Neutral Citation Number: [2012] EWHC 3539 (Comm)

Case No: 2012-834

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2012

Before :

MR JUSTICE ANDREW SMITH

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Between :

(1) Dar Al Arkan Real Estate Development Company (a company incorporated in the Kingdom of Saudi Arabia)	**Claimants**
(2) Bank Alkhair B.S.C.(c) formerly Unicorn Investment Bank B.S.C.(c) (a company incorporated in the Kingdom of Bahrain)	
- and –	
(1) Mr. Majid Al-Sayed Bader Hashim Al Refai	**Defendants**
(2) Kroll Associates U.K. Limited	
(3) Mr. Alexander Richardson	
(4) FTI Consulting Group Limited	

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Anthony Trace QC, Mark Warby QC, Andrew Ayres, Richard Munden, Rosanna Foskett and Narinder Jhittay
(instructed by **Dechert LLP**) for the Claimants

Daniel Toledano QC and David Peters
(instructed by **PCB Litigation LLP**) for the 1st Defendant

Craig Orr QC, Adam Wolanski, Nicholas Sloboda and Sophie Weber
(instructed by **Slaughter and May**) for the 2nd Defendant

Anthony Peto QC and David Lowe
(instructed by **Mishcon de Reya)** for the 3rd Defendant

Hearing dates: 6,7,8,12,13 and 14 November 2012

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Approved Judgment

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

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MR JUSTICE ANDREW SMITH

Mr Justice Andrew Smith :

1. The first defendant, Majid Al-Sayed Bader Hashim Al Refai ("Mr Al Refai"), the second defendant, Kroll Associates UK Limited ("Kroll") and the third defendant, Mr Alexander Richardson ("Mr Richardson"), apply to set aside orders made on ex parte applications on the grounds (i) that, when they applied to the court, the claimants did not make full and frank disclosure and misled the court in their evidence and submissions and (ii) the claimants have not complied with an associated undertaking to and order of the court. The claimants dispute that the orders should be set aside, and also submit that, even if some or all of them are set aside, I should replace them with new orders against the defendants to similar effect (except for an increase in the amount of a freezing order against Mr Al Refai).

2. There were other applications before me, including applications made by the claimants to cross-examine Mr Al Refai, Mr Richardson and Mr Thomas Everett-Heath, Kroll's managing director, on affidavits that they swore in response to an order made by Popplewell J on 18 June 2012. The claimants say that none of the affidavits complies with the order. The fourth defendant, FTI Consulting Group Limited ("FTI"), was not concerned with the applications that I heard and took no part in the hearing: there was some uncertainty about whether they had been given formal notice of it. The claimants have applied for permission to amend the claim form and to serve it on Mr. Al Refai out of the jurisdiction, Mr. Al Refai having indicated his intention to dispute the court's jurisdiction over the claims against him, but that application was not before me for determination.

3. This litigation is being pursued on the extravagant scale: the troublingly long particulars of claim (175 pages, plus a wealth of lengthy annexes) are signed by six pleaders; 14 counsel, including five leading counsel, appeared on these applications; the documentation in the thirty crammed (indeed over-crammed: see the Commercial Court Guide, appendix 10, 2(vii)) lever arch files was an embarras de richesse; and the citation of authority (even in support of the uncontroversial) was generous to a fault. That said, it would be graceless not to acknowledge the considerable help that I had from counsel on these applications.

4. The first claimant, Dar Al Arkan Real Estate Development Company ("DAAR"), a Saudi Arabian property development company, and the second claimant, Bank Alkhair BSC(c) ("BA"), a Bahraini registered investment bank, have common shareholders and directors, including Sheikh Yousef Al Shelash ("Sheikh Yousef"), who is chairman of them both, and Sheikh Abdullatif Al Shalash ("Sheikh Abdullatif"), who is the managing director of DAAR and a director of BA. According to the claimants' pleading, "The business of BA is dependent in part upon the custom of DAAR". Until August 2010 Mr Al Refai was the Chief Executive Officer and the Managing Director of BA. He has since his dismissal been involved in criminal and civil proceedings in Bahrain, and has apparently left Bahrain: the claimants believe that he is now living in Kuwait. He has been convicted in his absence by the Bahraini courts of offences including embezzlement and misuse of BA's funds, destruction of their documents, forgery and money laundering.

5. The claimants allege that Mr. Al Refai instigated a campaign after he was dismissed to discredit, damage and destroy their business "Whether out of frustration,

desperation or a desire for revenge" (to quote again from the claimants' pleading), and to this end he enlisted the assistance of Kroll, an English company, who provide investigatory, business intelligence and other services, of Mr Richardson, a chartered accountant with a home in England but who is apparently ordinarily resident in Bahrain where he has a business called Business Solutions Incorporated WLL ("BSI"), and of FTI, an English company, who provide public relations services; that in the course of such a campaign, which, according to the claimants, began in November 2010, the defendants went about harming the claimants' commercial relationships with third parties and with the "business and financial world at large"; and that they engaged in "wholesale publication of damaging and untrue allegations and smears against DAAR or BA or [Sheikh Yousef]", and to this end deployed a large amount of information and material confidential to BA and DAAR to which Mr Al Refai had had access when employed and which he took without authority. (They estimate that Mr. Al Refai removed 150,000 to 200,000 documents in breach of his contract of employment.) Specifically, the defendants are said to have conducted the campaign and disclosed such confidential information through a website (the "Website") that was launched in February 2012 and closed only after these proceedings were brought and the court had made the ex parte orders that are now challenged. (The evidence indicates that the Website was closed on about 4 August 2012.)

6. The claimants have asserted against the defendants six causes of action:

   i) Breach of confidence;

   ii) Conspiracy to injure using unlawful means ("unlawful means conspiracy");

   iii) Conspiracy the predominant purpose of which was to injure ("conspiracy to injure");

   iv) The tort of unlawful interference with business or commercial interests, or, as it is sometimes called, of causing loss by unlawful means;

   v) Defamation; and

   vi) Malicious falsehood.

   The claimants have not yet quantified their claim, but they estimate DAAR's loss to be at least $500 million and BA's loss to be at least $130 million. As I have said, the claimants have applied to amend their pleadings, and they intend (i) to include a claim against Mr Al Refai in breach of contract, and (ii) to bring claims under various foreign laws. These claims were not canvassed on the ex parte applications, and I have not heard argument about whether the amendments should be permitted. They do not arise for consideration in this judgment.

7. The defendants have not yet pleaded defences to the claims, but Kroll and Mr Richardson have made it clear that they will assert that what was published on the Website and elsewhere was true, and rely on what I shall call an "iniquity defence", a defence that the claimants seek to protect confidentiality in iniquity and that the publication was in the public interest. (Generally when I use the expression "iniquity defence", I refer also to a defence of justification to the defamation claims.) They

say that they disclosed through the Website breaches of regulations and other wrongdoing on the part of BA, in particular because of Sheikh Yousef's control of BA, because BA were involved with DAAR in improper dealings between related parties and because BA made misrepresentations about these matters to the Central Bank of Bahrain ("CBB").

