracy of that evidence, despite Ms Oppenheimer's submissions to the contrary.

188. The one respect in which Ms Oppenheimer advances positive grounds for challenging the date on which proceedings were in contemplation relates to criminal proceedings against Mr Al Sadeq himself. Mr Allen initially identified the date in the table simply as "September 2014", which was later clarified in Allen 9 [173] as being the date of his arrest, which was 5 September 2014. Ms Oppenheimer's submission was that criminal proceedings could not have been in contemplation prior to the date when a criminal complaint was filed with, and accepted by, the public prosecutor which was on or about 19 February 2015. This was because the public prosecutor cannot have contemplated such proceedings before that date. I can see no merit in the argument. If, as I conclude in relation to issue 5, litigation privilege can attach in relation to proceedings to which the privilege holder is not a party, the contemplation of the public prosecutor is irrelevant to

the inquiry. It is the contemplation of the privilege holder, Dechert's clients, which determines the date from which privilege attaches. There is no reason in principle, or in the circumstances of this case, why those clients could not reasonably have contemplated criminal proceedings being brought against Mr Al Sadeq well before a formal complaint was made to the prosecuting authority, and the evidence suggests the contrary: Baker & McKenzie had been investigating the Leases Cases well before Dechert's engagement in 2013; a note of Mr Gerrard's questioning of Mr Al Sadeq on 9 September 2014 referred to the fact that he would need to go and discuss with the Ruler whether Mr Al Sadeq should be prosecuted; and it is clear from the evidence that Dechert met the public prosecutor to discuss the case on 10 September 2014.

189. Ms Oppenheimer also submitted that because the date had been identified as "September" when the disclosure review occurred, there must have been excluded documents coming into existence between 1 and 8 September. This treated the date for contemplation of proceedings not as the date of arrest, 5 September, but 9 September, perhaps because the rubric in that part of the table included a reference to Mr Al Sadeq having made admissions on 9 September 2014 when first interviewed by Dechert. That gave rise to some confusion in the skeleton arguments and argument on appeal as to whether the date taken had been 5 or 9 September, but Mr Allen has confirmed his evidence in Allen 9, and reconfirmed in correspondence following the hearing, that the date on which such proceedings were contemplated was 5 September.

190. Ms Oppenheimer's argument assumes that the date taken in the review was 1 September, but there is no warrant for drawing that inference simply because the table was in, its first iteration, not precise about the date within September which was used. Mr Allen's evidence is that it was 5 September, the date of arrest. That disposes of the point.

Issue 5 Does litigation privilege extend to criminal proceedings or extradition proceedings, where Dechert's clients were not contemplated as parties to such proceedings?

191. On behalf of Mr Al Sadeq it is submitted that litigation privilege is not capable of applying in relation to litigation, actual or contemplated, to which the person asserting privilege is not and does not expect to be a party. The respondents submit that where, and only where, the ingredients for litigation privilege are fulfilled, it does so apply, whilst recognising that given the nature of the ingredients which have to be fulfilled, it will be a rare case where the test is met in relation to such litigation. Both sides invoke principle and authority in support of their argument. The Judge referred to the privilege attaching in relation to litigation in which the client had a "sufficient interest". Mr Edey made clear that it was not his contention that this was an additional ingredient which required to be fulfilled; rather it was a description of the kind of non-party litigation by reference to which the ingredients of litigation privilege would be fulfilled, given that the person claiming privilege must show that the relevant communications were for the dominant purpose of either enabling legal advice to be sought or given, and/or seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings.

192. I shall again address the arguments first by reference to principle, and then by reference to the authorities upon which the parties relied.

Principle

193. The starting point is the rationale for litigation privilege, which is twofold. First, there is the principle running through all the cases considered by Lord Taylor CJ in *Derby Magistrates Court ex pte B* giving rise to his summary at p. 507C-D that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth and that a client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Or as Bingham LJ put it in *Ventouris v Mountain* at p. 611C-D, it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. This applies as much to litigation privilege as to legal advice privilege: see *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 per Sir George Jessel MR at p. 649; *Waugh v British Railways Board* [1980] AC 521 per Lord Wilberforce at p. 531D-E. That rationale only applies where a lawyer is engaged, which was the context in which the privilege was developed in the 19th century cases, but litigation privilege is also enjoyed by a person acting without a lawyer in relation to actual or contemplated litigation (as Lord Carswell's formulation of the privilege in *Three Rivers (No 6)* at [102] encompasses). This is explained by the second rationale, which is that expressed by Lord Rodger in *Three Rivers (No 6)* at [52], that in an adversarial system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations. It is, in substance, the protection of a confidential space for a person and their lawyers to communicate with third parties, with candour on both sides, for the dominant purpose of litigation. The parties referred to this in argument as the 'safe space' rationale, although this shorthand needs using with care: privilege applies to communications and not to everything which happens within a safe space or "zone of privacy": see *Loreley Financial Ltd v Credit Suisse Securities Ltd* [2022] EWCA Civ 1484 [2023] 1 WLR 1425 at [41].

194. It is important to keep in mind that the protection is not, however, limited to protection from disclosure to the opponent in the adversarial litigation, at least where a lawyer is involved. It extends to any form of compulsory disclosure, such as disclosure to regulatory or tax authorities (see *Morgan Grenfell*). Thus it continues to exist after the litigation has come to an end unless and until waived by the privilege holder.

195. Provided the dominant purpose ingredient is fulfilled, there seems no principled basis for limiting the scope of litigation to that to which the person is a party. That may be a matter of happenstance and would produce unjust anomalies, as can be seen from a number of illustrative examples.

(1) It would involve a distinction between a private prosecution, to which the privilege holder would be party, and a public prosecution to which it would not.

(2) It is well known that in a number of jurisdictions, compensation can be awarded in criminal proceedings pursuant to a civil complaint as part of the criminal process. Indeed in this country, compensation orders in favour of a victim can be made by way of sentence, following conviction, in purely criminal proceedings, without the victim being a party to them. If communications come into existence for the dominant purpose of such criminal proceedings, with a view to seeking a compensation order as

part of the sentence, it is difficult to see any good reason for the privilege being denied where it would exist for the purposes of a civil suit.

(3) The point is well illustrated by the position in RAK, where, as Mr Allen explains, a claim for compensation can be made by the victim within criminal proceedings, without the need to issue separate civil proceedings but without becoming a party to the criminal proceedings. We were given to understand that such a civil claim had been made in the criminal proceedings which were pursued against Mr Al Sadeq in RAK. Moreover in RAK a victim has to make a formal criminal complaint, providing evidence about what is alleged to have occurred, before such criminal proceedings will be brought by the public prosecutor. In the kind of complex fraud which it was contemplated would form the subject matter of criminal proceedings against Mr Al Sadeq and others, that would require considerable investigation and gathering of evidence, and all the more so in this case where it appears that the public prosecutor was reliant on the resources and expertise of Dechert and their clients. It would be anomalous and unjust to deny privilege to that evidence gathering exercise, in contemplation of criminal proceedings which encompass a civil claim, when it would attach if the civil claim were to be advanced in civil rather than criminal proceedings.

(4) It is common for liability insurers to have the conduct of proceedings to which their assured are parties, but they are not. It would be absurd if litigation privilege attached to communications by the assured for the dominant purpose of gathering evidence and conducting the proceedings, but not to those of the insurers who commonly undertake that function. Other non-parties, such as litigation funders, may play a significant part in the conduct of proceedings,. Ms Oppenheimer suggested that insurers and litigation funders should be treated as "equivalent to" a party for the purposes of the privilege, but the principled basis for doing so can only be because they have an interest in the outcome, in those examples a financial interest. That, however, may equally be true of non-parties to litigation who have no control over it, as the next example illustrates.

(5) Similar anomalies would exist in relation to group litigation in its various forms, whether under a Group Litigation Order, by the case management of multiple claims by test cases and lead proceedings, as in the well-known Lloyds litigation in the 1990s (see *Deeny v Gooda Walker Ltd* [1994] CLC 1224 and the many related cases); and the recent test case in relation to business interruption arising out of the COVID pandemic (*Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2021] UKSC 1 [2021] AC 649); or collective proceedings in competition cases, where only the class representative(s), not the class members, are parties (see *Nippon Yusen Kabushiki Kaisha & Ors v Mark McLaren Class Representative Ltd* [2023] EWCA Civ 1471). In those cases non-parties may well have a part to play in evidence gathering for use in actual or contemplated litigation to which they are not themselves parties, and the twin rationales for litigation privilege are equally applicable in such cases.

(6) A similar anomaly would arise where two concerns form a joint venture company which becomes party to litigation, with each concern wishing to conduct its own process of advice and evidence gathering in relation to how the litigation should be conducted by the joint venture company (as to which they might not agree). The Buncefield litigation (*Colour Quest Ltd and others v Total Downstream UK Plc and others* [2019] EWHC 540 (Comm)) vividly illustrates such a situation, although as it

happens the joint venturers in that litigation were themselves made parties in addition to the joint venture company.

(7) Serious allegations may be made against a person, X, in litigation between others to which, for whatever reason, he may not be a party. Or X may be a witness or potential witness who wants advice as to the assistance he can and should give to a party. X may well wish to be advised in relation to the litigation, including whether and how they should participate in it, either formally by becoming a party or being a witness, or informally by providing assistance or evidence to a party. The advice would be covered by legal advice privilege but it would be anomalous, and contrary to principle, if communications by X or his lawyers with third parties for the dominant purpose of giving and getting such advice were not protected by privilege.