8. It is convenient, before describing how the ex parte orders came to be made, to explain two other matters:

i) The claimants rely in support of their claim of breach of confidence upon the terms of Mr Al Refai's contract of employment dated 31 December 2003 (the "Employment Contract"), which provided at clause 12.2 that:

> "Upon termination of this Agreement, regardless of the time, manner or cause of the said termination, [Mr Al Refai] agrees to surrender to Unicorn all lists, books and records of or relating to Unicorn and its affiliates or Proprietary Information (as defined in Exhibit C) and all other property belonging to Unicorn and all affiliated businesses…".

(Apparently it was planned that The Unicorn Group should be the parent company of BA, who were formerly called Unicorn Investment Bank BSC, and for present purposes the reference to Unicorn can be taken to be to BA.) The essence of the definition of Proprietary Information (for it is not necessary to set out the full definition) is in paragraph 1.1 of Exhibit C:

> "… [Mr Al Refai] agrees, during the term of his … employment and forever thereafter, to keep confidential all information and material provided to him … by Unicorn, its customers, or by third parties in connection with the performance of his … services as an employee on behalf of Unicorn (hereinafter referred to as "Proprietary Information"), excepting only such information as is already known to the public…"

ii) Because, according to the claimants' evidence, financial institutions in Saudi Arabia typically only lend on a short-term basis, in order to raise longer-term funds DAAR issues sukuk (which, in effect, are bonds compliant with Islamic law) in the international markets. When the ex parte applications were made DAAR had three sukuk programmes in place, namely the so-called sukuk III, under which $1 billion was due for repayment on 16 July 2012 and sukuk IV, under which $450 million will be due for repayment in July 2015. It was the claimants' case on the ex parte applications that DAAR had planned to raise the $1 billion for repayment of sukuk II in the market; that, in the words of the affidavit dated 7 June 2012 of Mr Ikbal Daredia, BA's acting Chief Executive Officer, it had become "extremely difficult (if not impossible at present) to source funding for DAAR"; and that this was attributable to the Website and otherwise to the campaign of the first three defendants. (In this judgment, when I refer to the "defendants" I generally mean the first three defendants, leaving aside FTI.) According to Mr Daredia, "The result of this inability to

raise funding will mean that DAAR needs to and is selling substantial assets within its land bank in Saudi Arabia to be able to make repayment" and that DAAR would suffer losses in consequence.

9. These proceedings were brought by a claim form issued on 19 June 2012. Before it was issued, applications had been made to and orders made by Blair J and Popplewell J. On 31 May 2012, the claimants applied to Blair J for authorisation "(if and in so far as is necessary) … to disclose and deploy in court and otherwise use certain emails and other evidence" for the purposes of the proceedings including any interim injunctive relief. The application was made under section 55 of the Data Protection Act, 1998 (the "DPA"), which prohibits disclosure of "personal data" and makes it an offence to do so, subject to a number of exceptions including disclosure authorised by a court order. The application was supported by a witness statement of Mr Antony Dutton, a partner in Dechert LLP ("Dechert"), the claimants' solicitors, and was presented on their behalf by Mr Anthony Trace QC, Mr Andrew Ayres and Miss Rosanna Foskett. Blair J granted the authorisation sought, the claimants undertaking to make as soon as reasonably practicable an ex parte application for interim relief against Mr Al Refai, Kroll and Mr Richardson.

10. The reason that the claimants made this application under the DPA was explained by Mr Dutton: he said that the claimants had "come into possession of a quantity of data, which may constitute data under section 1 of the DPA, and which may have been procured unlawfully". The claimants reserved their position as to whether in fact the provisions of the DPA covered the material but wanted to protect themselves in any event. Mr Dutton explained that he had been told by Sheikh Abdullatif that the claimants had two hard drives which had been sent to DAAR by post anonymously, and they believed that they contained emails from mailboxes operated by Mr Al Refai and "potentially" from mailboxes operated by "individuals associated with Mr Al Refai". Sheikh Abdullatif had told him that the material had not been requested by anyone employed by the claimants or obtained at their instigation. The first drive had been sent to DAAR's legal department in an envelope which gave the sender's name as "Mohammed Al Qhatani" and on which was written an incomplete telephone number. Sheikh Abdullatif had instructed DAAR's "legal team" to send it to BA because the material apparently concerned them. DAAR had received the second disc on 26 April 2012 in its post office box, and similarly sent it to BA. Mr Dutton emphasised that, according to information given to him by Dr Salahuddin Almajthoob, the Managing Director of Special Projects at BA, the discs had been dealt with carefully: that "Following liaison with BA's IT team, it was decided to store the data contained on the hard drive on a laptop computer specially purchased for this purpose", with the intention both (i) of avoiding any risk of access by others at BA and so of preserving the privacy of the data and (ii) of ensuring that viruses or other damaging software were not downloaded on to BA's computer system. It was only then that the material had been reviewed by a Mr Zain Al Hamad, a Financial Analyst, who reported that the material appeared to be emails from mailboxes of Mr Al Refai and persons associated with him, and apparently provided evidence that the defendants were engaged in a conspiracy to injure the claimants by using information confidential to BA.

11. On 1 June 2012 the claimants applied ex parte to Popplewell J for interim relief, in accordance with the undertaking given to Blair J. They sought (i) injunctive relief to

prevent the disclosure of confidential information and documents belonging to BA, to prevent confidential information and documents being uploaded and displayed on the Website and to prevent the defendants from "furthering by conduct their revealed aim of causing financial loss to the claimants"; (ii) a worldwide freezing order against Mr Al Refai; and (iii) permission to serve the proceedings out of the jurisdiction on Mr Al Refai and Mr Richardson. They asserted claims in breach of confidence, unlawful means conspiracy, conspiracy to injure and causing loss by unlawful means, but not then in defamation or malicious falsehood. The applications were supported by affidavits of Sheikh Abdullatif, Mr Daredia and Dr Salahuddin Almajthoob, BA's Managing Director, Special Projects. These affidavits were still in draft on 1 June 2012 and were sworn, without material changes, only on 7 June 2012. They included evidence about the impact on the claimants of the defendants' actions and in particular of the Website, including evidence of difficulties that DAAR had had in obtaining finance, and evidence of Sheikh Abdullatif that shortly after the Website had been launched Standard & Poor's ("S&P") had on 7 March 2012 reduced its rating of DAAR from BB- to B+, S&P's report specifically mentioning the Website. Sheikh Abdullatif set out in his affidavit this passage from the S&P report, which referred not only to the change of rating but also to the fact that S&P had placed DAAR under "CreditWatch", meaning that they thought that they had identified a matter for concern about their creditworthiness:

> "An attempt to discredit the company was escalated last week when what appeared to be hundreds of company and third-party documents detailing these allegations were posted on a public website. Although these unproven allegations (regulatory breaches, false accounting, and failure to disclose related party transactions) have been known for some time, we are concerned that the company may be sensitive to investor and creditor sentiment running up to the refinancing.
>
> …
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> The CreditWatch placement reflects the short-term refinancing and reputational risk that we believe the company is facing… We will also be closely following what effect, if any, the allegations may have on the company."