196. Ms Oppenheimer emphasised the reference in Lord Carswell's formulation in *Three Rivers (No 6)* at [102], to the "conducting" of proceedings, which was adopted and applied by this court in *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn* [2018] EWCA Civ 2006 [2019] 1 WLR 791 at [64]-[66], and in *Lorely Financial v Credit Suisse* at [33]:

> "The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
>
> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial."

197. Ms Oppenheimer submitted that the 'safe space' rationale could not apply to those not conducting or contemplated as conducting the litigation, who would have no need of such a 'safe space'. I cannot accept this argument for a number of reasons. First the safe space rationale is not limited to protection from disclosure to opponents in the litigation, as I have explained. Secondly, a person gathering evidence for the purpose of its use by another in conducting litigation in which it has an interest *does* come within the 'safe space' rationale. Thirdly, the 'safe space' rationale is not the only one for litigation privilege; it also covers communications for the purposes of taking legal advice on the merits of contemplated proceedings, engaging the rationale identified in *Derby Magistrates*, as Lord Carswell himself recognised at [85]. Ms Oppenheimer derived some support for her proposition that the advice must relate to the conduct of proceedings from what was said by the Court of Appeal at [15] of *WM Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652. However, that does not detract from the fact that the 'safe space' rationale is not the only rationale for litigation privilege. Finally, those having conduct of litigation are not always parties, as for example with insurers.

198. Ms Oppenheimer also emphasised that litigation privilege was confined to adversarial litigation, and argued that the rationale could not therefore extend to criminal proceedings in which the victim was not, as a non-party, in an adversarial role. However, criminal proceedings are adversarial, and a public prosecutor brings such proceedings to vindicate

the harm to the victim, which in substance means that the victim stands in an adversarial role to the defendant. Moreover, where the victim is seeking compensation from the defendant, the stances taken by the victim and the defendant are directly adversarial without the victim being a party.

199. Ms Oppenheimer further submitted that extending the privilege to non-parties was fundamentally at odds with the criminal disclosure regime in England and Wales, which treats communications between the police or prosecuting authority and victims and witnesses, taking place for the dominant purpose of the criminal proceedings, as disclosable, and not covered by any privilege held by the victim or witness. There seemed to be two strands to the argument, one addressed to pre-existing privilege in material in the hands of the victim or witness, and the other, which I understood to be the main point, to privilege, in the hands of the victim or witness, becoming attached to communications with them, where and because the victim or witness contemplates that the communication is for the dominant propose of use in a prosecution.

200. As to the first category, where privilege already exists in the hands of the victim or witness prior to the material being sought by, or coming into the hands of, the prosecution, victims and other non-parties are entitled to assert privilege to resist disclosure of material which is privileged. The *Derby Magistrates Court* case was an application of this principle in respect of legal advice privilege. There is no reason for a different approach to material which is subject to pre-existing litigation privilege. Where such material is provided voluntarily, privilege will be waived because it will lose its confidentiality, being disclosed to the police or prosecution in contemplation that it may be used for the purposes of criminal investigation and/or prosecution. Where, however, the privilege is not waived, and it comes into the possession of the police by other means, say a search or via a third party, the privilege holder can still assert the privilege to prevent its disclosure or use for so long as the privilege subsists. Ms Oppenheimer submitted that this would be an unsatisfactory restriction on the evidence available for criminal prosecutions where, for example, the victim had previously sought a report which was unfavourable and which would undermine the prosecution's case. But that is simply the consequence of the privilege being inviolate where it exists, and not being susceptible to competing public interest considerations whether in civil or criminal proceedings. It would apply equally if the pre-existing privilege attached by reason of existing or contemplated civil proceedings. If the prosecution were aware of the contents of such a report because it had come into their hands, that might affect whether a prosecution should be pursued, but that is a separate question.

201. As to the second category, the respondents' case does not have the consequence that victims and witnesses will have privilege in communications with the police and prosecuting authorities by reason of the dominant purpose of the victim or witness being their use in existing or contemplated prosecutions. Victims and witnesses will not hold privilege in such communications, consistently with the respondents' case, for one or both of two reasons. First, that is so because in this situation the person whose purpose has to be examined is the person who procures the communication (see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 discussed below), which in the posited circumstances will usually be the police or public prosecutor, not the victim or witness. Secondly, that is so because the communications will lack the necessary quality of confidence. The victim or witness will contemplate that they will be made public by their use in the proceedings. The very contemplation which gives rise to

what would otherwise attract privilege, namely use in public proceedings by the police or prosecuting authority, is what prevents privilege attaching. This meets the main point advanced by Ms Oppenheimer.