12. Sheikh Abdullatif also gave evidence, consistent with that of Mr Dutton, about the circumstances in which the first hard drive was received by DAAR and what they did with it, but did not refer to the second hard drive. He said that on 10 April 2012 he received a call from "a member of DAAR's legal team", and was informed that DAAR had received a hard drive by post but they had not reviewed its contents. He instructed the "legal team" to send it to DAAR's IT department to check it for viruses and other malicious software and then to consider the data on it. After reviews by members of the legal team and the IT department, Sheikh Abdullatif was told that the "contents appeared to be emails from accounts apparently operated by Mr Al Refai". Sheikh Abdullatif stated that he "told the legal team that they must document the entire process of the receipt of the data, from the moment that it was collected from the PO box, and to document what they believed to be on the hard drive". He asked them also to keep the envelope in which it was delivered and to "take photographs of

the hard drive". He then told the legal team to send the drive to Ms Kubra Ali Mirza, BA's Chief Compliance Officer, since it might have "more relevance to BA than to DAAR". He spoke to Sheikh Yousef and to the Head of Internal Audit at DAAR and they recognised that the drive might contain personal information of Mr Al Refai. Therefore, Sheikh Abdullatif said, they nominated Dr Almajthoob's Special Projects team at BA to "take custody of the hard drive" and specifically Mr Al Hamad to be responsible for reviewing the data with a view to distinguishing what was and what was not relevant to BA or DAAR. Sheikh Abdullatif also took advice from Mr Olayan Alotaibi, then the Head of IT at DAAR, about storing the data and preserving its integrity, and was advised that the data should be loaded on to a separate computer that was not connected to DAAR's network, in order both to preserve the data and to protect DAAR's network from viruses. Sheikh Abdullatif concluded this part of his evidence as follows:

> "No one within DAAR asked for these emails to be procured. To the best of my knowledge, no payments have been made to any individual or entity in exchange for the information.
>
> Without waiving privilege, both DAAR and BA have sought advice in Bahrain and Saudi Arabia respectively in relation to the handling and viewing of this material. We remain comfortable that at all times our actions have been lawful."

Thus, the evidence presented the picture of a careful regime to protect data that DAAR had received without seeking it, of procedures to respect Mr Al Refai's right to have some of it kept confidential and of concern to act within the law.

13. As I have said, Sheikh Abdullatif did not refer in his affidavit to the second drive, but Dr Almajthoob referred to them both. He said that he understood that a package containing a hard drive was deposited in DAAR's mailbox "[a]round the middle of April 2012", that on 19 April 2012 it was transferred to Ms Mirza and that she provided it to members of his Special Projects team. The data was transferred to a laptop computer that was not connected to BA's servers, and it was reviewed in order to remove irrelevant information that was clearly personal to Mr Al Refai and to separate that which was considered relevant so that it could be provided to Dechert. He said that, "BA took legal advice in Bahrain as to its position vis-a-vis the receipt of the material. BA was advised that it was acceptable under Bahraini law to receive and review the material, as it was not procured on BA's request". As for the second drive, Dr Almajthoob said that a further package was received by DAAR "at the end of April 2012", that it was provided to his "team" on 26 April 2012 and that the emails were provided to Dechert for review.

14. Popplewell J did not make any order at that hearing on 1 June 2012: he considered that more time was required both to read the material presented by the claimants and for the hearing. The hearing was arranged, I was told, on the basis that two hours were required and that the judge should have reading time of one and a half hours. This was not a proper estimate: there was no deliberate attempt to railroad the court into granting the applications, but it was utterly unrealistic to suggest that in 90 minutes a judge could read and digest for an ex parte hearing a skeleton argument of 46 pages, over 130 pages of witness evidence and specified "key documents".

15. The applications were adjourned for a day's hearing on 14 June 2012, and Popplewell J reserved them to himself. Mr Trace suggested to Popplewell J on 1 June 2012 that nevertheless he should introduce "some of the more salient points", and addressed the court at some length: the hearing lasted an hour and a half. Towards the beginning of his observations, Mr Trace emphasised the evidence that the claimants "have had no hand in actually paying for or producing" the information on the drives, and that the "problem is that [they] do not know the provenance of the relevant material". This had also been emphasised in Mr Trace's skeleton argument for the hearing, in which he said that, "None of the [claimants] or their legal team have had any involvement in illegal or improper conduct. They are *therefore* entitled, it is submitted, to put this material before the Court as relevant evidence" (emphasis added). He returned to the point under the heading "Full and frank disclosure" and the sub-heading "The provenance of the new material", where he commented that its provenance had "rightly [been] given a prominent position", and acknowledged that it was highly likely that the material had been obtained by a third party by "inappropriate means", but submitted that the evidence was admissible and that the claimants themselves had "clean hands". At the hearing before me, the claimants emphasised that, even if the claimants had obtained improperly or even unlawfully the evidence upon which they relied, it would not make the evidence inadmissible: the court could and should receive it and consider whether its provenance affected its weight. I accept that, but it is not how the matter was presented to Popplewell J.

16. No less importantly in view of how matters have developed, Mr Trace also submitted that the defendants' "position has been protected by the careful conduct of the [claimants] since receiving the new material. It is correct that issues of legal professional privilege and personal privacy have yet to be resolved but all necessary safeguards can be put in place to protect the [defendants] …". He referred to privilege and privacy because the drives contained emails in which Mr Al Refai had legal privilege or were otherwise confidential and of no relevance to the claimants.

17. The applications were restored on 14 June 2012 for a full day's hearing. Mr Trace advanced them on the basis that the claims were governed by English law, not only so as to support the claimants' argument for English jurisdiction but so that the English law remedy of injunctive relief should be available: article 15 of the Rome II Regulation (the Regulation on the Law Applicable to Non-Contractual Obligations, COM/2003/0427). For this reason he sought to establish that England was "the country in which the damage occur[red]" within the meaning of article 4(1) of Rome II. Hence this exchange between Mr Trace and Popplewell J:

> "Popplewell J: So far as the torts are concerned, it is law of the country where the damage is suffered unless the tort is manifestly more closely connected with England for our purposes. If you do not get England … you have to show the torts are manifestly ones connected with England. On what basis do you say that damage is suffered here?
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> Mr Trace: The prime area is raising of finance here. It is not just the fact that one of the sukuks is on the London Stock Exchange.

> Popplewell J: You say "not just the fact"; that might give rise by the investors here but not the claimants [sic].
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> Mr Trace: The evidence is that they were advised to look at the leading market in the world, as the evidence says, in front of your Lordship. They looked at London. They issued their sukuk, particularly the second one, due in 2015. They looked for finance here and an awful lot of focus is on London. If here in London the yields are going all over the place in relation to their bonds and effectively all doors are being closed to them in London, then they are suffering financial loss here."