202. Principle therefore supports the respondents' position on this issue.

The authorities

203. *Waugh v BRB* is the leading modern authority on litigation privilege. There Lord Edmund Davies at p. 543H-544B endorsed the principle as being that expressed by Barwick CJ in *Grant v Downs* (1976) 135 CLR 674, 677 in the following terms:

> "Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

204. There is nothing in that formulation which requires the privilege holder to be party to the litigation. Nor do I read Lord Carswell's formulation in *Three Rivers (No 6)* at [102] as including such a limitation. I would read the word "parties" in that paragraph as being used simply to mean persons claiming privilege, to distinguish them from the third parties with whom they are communicating, rather than to impose a requirement that the litigation in existence or contemplation must be litigation to which the privilege holder is formally a party.

205. The same is true of the definition of legal professional privilege in s. 10(1)(b) of the Police and Criminal Evidence Act 1984 which provides:

> "Subject to subsection (2) below, in this Act "items subject to legal privilege" means— … (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings."

206. In *Guinness Peat v Fitzroy Robinson*, a claim was brought by the plaintiff building developers against the defendant architects. The defendants had written a letter to their liability insurers to notify them of the claim, before the proceedings began, as was required by the terms of the policy. The letter expressed views as to the merits of the claim, and was inadvertently disclosed to the plaintiff upon discovery. On learning of the mistake, the defendants sought to restrain the plaintiff from relying on it on the grounds it was privileged. The privilege was upheld at first instance and on appeal. The leading judgment in this court was given by Slade LJ. The dominant purpose of the architects had not been for advice or use in respect of contemplated litigation but rather to comply with the policy requirement (p. 1035C). The defendants did not therefore have their own litigation privilege to assert. Nevertheless, it was held that because the insurers had been responsible for procuring the letter to be written, it was their dominant purpose which was relevant, and that purpose was for advice and or use in contemplated litigation (pp.

1036D-E and 1037B-C). That left the question whether the defendants could claim the privilege, notwithstanding that the insurers had had the relevant contemplation. Slade LJ addressed this question at p. 1038G-1039B, holding that by reason of the common interest between the defendants and their insurers the defendants themselves had common interest privilege. The conclusion that the defendants held privilege in the document was therefore premised on the privilege being that of the insurers. This is direct authority that litigation privilege can arise by reason of contemplation of litigation to which the person having that contemplation is not a party, in that case, the insurers. Ms Oppenheimer relied on the passage at p. 1038G describing the position in that case as one "where the insurers will in all but name be the effective defendants to the proceedings." That was not, however, the reasoning for the decision that the insurers had their own privilege, which had earlier been identified solely by reference to their having procured the document and had the litigation in contemplation.

207. A similar approach was adopted by Aikens J in *Winterthur Swiss Insurance Company v AG (Manchester) Ltd (in liquidation)* [2006] EWHC 839 (Comm), obiter at [92]-[93] and [139(1)], in holding in respect of the "pre-ATE policy documents" that had the dominant purpose test been made good, the litigation privilege would have been that of the ATE insurers, notwithstanding that they were not contemplated as being parties to the litigation.

208. In *Gibbins*, Potter LJ said at [46]:

> "So far as policy is concerned, it is clear that the existence and application of the rule respecting LPP is one of policy which applies equally to civil and criminal proceedings and is applicable *whether or not the party relying upon it is or is not a party to, or witness in, the proceedings*." (my emphasis)

209. The two appellate authorities upon which Ms Oppenheimer principally relied were *Schneider v Leigh* [1955] 2 QB 195 and *USA v Philip Morris Inc* [2004] EWCA Civ 330 [2004]1 CLC 811.

210. In *Schneider v Leigh* [1955] 2 QB 195 the plaintiff was involved in a road accident with a vehicle owned by a company, Pedigree, and brought a personal injury claim against Pedigree. Pedigree's solicitors instructed an expert, Dr Leigh, to prepare a medical report, and then wrote to the plaintiff quoting two paragraphs from the report. The plaintiff commenced proceedings against Dr Leigh for libel, and Dr Leigh claimed privilege on the basis that the report was prepared for the purpose of the claim between the plaintiff and Pedigree. A majority of the Court of Appeal (Romer and Hodson LJJ) held that the report could be disclosed in the libel action. That was to be permitted only once the claim between the plaintiff and Pedigree had concluded, based on a concession offered by counsel for the plaintiff for the benefit of Pedigree.