Later Mr Trace said,

> "… The breach of confidence we rely on is unlawful means but the guts of this and our final claim is predominant intent to injure directed at damage in England. We say it would be very odd indeed if that is not completely justiciable here governed by English law under Rome II. That is the primary way I put it this morning.
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> On the gateways [for permission for service out of the jurisdiction], … Obviously we serve Kroll because they are here. The gateways are important for D1 and D3. For D1 we have identified three as one must do. The damage suffered in England. …".

18. I should set out a further exchange that took place during the hearing on 14 June 2012. It was about the evidence of Dr Almajthoob, who stated in the context of evidence that Mr Al Refai has property in this country (to support the application for a freezing order), that he had been informed by "enquiry agents engaged by the Claimants" that certain "bank accounts are linked to or beneficially owned by Mr Al Refai", listing 17 bank accounts. Popplewell J asked about this evidence:

> "Popplewell J: The other thing that occurred to me was this: [Dr Almajthoob] makes reference to a number of bank accounts linked to or beneficially owned by Mr. Al Refai, on information from inquiry agents. Is that information that can have been lawfully obtained?
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> Mr Trace: My Lord, those present in court just do not know.
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> Popplewell J: *Prima facie* one would have thought certainly in relation to English bank accounts that will have been private investigators texting illegally, will it not?
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> Mr Trace: My Lord, yes. …"

19. I observe that Dr Almajthoob did not properly state the source of his information: the reference to enquiry agents engaged by the claimants was not adequate: see Masri v Consolidated Contractors International Co SAL, [2011] EWCA Civ 21, White Book,

32.15.4. This is a recurrent deficiency in the claimants' evidence, both that adduced at the ex parte hearings and later affidavits and statements, although all the witnesses have routinely and inaccurately stated that they give the source of information about facts and matters not within their own knowledge. This has much detracted from the quality of their evidence.

20. Popplewell J was not satisfied on 14 June 2012 that the claimants had shown a sufficient case that they had claims governed by English law, but was clearly troubled by the applications, and invited the claimants' representatives to make further submissions after more research. He observed that the importance of showing damage in England had "emerged as a point of most importance during the course of the afternoon" and that, as Mr Trace had formulated it, it had developed into "this point on reputation". He said that he wished to have longer to think about "the reputation aspect of it, particularly to look at the libel cases". At the end of the hearing that day, Popplewell J again made it clear that he remained concerned about whether damage had been suffered in England so that the governing law of the putative wrongs was English law, and therefore injunctive relief in respect of them was available. He said this:

> "It does seem to me that on that you have shown serious issue to be tried and on the question of whether the harm has already been done essentially and whether, when one takes into account the wider and narrow public interest, as the Vice-Chancellor as he then was in Femis described it, in terms of publication of the information. Those are all factors which weigh against the exercise of the discretion to grant interim relief in relation to proprietary information. Notwithstanding all those, it does seem to me at least right for the purposes of the period between now and the return date that the balance of convenience favours the grant of an injunction, subject to the governing law points."

(The reference to Femis was to Femis-Bank (Anguilla) Ltd and ors v Lazar and ors, [1991] Ch 391, in which Browne-Wilkinson V-C refused an interlocutory injunction to restrain the publication of defamatory material pending trial of a claim for conspiracy to injure.)

21. On 14 June 2012 Popplewell J only granted further authorisation under the DPA and made other procedural orders of no significance for present purposes. He adjourned the main applications for further consideration on 18 June 2012 of whether the claimants had a sufficient argument that they had suffered loss in England. On 15 June 2012 he sent a message to Mr Trace and asked for "further assistance on the question whether damage to reputation is a recoverable head of loss for the tortious causes of action advanced, adding "cf Addis v Gramophone", the decision of the House of Lords of Addis v Gramophone Co Ltd, [1909] AC 488 about the recoverability of damages for loss of reputation and resultant financial loss on the grounds of breach of contract and more specifically wrongful dismissal.

22. At the resumed hearing the claimants adduced further evidence by way of an affidavit of Mr Christian Tuddenham, a solicitor employed by Dechert, who exhibited:

i) A report from Forensic Risk Alliance ("FRA") about the importance of the London financial markets in Islamic or Sharia compliant financing and the importance of credit ratings and rating downgrades for companies seeking finance in the capital markets; and

ii) A letter that BA had written to the CBB on 22 April 2012 (the "CBB letter"), which was signed by Sheikh Yousef as Chairman of BA and headed "Response to the defamation allegation made against [BA]" and which said this about the Website: "The website makes various unproven allegations and accusations. It largely relies on false information, unauthenticated and forged documents, conflicting information, misrepresents and misconstrues certain facts to lead readers to incorrect conclusions".

23. Mr Trace provided a further skeleton argument dated 17 June 2012, in which he submitted that the claimants had suffered damage by way of:

> "a. Financial loss in London;
>
> b. Damage to their reputation in London;
>
> c. Damage by way of [the claimants] not receiving funding or not receiving funding on such favourable terms from financial institutions, which it would have been likely to receive, had the Website not been launched".

The skeleton referred to the concept that the reputation of a company, firm or business is divisible by locality so that a "local" reputation can be damaged, and Mr Trace continued as follows:

> "A question was raised by Popplewell J … whether "reputational damage" was a proper head of loss in tortious claims. The answer is yes in principle, although a (criticised) decision of the Court of Appeal holds that damages for "injury to reputation" are not recoverable in a 'lawful means conspiracy' … case, unless there are specific losses which can be shown rather than "airy-fairy general reputation in the business or commercial community".

He went on to consider the speeches of the House of Lords in Addis v Gramophone Co Ltd, and said that it followed from them "that "reputational damage" is plainly a recoverable head of loss in a tortious claim, as a matter of principle". Further, the skeleton said that, in view of the report of FRA, the claimants wished to advance claims in malicious falsehood and defamation (as well as the claims previously made.) (The Rome II Regulation does not, of course, apply to defamation.) The decision of the Court of Appeal to which the skeleton referred was Lonrho plc and ors v Fayed and ors (No 5), [1993] 1 WLR 1489, and it was said to have been criticised in McGregor on Damages (18th Ed, 2009). This was rather misleading: the editor of McGregor criticised what was said in the Lonrho case about whether damages for injury to feelings were recoverable, but did not make any criticism relevant to compensation for damage to reputation.

24. The hearing on 18 June 2012 lasted one and a quarter hours. After further submissions, Popplewell J concluded that the claimants had shown a sufficient case that damage had been suffered in England and that he should grant the relief that they sought. He said this:

> "It does seem to me that in the light of the further material, including in particular the expert's report and the submissions, you have satisfied me to the standard of a good arguable case of damage sustained in London by reference to the re-financing as well as by reference to reputation and an arguable case, a good arguable case, that reputation will do, and on that basis I am satisfied you are "over the hurdles" as it were, on proper law and in relation to the tort gateway."