211. At pp. 202-203, Hodson LJ said:

> "It is essential to bear in mind that the privilege is the privilege of the litigant, accorded to him in order that he may be protected in preparing his case, and not the privilege of his witnesses as such. The litigant can waive the privilege if he chooses, and if he does so the proofs of his witnesses can be shown to the opposing party without the witnesses having any ground for complaint. What is being sought here is, in effect, to extend the umbrella of the protection which the privilege gives the

> company to the defendant, who is, on the hypothesis that he is the author of the libel, to be looked at for the purpose of this application as a proposed witness on behalf of the company. In this capacity not only has he no privilege of his own, but he is under no duty to assert the right of the company to resist the production of any documents."

212. Romer LJ, after referring to the fact that the report attracted litigation privilege in the hands of Pedigree said at p. 205:

> "In order to establish this claim the defendant must show, as it seems to me, either that the privilege in the first action is one which he as well as the company can assert, or that he at least has such an individual right to share in the protection which the privilege affords to the company that the latter cannot waive the privilege without his consent. In my judgment, however, neither of these views is capable of being sustained. The privilege which exists in the first action is, in my opinion, that of the company and of no one else; and the company can at any time waive the privilege without the defendant's consent and, indeed, without any reference to him at all.

213. Singleton LJ in his dissenting judgment treated the privilege of the client, Pedigree, as "inuring for the benefit of the witness".

214. The decision is of relatively narrow application. It is authority for the proposition that a witness has no litigation privilege of their own in documents brought into existence for the purposes of the litigation, and was so treated by Croom-Johnson LJ in another decision of this court, *The Aegis Blaze* [1986] 1 Lloyd's Rep 203 at 210. It is also authority that the witness cannot rely on the client's privilege where the client has itself waived the privilege, as must have occurred by Pedigree's solicitors in that case having sent extracts of the report to the plaintiff, which explains Romer LJ's reference to waiver at the end of the passage quoted, and may also explain Hodson LJ's reference to waiver and the last part of the passage quoted: as Ms Oppenheimer herself submitted, if the client had not waived the privilege, the expert *would* be bound to assert the privilege of those instructing them. It forms no authority for the proposition that a client cannot have litigation privilege in a communication made in contemplation of litigation to which it is not a party: there is nothing in the decision to suggest that Pedigree could not have asserted its own privilege, had it not been waived, notwithstanding that it was not a party to the subsequent libel claim. Nor was it a case in which the privilege arose by reference to contemplation of proceedings to which Pedigree was not party: there was no question of Pedigree having litigation privilege by reason of any contemplation of subsequent libel proceedings; the privilege arose simply out of contemplated use in the existing personal injury proceedings brought against Pedigree.

215. Ms Oppenheimer submitted that if the respondents' case were correct, Dr Leigh would have been able to assert his own privilege, having produced the report which he contemplated was for use in the proceedings to which he was not a party. However, as *Guinness Peat* illustrates, the person whose dominant purpose falls to be addressed is not necessarily the maker of the document or author of the communication, but rather the person who procures it. The privilege in documents produced by witnesses, and communications with them, will be that of the client who procures such documents or communications, not that of the witness.

216. In *USA v Philip Morris Inc* the relevant issue was simply whether the litigation there in contemplation, which was a third party disclosure application by way of a letter of request, was adversarial in the sense required for litigation privilege to attach. At [72]-[73] Brooke LJ, giving the leading judgment in this court, held that it was not. There is nothing in either the reasoning or the decision to support a proposition that litigation privilege cannot extend to documents brought into existence in contemplation of litigation to which the person having that contemplation is not a party.

217. Finally, there is the decision of Moulder J in *Minera Las Bambas SA v Glencore Queensland Ltd* [2018] EWHC 286 (Comm), which is a reasoned decision on the point in favour of Mr Al Sadeq's case on this issue. Her essential reasoning is that the rationale for litigation privilege is that a party should be free to seek evidence without having to disclose it to the other side, which cannot apply unless the privilege holder is party. This reasoning is unsound, because the privilege, where it exists, is wider than merely protection against disclosure to the opposing party in the litigation; and for the reasons I have endeavoured to explain, the principled application of the rationale for the privilege points to the opposite conclusion.

218. The authorities, therefore, support the respondents' case on this issue.

Conclusion on issue 5

219. I would therefore resolve this issue in favour of the respondents.

220. I would leave open the question whether there has additionally to be a sufficient interest in the contemplated proceedings, over and above satisfying the dominant purpose test, because if that is a requirement, it was plainly satisfied in this case. Ms Oppenheimer argued that it was fatal that Dechert's clients were not the victims in the contemplated criminal proceedings in RAK. It was said that the victims were RAKIA, not RAK Development. It is not clear that the factual premise for this submission is correct: RAK Development was described as holding and managing various assets such as shares, properties and loans which had previously been owned by RAKIA, including the assets which RAKIA alleges were the subject of significant frauds and other wrongdoing committed by Dr Massaad and associates of his. However, assuming the losses to be those of RAKIA alone, who from 2014 were not Dechert's client, nevertheless RAK Development would in my view have a sufficient interest in proceedings in which RAKIA was the victim by reason of the role described. Cases where the dominant purpose test is satisfied but the party claiming privilege is essentially a stranger to the litigation are likely to be extremely rare; and whether there is an additional requirement of a sufficient interest in the proceedings in all cases is better determined if and when it arises for decision.

Issue 6: Does the *Three Rivers (No 5)* principle apply to litigation privilege?

221. On behalf of Mr Al Sadeq it is contended that litigation privilege only applies to communications with Dechert or third parties by individuals authorised to conduct litigation on behalf of Dechert's client, RAK Development, on the grounds that this is a principled extension of the *Three Rivers (No 5)* principle which applies to legal advice privilege. The Judge did not determine this issue. He said at [183] that it was not necessary to make the order sought at paragraph 4 of the Draft Order because the need to do so appeared to have been resolved by correspondence "as discussed above". Paragraph

4 sought identification of the individuals authorised to conduct the contemplated proceedings. This appears to be a reference to correspondence to which he referred at [117], but unfortunately that was concerned to identify those authorised to give and seek legal advice in the context of legal advice privilege. It did not address who was authorised to conduct litigation. The parties have confirmed that there was no other correspondence which did so. The Judge did not, in any event, seek to address paragraph 5.2 of the Draft Order which required the issue to be resolved, even if the identity of the individuals was not in issue. Equally unfortunately, the time constraints of the appeal hearing meant that neither side addressed any oral argument to this issue, although it was addressed briefly in the skeleton arguments.

222. The principle, applicable to legal advice privilege, has received considerable criticism, both judicially and by leading commentators, and has not been followed in other jurisdictions: see *SFO v ENRC* at [123]-[130]; *R (Jet2.com) v Civil Aviation Authority* [2020] EWCA Civ 35 [2020] QB 1027 at [47]-[58]; and *Hollander* on Documentary Evidence 14th edn. 17-10 to 17-11. It is, however, binding in relation to legal advice privilege on all courts below the Supreme Court.

223. Its rationale does not, however, apply to litigation privilege. Legal advice privilege is confined to communications which the lawyer has with its client (either directly or through the intermediate agent of either), and does not extend to communications with third parties. It is necessary, therefore, to have a rule for the purposes of legal advice privilege as to which natural persons qualify as 'the client' where the client is an entity with legal personality, such as a company. By contrast, litigation privilege extends to communications with third parties, and all legal and natural persons come within the scope of that description; it encompasses any legal or natural person who is not the client. It would include employees of the client, communication with whom fell outside the scope of legal advice privilege in application of the *Three Rivers (No 5)* principle because they were not authorised to seek or receive legal advice on behalf of the client. If an individual who receives the instructions at a third party company to provide information is not authorised to do so, that individual is still a third party, just as much as an individual not authorised to give or receive legal advice.

224. Moreover, the authority on which Mr Al Sadeq's case on this issue focusses is not the authority of the sender or recipient of the communication to send or receive it (which is what the *Three Rivers (No 5)* principle was concerned with); rather it focusses on the authority of persons to conduct litigation. Such authority is irrelevant to litigation privilege: communications with third parties can be covered by the privilege irrespective of any role the third party may or may not have in conducting the litigation. Third party witnesses have no role in the conduct of the litigation, and no authority to conduct it, but the privilege can nevertheless attach to communications with them. This applies irrespective of my conclusion on Issue 4 that the client need not be a party to the contemplated litigation.

225. I would therefore conclude that the *Three Rivers (No 5)* principle has no application to litigation privilege.

LEGAL ADVICE PRIVILEGE

226. Paragraph 3.1 of the Draft Order sought an order that documents or parts thereof involving communications created for the dominant purpose of the defendants'

investigatory work could not be withheld from inspection on the grounds of legal advice privilege. In support of that case, Ms Oppenheimer relied on evidence that a large part of their work involved activities by way of investigation which it was said involved no legal skills or analysis, but were rather the type of activities ordinarily carried out by police such as interviewing, searches of premises and briefing and providing evidence to the public prosecutor; and, it was said, the work of a public prosecutor itself.

227. In Mr Allen's evidence he explains that there are very few documents for which legal advice privilege alone was claimed, because where documents were treated as attracting litigation privilege they were not reviewed separately for legal advice privilege. None were withheld on the basis of legal advice privilege alone in the original disclosure, and only a very few on that basis subsequently. This issue is not, therefore, of great significance in the light of my conclusions on the litigation privilege issues which are in the respondents' favour. The re-review required by my conclusions on the iniquity exception will not affect the nature of documentation caught by this issue, because to the extent that the iniquity exception applies more widely than was previously thought, it will prevent legal advice privilege arising, just as much as litigation privilege.