25. Thus, on 18 June 2012 Popplewell J made these orders:

i) Non-disclosure orders against all the defendants.

ii) Document delivery orders (a) against all the defendants requiring them to deliver up to BA any documents (including electronically stored documents) that they knew or had reason to believe were Proprietary Information (as defined in the Employment Contract), and (b) against Mr Al Refai requiring him to deliver up other documents covered by clause 12.2 of the Employment Contract.

iii) Disclosure orders against all the defendants, requiring them to give information about disclosure to third parties of information or material that they knew or had reason to believe was Proprietary Information and to verify the disclosure (or to have the disclosure verified) on affidavit.

iv) Orders permitting the service of the proceedings out of the jurisdiction on Mr Al Refai and Mr Richardson.

v) A worldwide freezing order against Mr Al Refai, freezing his assets to a value of £100 million, together with orders about the provision of information about his assets.

26. I have sufficiently described the orders other than what I have (rather inexactly) labelled non-disclosure orders. I must set these out in full:

> "The Intended Defendants must not:
>
> 1. Disclose to anyone any information or material which is in, or comes into, their possession or control and which they know or have reason to believe is Proprietary Information;
>
> 2. Do anything which they know or have reason to believe would cause, assist in or facilitate the uploading of Proprietary Information to any website including, in particular, the website accessed with address http://sukuk-compliance.com and http://www.daralarkan-crisis.com;

> 3. Do anything which they know or have reason to believe would cause, assist in or facilitate the operation of the website accessed with address http://www.sukuk-compliance.com and http://www.daralarkan-crisis.com;
>
> 4. Do anything which they know or have reason to believe would cause, assist in or facilitate a breach of clause 12.2 and/or Exhibit C of the [Employment Contract] (the relevant provisions of which are referred to in Schedule C to this Order). "

27. The return date for the orders was 27 June 2012. The claimants gave the court an undertaking that they would "preserve and keep safe the original hard drives containing the Material and delivered to [DAAR] as described [by Sheikh Abdullatif in his affidavit]" (the "preservation undertaking"), the "Material" being defined as "the email documents, information and material received by [DAAR] and referred to [by Sheikh Abdullatif in his affidavit]". (The preservation undertaking referred to "the original hard drives … described in the first affidavit of [Sheikh Abdullatif]", although, as I have said, he described only one drive. This was an error: the intention was to refer to the two drives that, according to the claimants, were received by DAAR in April 2012, and when he gave oral evidence before me Sheikh Abdullatif confirmed that he so understood the undertaking. However, the undertaking assumed that drives were indeed delivered to DAAR as the claimants had said, and this is a contentious question.) The claimants gave a further undertaking (the "categorisation undertaking") that they would identify the Material that was personal or irrelevant to the proceedings and what was subject to legal professional privilege, with a view to preserving proper confidentiality in it and having unnecessary copies destroyed.

28. On 22 and 25 June 2012, Field J made minor changes to the order of 18 June 2012, and the case came before Popplewell J again on 27 June 2012, the return date. He extended the non-disclosure and other orders against the defendants, and he also made an order against the claimants (the "drives delivery order") in the following terms:

> "The original hard drives … shall be delivered as soon as reasonably practicable to the Claimants' solicitors (Dechert LLP) and preserved and kept safe in the London offices of Dechert LLP pending further order of the Court. Upon delivery of the Original Hard Drives to Dechert LLP in accordance with this Order, the Claimants shall be released from [the preservation undertaking]."

29. On 2 July 2012 Mr Dutton was in Bahrain and was provided with two drives that he was told by Mr S S Balram, who is or describes himself in correspondence as "General Counsel" to BA, were the "original hard drives" that had been delivered to DAAR. On 3 July 2012 Mr Dutton returned with them to London and arranged for them to be stored at Dechert's offices as contemplated by the drives delivery order.

30. After this order had been made on 27 June 2012, on 28 June 2012 Kroll's solicitors, Slaughter and May ("S&M") sought Dechert's consent to have an independent forensic expert examine the drives, asking when they expected to receive them in

London. After further correspondence, Dechert wrote to S&M on 6 July 2012, stating that the claimants had complied with the drives delivery order and that they had possession of the "Original Hard Drives". They also said that they did not think that it was "a priority" that they seek the claimants' consent that Kroll should have an expert examine the drives.

31. On 6 July 2012 Dechert arranged to have the drives examined by experts called Grey Heron IT Solutions Ltd ("Grey Heron"). Mr Craig Orr QC, who represented Kroll, criticised Dechert for being "wholly disingenuous" because they did so on the same day as they wrote to S&M that forensic investigation was not a priority. I do not consider this criticism justified (and, as I shall explain, any connotation that Dechert were being dishonest has been disavowed), and to my mind the criticism does not precisely reflect the correspondence: Dechert did not say that forensic examination was not a priority: they said that it was not a priority that they should obtain the claimants' consent for Kroll's expert to examine the drives.

32. What is more important is that Grey Heron, having had the drives examined by a Mr James Hinton, a Chief Technical Officer and certified penetration tester, informed Dechert on 7 July 2012 that the drives (which were together referred to as the "first set of drives" and individually as "HDD1" and "HDD2", labels that I adopt) contained material that may have originated from DAAR and that had been deleted from the drives. On 13 July 2012 Mr Dutton met Sheikh Yousef and Sheikh Abdullatif in Bahrain, and was told by Sheikh Yousef that the first set of drives were not the "original hard drives that had been delivered to [DAAR]", but copies of the originals. Sheikh Yousef told Mr Dutton that the first set of drives had been given to Mr Dutton "in error". (If this is so, of course, the claimants had still not complied with the drives delivery order.) On 18 July 2012 Mr Dutton went to the offices of DAAR in Riyadh and was provided by Mr Balram with two further hard drives (the "second set of drives", comprising what were referred to as "HDD3" and "HDD4") and was told by Mr Balram that the second set of drives were the "original" hard drives that had been delivered to DAAR. On 19 July 2012 Mr Dutton brought them to Dechert's London offices. Mr Orr observed, that, if the second set of drives are the "original" hard drives, they were not delivered to Dechert until some three weeks after the drives delivery order under which they were to be delivered "as soon as reasonably practicable". However, it can be said immediately that HDD3 and HDD4 were not received by DAAR in April 2012, and I understand that to be uncontroversial: as I shall explain, the undisputed evidence is that data was not loaded on to HDD4 until 30 May 2012.

33. Grey Heron examined the second set of drives, and on 23 July 2012 they reported to Dechert that there was material on one of the drives that had been deleted and that might have originated from DAAR. They also reported that there were indications that Dr Aimajthoob was the author of the material deleted from the first set of drives and one of the second set.

34. On 24 July 2012 Dechert, supposing that they had taken delivery of the "original" hard drives and therefore the drives delivery order had released the claimants from the preservation order, sent an email to the claimants reminding them of the undertakings in the order of 18 June 2012, and asking them to destroy copies of any material from

the drives (including all material relevant to the proceedings, a copy of which Dechert would retain).