228. The approach to this issue is illuminated by the relevant principles summarised in *Jet2.com*, derived from earlier authority.

(1) For legal advice privilege to apply to a particular communication it has to be shown that its dominant purpose was legal advice given by a lawyer (at [70]-[96] and *Three Rivers (No 6)* at [50]).

(2) The advice must be legal advice, not commercial advice (at [46]). This means that the communication must be made "in a legal context", but in that context legal advice is widely defined (at [60]). It is not confined to advice on the application of the law, or to communications which expressly seek or give legal advice, but includes advice as to what the client should do in the relevant legal context (at [68] citing *Three Rivers (No 6)* at [62], derived from Taylor LJ in *Balabel v Air India* [1988] Ch 317, 330). It applies not just to legal advice as such, but to advice given with the benefit of the lawyer's skill as a lawyer or "through a lawyer's eyes" (at [67]). It applies to the "continuum of communications" aimed at "keeping both informed so that advice may be sought or given as required" (at [68] quoting from *Three Rivers (No 6)* at [111] again derived from Taylor LJ in *Balabel*).

(3) The terms of engagement of the lawyer, to give legal advice, are not determinative of whether the communication is in a legal context for these purposes, although they make a good starting point; the test for privilege must be applied document by document (at [67]).

(4) The privilege will attach not only to communications which fulfil these criteria but also to those which disseminate or would otherwise reveal their contents (at [45]).

(5) It follows from these criteria that most communications from and to the client are likely to be set in a legal context and to attract privilege, although a particular communication may not do so (at [69(ii)]).

229. There can be no real doubt that Dechert was appointed as a law firm for its legal expertise. Such legal expertise extends not only to advice on black letter law and its application to

particular facts, but also to the practical aspects of legal proceedings and preparations therefor, including advice as to what evidence can and should be sought in the legal context of its use in assessing liability and/or bringing proceedings. The skills of a lawyer extend to "taking statements", "assembling the facts and handling the evidence", and "an exercise in advocacy" in the words of Lord Carswell in *Three Rivers (No 6)* at [114]. That is a legal context which will generally cover investigatory work such as interviewing those suspected of crimes, or potential witnesses, and the presentation of evidence to a public prosecutor in a form which assists in relation to a potential prosecution, even to the extent (to use the words in one of the T18 documents) of bringing it to the prosecutor on a golden platter. Dechert was engaged in the investigatory process to bring their lawyers' skills to that process and to conduct it through lawyers' eyes. The evidence adduced on behalf of Mr Al Sadeq on this application does not establish that, as Ms Oppenheimer suggested, Dechert was "stepping into the shoes" of the public prosecutor, or acting as a "quasi-public prosecutor"; but had it been doing so, that would, in my view, involve acting in a legal context against the background of being instructed to provide legal advice in relation to suspected fraud. I would therefore reject Ms Oppenheimer's submission that because the work might also have been undertaken by a non-lawyer, such as a policeman or a public prosecutor, it fell outside the legal context in which Dechert was instructed as a global law firm. A blanket order of the width sought in paragraph 3.2 of the Draft Order, applying to all investigatory work, cannot be justified.

230. The issue therefore boils down to whether there are grounds for inferring that the respondents applied the test too widely to any documents which were concerned with some particular aspect or part of their investigatory role (there being very few such documents in which legal advice privilege alone was claimed at all). It is accepted by the respondents that any document created as part of a *purely* investigative role, divorced from the respondents' role as lawyers, would not be privileged. However, Mr Allen's evidence was that he applied the legal advice privilege test to each document over which that privilege has been claimed. The approach he and his team adopted was that Dechert and the individuals concerned were instructed as lawyers by its client, and their investigatory work was generally carried out in that context and capacity and using their professional skills as lawyers. That did not result in a blanket claim to legal advice privilege for all documents resulting from investigative work: a number of communications with the public prosecutor, for example, had been disclosed; and it was accepted that communications for the purposes of public relations did not attract legal advice privilege. I conclude that, subject to consideration of the further evidence, there is nothing from which it can be inferred that Mr Allen or his team wrongly claimed legal advice privilege in relation to communications involving any particular aspect of the respondents' investigative activities.

The Further Evidence application revisited

231. Ms Oppenheimer sought to rely on the T18 and T20 material as relevant to this issue. Mr Page instructed a team whose investigation gave rise to the RAK Project Reports, allegedly obtaining information by unlawful hacking. The respondents accept that for the purposes of the iniquity exception there is a prima facie case of such unlawful hacking. The material is said to be relevant to the current issue on the grounds that it shows that as part of the investigation, the product of the hacking was shared with and used by Dechert in the course of its investigation; and that much of the hacking appears to have been motivated not so much by concerns about fraudulent conduct by Dr Massaad but rather

by (i) concerns about his current business activities (ii) concerns about the publication of human rights abuses by the RAK government and/or Mr Al Sadeq and (iii) concerns about Dr Massad's relationship with the Ruler's brother; and that hacking or other unlawful evidence gathering activities were targeted at persons perceived to be associated with Mr Al Sadeq, specifically including his wife and an unidentified advisor to his legal team.