35. On 25 July 2012 there was a hearing before Field J at which (i) the claimants joined FTI in the proceedings and obtained a non-disclosure order, a document delivery order and a disclosure order against them in similar terms to those against the other defendants, and (ii) the claimants applied to cross-examine Mr Everett-Heath of Kroll and Mr Richardson on affidavits that they had provided in response to the disclosure orders. The applications to cross-examine were opposed inter alia on the grounds that the claimants were apparently relying on evidence obtained by computer hacking but were not allowing Kroll to have an independent forensic examiner examine the drives. Faced with this argument, the claimants served a draft witness statement of Mr Dutton: it was finalised and signed on 29 July 2012. He explained what drives he had collected from the claimants, indicated the large amount of data on them and what was being done to comply with categorisation undertaking, and then stated that Grey Heron had informed Dechert that deleted material on both of the first set of drives and one of the second set of drives suggested that they "may have originated from [DAAR]" and that "deleted documents have been recovered by Grey Heron from the … three drives which contains metadata indicating that Dr Salahuddin Almajthoob is the author of those documents". Mr Dutton also said that Grey Heron had reported that deleted documents on the drives suggested that "a known 'hacker' has had access to the email accounts of [Mr Al Refai]", and that "it appears that an individual using the name 'HaCkOoR', which Grey Heron have informed my team is the known alias of a hacker by the name of Bassam Salman, has created Word documents (since deleted) which contain scanned images of emails taken from the email accounts of [Mr Al Refai]". Mr Dutton explained that, contrary to what he had been told by Sheikh Yousef, "Grey Heron's investigations to date …indicate that it is the 1st set of drives which are the Original Hard Drives as referred to in the First Affidavit of [Sheikh Abdullatif] sworn on 7 June 2012".

36. Field J ordered that FTI be joined as a defendant and gave injunctive relief against them, and he adjourned the claimants' applications for cross-examination to be heard at the same time as any applications for discharge of the orders against them that Kroll, Mr Richardson and FTI might make.

37. Mr Orr emphasised that Mr Dutton's witness statement was not served even in draft until very shortly before the hearing on 25 July 2012. Further it was only on 24 July 2012 that Dechert advised Kroll that the hard drives would be available for inspection by their expert the next day. He and Mr Jonathan Cotton, a partner in S&M on whose evidence Kroll rely, described the timing of the evidence as "tactical" and suggested that Dechert delayed as long as possible before allowing Kroll's expert to examine the drives. It is not clear to me what tactical advantage is said to have been sought by Mr Dutton, Dechert or the claimants: Mr Dutton is an experienced litigation solicitor, and it is difficult to suppose that they thought that, by serving evidence so shortly before the hearing on 25 July 2012, they would secure orders for the cross-examination of Mr Everett-Heath and Mr Richardson without the evidence being properly considered or that they would thereby deprive Kroll and Mr Richardson of any opportunity to answer it. Nor am I persuaded that I should attach significance to the timing of the invitation to inspect the drives. Clearly Mr Dutton and Dechert were working under great pressure, and I do not have enough information to conclude

that the evidence could or should have been served or inspection of the drives should have been allowed earlier than it was. I therefore am not persuaded of this particular complaint of Kroll.

38. On 7 September 2012 Kroll applied to have set aside or discharged practically all the orders in the proceedings as far as they affected them, and Mr Richardson made a similar application. Mr. Al Refai acknowledged service of these proceedings only on 5 October 2012, although they were served on him on 19 June 2012. On 16 October 2012 he applied to have discharged the orders made against him of 18 June 2012. All the defendants included in their notices applications to set aside the DPA orders, but I made it clear during the hearing that I do not propose to deal with those applications in this judgment, but shall invite further submissions about the DPA orders in light of it. None of the parties suggested that this was an inappropriate course.

39. Kroll engaged Stroz Friedberg LLP ("Stroz"), whose services include digital forensics, to inspect copies of the four hard drives and they prepared a report dated 7 September 2012. The conclusions of Mr Spencer Lynch, a Director, Digital Forensics at Stroz, from his analysis of the metadata included the following:

i) That the first set of drives was not a copy of the second set, and hacked data was loaded on to the first set before any hacked data was loaded on to the second set.

ii) That HDD1 contained data that had been loaded on to it between 5 and 28 March 2012, which was before data had been loaded on to any of the other three drives.

iii) That HDD1 appeared to have been in possession of users from DAAR on 7 March, 20 March and 25 March 2012 because HDD1 was connected to and accessed from DAAR's system on those dates.

iv) That on 20 March 2012 a user with a password or security identifier (referred to as a "SID") 1182 had copied on to HDD1 files containing hacked emails. It is agreed that 1182 was the SID of Mr Alotaibi.

v) That on 25 March 2012 certain data (the so-called "Budoor emails" from an account owned by Mr Al Refai's wife) had been obtained by hacking and shortly afterwards loaded on to HDD1, and that, as Stroz believed, HDD1 had been in possession of the hacker when these emails were loaded on to HDD1 at 7.00am. Shortly afterwards, at 9.36am, Mr Alotaibi's SID 1182 was used to have access to them.

vi) That HDD1 had contained two documents, one from Dr Almajthoob and one from Mr Alotaibi, that had been created before 10 April 2012 and had been deleted on 2 July 2012. Stroz were unable to identity the user who had deleted them, but it was someone on the DAAR common domain with SID 1668. There is no dispute that that is (or was) Sheikh Abdullatif's SID.

vii) That HDD4 contained hacked data that had been loaded on to it only on 30 May 2012, including data from five email accounts that was not on the other drives.

40. In his skeleton argument Mr Trace questioned this evidence. He relied upon a further report of Mr Hinton dated 15 October 2012 in which he pointed out that it is not possible from the information about SIDs to conclude who had hacked the emails found on the drives, and it is not suggested by the defendants that it is. Mr Hinton also said that "time stamps" from metadata do not provide reliable evidence because they depend on the Window Operating System clock of the machine on which a file is created, modified or accessed, and that is ultimately controlled by the user. I do not accept that this casts any real doubt upon what Mr Lynch said in his report about the timing of data on the drives. He acknowledged in his report of 7 September 2012 that time stamps can be unreliable and indeed that one of the drives, HDD3, appears to have unexplained anomalies in this regard. He pointed out in a further report of 24 October 2012 that his conclusions that at least some of the emails on HDD1 were copied to the drive while they were being downloaded from email accounts depend upon a comparison between two different time stamps, those generated by the remote servers hosting the email accounts from which the hacked emails were downloaded and those of the system associated with the copies of the emails on the drives that show the dates on which the file was created and last modified. While in theory both might be wrong, it is far-fetched to suppose that the timings of both are not only wrong but nevertheless consistent with each other, as they are in the case of HDD1, HDD2 and HDD4. In any case, DAAR have not given any evidence that the clock of their system explains away the findings of Mr Lynch. I add that Mr Hinton also suggested that Mr Lynch's conclusions might be compromised because of different time zones or the use of the Hijri rather than the Gregorian calendar, but this point too was convincingly answered: Mr Lynch's conclusions are supported by raw email header data, which record the times by reference to the universal time convention (or "UTC") and even if times are converted on a system for the purposes of display to the user, this does not affect the timings indicated by the metadata. In the end Mr Trace did not engage with these points or seek to answer them.

41. On 21 September 2012 Teare J ordered that the claimants make certain disclosure about the drives, including documents relevant to when, how and by whom the material on the four drives was obtained, documents relevant to when and why a copy was made (according to the claimants' account) of the second set to create the first set and documents relevant to any deletion of documents from any of the four drives. The claimants were to use their best endeavours to make this disclosure by 28 September 2012 and were in any event to make it by 12 October 2012.

42. On 28 September 2012 the claimants served in response to Teare J's order an affidavit of Dr Abdulrehman H Al Harkan, the General Manager of DAAR, who, having joined DAAR only on 29 May 2012, was asked on 10 September 2012 by DAAR's Executive Committee, to investigate the findings in forensic reports of IT experts. He stated that DAAR had not been able to identify any such documents or other material. They also served in draft an affidavit of Dr Almajthoob, to which he deposed on 3 October 2012 and to which I shall refer later. With regard to the deletion of documents, they served an affidavit dated 28 September 2012 in which Sheikh Abdullatif said that he had deleted from HDD1 a spreadsheet that Dr Almajthoob had

authored "because [he] believed that it must have been saved on to the hard drive in error by Dr Almajthoob following receipt of the hard drive from DAAR". He said that it had been created for the purpose of Bahraini criminal proceedings against Mr Al Refai and that it "had nothing to do with the English proceedings". He continued, "When I reviewed HDD1, and saw this spreadsheet was contained on the drive, I assumed that Dr Almajthoob had inadvertently saved the document on to the hard drive as opposed to on to his PC, in the course of working on the Bahraini action. I therefore deleted the spreadsheet. I did not, and do not, believe that this document was contained on the original hard drives received by DAAR". As I shall explain, although in this affidavit Sheikh Abdullatif referred to deleting only one document, it is now common ground and Sheikh Abdullatif has since acknowledged in later evidence that he deleted two.

43. At a hearing on 23 October 2012 of an application by Mr Al Refai for the worldwide freezing order against him to be varied, Cooke J considered whether Mr Al Refai was in breach of the document delivery order and the disclosure order, and so in contempt of court. He determined that he was, holding "It is clear that the order has not been complied with at this stage, because no affidavit has been produced in accordance with … the order and a letter purporting to give details of disclosure of the proprietary information to third parties was supplied last night. That letter in itself does not tell one very much …. I am not … satisfied that there had been compliance with the order of the court and that the contempt has at this stage been purged". Mr Al Refai claims that he has now taken proper steps to remedy this, but I need not examine what he has done and whether he has now done what was required of him.

44. The defendants apply to have set aside the non-disclosure orders, the document delivery orders and the disclosure orders made on 18 June 2012, and they resist the claimants' contention that, if orders are set aside, they should be replaced with new orders to the same effect on two main grounds:

    i) Breach by the claimants of their duty on the ex parte applications in that they not only failed to make full and frank disclosure to Popplewell J but, on the contrary, misrepresented matters to him and thereafter they have failed to correct the untruths, errors and inadequacies in their presentation; and

    ii) Breach by the claimants of the preservation undertaking and the drives delivery order.

    Mr Al Refai applies to have set aside the permission for service out of the jurisdiction and the world wide freezing order on the same grounds.

45. I must consider whether the defendants have proved their grounds for setting aside the ex parte orders. They must establish them to the civil standard: see St Merryn Meat Ltd and ors v Hawkins and ors, [2001] CP Rep 116 at para 11 and JSC BTS Bank v Granton Trade Ltd and ors, [2012] EWCA Civ 564 at paras 19-21. The defendants submit that the claimants acted dishonestly and in bad faith both in obtaining the ex parte orders and in respect of the preservation undertaking and the drives delivery order: the authorities to which I have referred acknowledge that in deciding whether allegations are proved to the civil standard the court has regard to the nature of the

allegations, and when, as here, there are serious allegations of dishonesty and other impropriety, the more cogent must be the evidence to establish them.

46. The defendants also criticise the claimants' advisers, and in particular Mr Dutton, but they do not allege that the advisers acted dishonestly or in bad faith. They were, in my judgment, right not to do so, but in view of the nature of the defendants' complaints I should state specifically that I have seen no material that would support an allegation of that kind against Mr Dutton or Dechert or counsel instructed by them.

47. The parties served a great deal of written evidence on these applications, and I must examine the defendants' allegations at some length. The court often declines to enter upon a detailed examination of this kind upon an application to set aside orders obtained ex parte on the grounds of non-disclosure: thus it was said by Toulson J in Crown Resources AG v Vinogradsky and ors (unreported 15 June 2001) that, "Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of the non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself". The court will, I think, adopt much the same approach on applications to set aside interlocutory orders on other grounds such as alleged breach of orders or undertakings. But the court is not inflexible in the approach that it will adopt, and I have concluded that I should examine the defendants' complaints more fully than is sometimes appropriate and make findings upon their allegations. The position here is, perhaps, rather different from that contemplated by Toulson J: the defendants' allegations are not about matters that will need to be determined in order to determine the claims brought in these proceedings, although possibly issues about what evidence should be admissible at trial will give rise to similar questions. But, more importantly to my mind, the defendants make allegations which, in my judgment, should be examined not only so that the defendants are not subjected to orders that were not properly obtained but also in the public interest to protect the court against abuse of its procedures of the kind that, if the allegations are made out, has occurred in this case.

48. That said, I do not overlook that there has not been a hearing with full oral evidence after disclosure and other procedures that assist the determination of the facts in cases of this kind, and I must, of course, be satisfied before concluding that the grounds for discharging an order have been proved that it is fair to do so, having regard to the nature of the allegation and the nature and course of the hearing before the court: JSC BTA Bank v Granton Trade Ltd and ors, [2012] EWCA 564 Civ at para 21, approving the observations of Christopher Clarke J at [2011] EWHC 2506 (Comm) at para 123. As I shall explain, I do not consider it fair to determine all the disputed facts for this reason.

49. At the start of the hearing before me it appeared that the applications were to be determined on the basis of only written evidence. However, when Mr Orr, who represented Kroll, cited the judgments in the JSC BTA Bank case and St Merryn Meat Ltd and ors v Hawkins and ors, [2001] CP Rep 116, which refer to the possibility of cross-examination on applications of this kind, I asked counsel to confirm this. The

defendants did not apply to cross-examine any witnesses, but Mr Trace said that the claimants would tender for cross-examination Sheikh Abdullatif and Dr Almajthoob. Later he said that they also tendered Dr Harkan for cross-examination about his investigation and his conclusions. No notice of these offers had been given. I allowed the defendants to cross-examine these witnesses, but I limited the time for this to three hours, making it clear that I did not expect them to challenge the witnesses on everything that was in dispute. (In the event, I allowed a few minutes more than three hours.) With the agreement of the other defendants, the cross-examination was conducted by Mr Orr. For reasons that I shall explain later in my judgment, I was driven to conclude from the cross-examination of Sheikh Abdullatif and Dr Almajthoob that they were dishonest witnesses and that their evidence was untruthful. I do not so regard Dr Harkan, but it was clear that his evidence of important matters depended entirely upon what he had been told by others, and therefore it was of limited value.