232. I have already observed that none of the T18 material, on which this is primarily based, meets the first limb of the *Ladd v Marshall* test. There is no good reason for admitting it in this context, any more than in the context of the issue as to the existence of the iniquities.

233. Moreover, assuming it to establish that which it is suggested it establishes, that would not justify the blanket order sought in relation to all Dechert's investigatory work; nor is there any more particular order fashioned and supported by a proper inference that legal advice privilege has wrongly been claimed in respect of any documents surrounding this aspect of Dechert's involvement. The substance of what the fresh evidence is relied on to show is that Dechert was communicating with Mr Page in respect of the activities of those Mr Page engaged, and receiving and using the fruits of those activities. If those activities were unlawful, that affects whether the iniquity exception is engaged (in respect of an iniquity which is not the subject matter of the present appeal, but which Mr Edey confirmed will require a further review to be undertaken in the light of amendments and proposed amendments to the P/C since the date of the disclosure application). But that apart, the nature of the activity does not assist Mr Al Sadeq's case on legal advice privilege in the present appeal. If a lawyer uses others to gather evidence, that is a classic example of activity within a legal context. Insofar as it is said to show that Dechert was to investigate (i) concerns about Dr Massaad's current business activities (ii) concerns about the publication of human rights abuses by the RAK government and/or Mr Al Sadeq and (iii) concerns about Dr Massaad's relationship with the Ruler's brother, again it is not self-evident that such investigations would not arise in a legal context.

234. Moreover, the material is addressed to particular aspects of Dechert's work, and it cannot justify a blanket prohibition on claiming legal advice privilege in relation to *any* of Dechert's investigatory work, which is the order sought, and which the Judge correctly rejected. The documentation relied on does nothing to support a submission that documents in relation to these aspects of Dechert's such activity have wrongly been withheld from disclosure on the grounds of legal advice privilege, in the few instances where such privilege has been invoked to withhold disclosure.

235. Ms Oppenheimer also relied on one particular document in the T20 material comprising an email sent by Mr Gerrard to Mr Page on 27 March 2015. The email referred to a meeting the previous week in which Mr Page had apparently offered to send Dechert a report in relation to Dr Massaad and others and their business interests. It continued: "We discussed how we might proceed going forward and in particular whether it would be appropriate that Dechert formally instruct you….so as to attempt to cover any work product under legal professional privilege. With this in mind we have cced the client and Gavin Watson [a Dechert partner] for their views."

236. The logical implication is that Mr Gerrard thought that by Dechert instructing Mr Page, privilege could attach where it would not have attached whilst Mr Page was engaged by the Ruler. Whether he was right about that, and if so the propriety of the suggested course, are not matters which I need to decide. Its only relevance in the present context is as to

Dechert's role, and in that context it is simply further evidence that Dechert was intended to receive and use Mr Page's "work product".

237. In this context, therefore, the T18 and T20 material fails to fulfil the second limb of *Ladd v Marshall* and should not be admitted for that reason.

238. I would accordingly refuse the further evidence application in this context too.

The Three Rivers (No 5) principle applicable to legal advice privilege

239. It is common ground that we are bound by the *Three Rivers (No 5)* principle in relation to legal advice privilege, and that the cross appeal must therefore be dismissed.

DELAY

240. This court has repeatedly emphasised the importance of judgments, even in complex matters, being delivered within three months, and the adverse impact of delay not just on the parties but also on public confidence in the justice system (see *Bank of St Petersburg v Arkhangelsky* [2020] EWCA Civ 408 at [84]). Delay, even inordinate and inexcusable delay, is not itself a ground for allowing an appeal, but where there has been lengthy delay an appellate court has to exercise special care in reviewing the judge's findings of fact and reasoning: see *Dansingani v Canara Bank* [2021] EWCA Civ 714, at [85]. As I have said, we are unaware of any reason for the length of the delay in this case, which in the absence of some exceptional personal circumstances is unacceptably long and regrettable. Nevertheless, the delay has not ultimately affected the approach to determining the issues which have arisen on the appeal.

CONCLUSION

241. I would therefore dispose of the appeal and cross appeal in accordance with the principles I have articulated, and hear the parties further on the form of an appropriate order in the light of those conclusions.

LORD JUSTICE MALES:

242. I agree.

LORD JUSTICE UNDERHILL:

243. I also agree.