50. It is convenient first to examine the evidence that the claimants are in breach of the preservation undertaking and the drives delivery order. Mr Trace did not submit that the claimants have met the court's requirements of them. Assuming for present purposes that drives were delivered to DAAR through the post in April 2012 as they described in their evidence, I cannot tell whether they were the first set of drives delivered to Dechert on 2 July 2012. If they were not, the claimants have not delivered the "Original Hard Drives" to Dechert as required by the drives delivery order. However, if they were, then the claimants did not preserve the drives as required by the preservation order: HDD1 was one of the Original Hard Drives, and the claimants did not preserve it because Sheikh Abdullatif deleted from it two documents.

51. Both documents were of some significance, and support the defendants' contention that the claimants were party to unlawful hacking of emails. One is the spreadsheet to which Sheikh Abdullatif referred in his affidavit of 28 September 2012. It is a Microsoft Office Excel document, and during the hearing before me it was sometimes referred to as "the list". It sets out personal details (such as ID numbers and passport numbers) of Mr Al Refai and persons with whom he was associated, including, for example, his wife and his personal accountant; and it gives details of companies and other entities with which he was associated. According to Dr Almajthoob, work on compiling the information began in December 2011, and the forensic evidence indicates that the document was created by Dr Almajthoob on 21 February 2012. On 4 March 2012 Dr Almajthoob sent it by email to Sheikh Abdullatif. It was apparently last modified by Mr Alotaibi on 11 March 2012. There could have been no dispute that it was used to hack into emails, and Mr Orr submitted that that was its purpose and that Dr Almajthoob and Mr Alotaibi were complicit in the hacking.

52. The other document was referred to as the "Webhosting" document, and it is a Microsoft Word document. It states what apparently is (or was) an email address of Mr Al Refai's accountant and there are unexplained details that might be the password for the account. It then sets out an address of the Website and an exchange between Mr Salman and the entity that hosted the Website, and that used the name "Hostkey support". It appears clear that Mr Salman was impersonating the person who owned the Website, and obtained confirmation from Hostkey support that they

had the Website on their servers. The inference is, Mr Orr submitted, that Mr Salman had obtained enough personal information about Mr Al Refai to do so, and was seeking to find out information about the Website and where it was hosted in order to have it closed down. The forensic evidence indicates that Mr Alotaibi had access to the Webhosting document at least on 4 March 2012 because the metadata indicates that it was "last modified" by him (or someone using his SID) on that date.

53. A failure to comply with undertakings or orders of this kind can justify the court discharging interim relief: see Crown Resources AG v Vinogradsky and ors, unrep, 15 June 2001 and Gill & ors v Flightwise Travel Service Ltd and anor, [2003] EWHC 3082 (Ch) at para 28. The claimants submit that nevertheless the orders that Popplewell J made against the defendants should not be discharged for these reasons:

    i) Despite these failures, the claimants were not guilty of an abuse of the court's process.

    ii) Their failures to comply with the preservation undertaking and the drives delivery order were not deliberate.

    iii) Their failures to comply with the preservation undertaking and the drives delivery order are understandable**.**

    iv) The claimants have given a candid explanation about how they handled the drives and have not been underhand.

    v) The failures have not prejudiced the defendants.

    vi) The claimants have apologised for the failures.

54. The first point apparently derives from the judgment of Toulson J in the Crown Resources case. He was asked to discharge a worldwide freezing order on the grounds (i) of non-disclosure and misrepresentation on the ex parte application on which it was granted and (ii) of subsequent breaches of undertakings and other alleged breach of process. As for the second ground, Toulson J said that three questions were to be asked: whether the claimant was in breach of an undertaking; whether there was an abuse of process; and what action the court should take. Mr Trace, as I understood him, relied upon this authority to submit that the court does not discharge an order obtained on the grounds of breach of a related undertaking or order unless it can be said that the breach was such that it was an abuse of the court's process. I do not so understand Toulson J. The three questions that he identified simply reflected the grounds upon how the application to discharge the freezing order was presented before him. I do not accept that otherwise Toulson J would have identified as a separate question whether there was an abuse of process. The court will in an appropriate case discharge an order on the grounds of breach of a related order or undertaking without engaging with the question whether the breach is to be labelled as an abuse of process or gives rise to an abuse of process. Although the decision whether to discharge the order will depend upon all the circumstances, it will generally be a distraction to enter upon a distinct inquiry about abuse unless (as in the Crown Resources case but not in this case) the application to discharge is specifically put on the grounds of abuse of process.

55. Having served Dr Harkan's evidence of 28 September 2012 in reply to Teare J's order, on 15 October 2012 the claimants served further evidence about the hard drives: an affidavit of Dr Harkan, an affidavit of Sheikh Abdullatif, a witness statement of Mr Alotaibi, an affidavit of Dr Almajthoob and a witness statement of a Mr Ali Saleh A Alothaim. Since an important part of the defendants' submission is that the claimants here too gave a dishonest account about how the drives came into their possession and the handling of the data, I must examine this evidence.

56. Dr Harkan explained that he had been tasked by DAAR's Executive Committee on 10 September 2012 with investigating the questions raised by the Stroz report. His conclusions from his investigation included these:

    i) On 4 June 2012 DAAR received "a third hard drive" (the "third drive"), and Sheikh Abdullatif learned about this "around mid-June".

    ii) DAAR staff had made "multiple copies" of the drives originally received through the post.

    iii) DAAR provided to Dechert the first set of drives "in the belief that the Order of Mr Justice Popplewell dated 27 June 2012 required DAAR to hand over to its lawyers exact copies of the original data" that they had received, and DAAR had not appreciated that they were to hand over the drives themselves. This was because of "difficulties in language and translation, and a lack of IT knowledge".

    iv) The hard drives received by DAAR were "handled carelessly". Dr Harkan said that the drives originally received through the post were "mixed up with other drives already held by DAAR". He was "unable to say for certain which (if any) of the four hard drives which were handed to Dechert LLP on 2 and 18 July … are physically the Original Drives. If it is established that none of the four hard drives that were provided to Dechert LLP are the Original Drives, then I am unable to say for certain where else the Original Drives are".

    v) When they received the hard drives "in early April 2012 (which was also when the system for receiving hard drives was put in place) no-one within DAAR anticipated that the Original Drives (or any copies thereof) would form part of the evidence in support of a conspiracy claim (or any other proceedings)" against the defendants.

    Dr Harkan, as I have said, had no direct knowledge of these matters. He set out what he learned from his investigation, but his affidavit did not state the source of his information except that Mr Abdulrahman Al-Rasheed, the head of DAAR's Legal Department, told him that the Original Drives were received on 10 April 2012, 26 April 2012 and 4 June 2012 and that the first two drives were delivered to Ms Mirza under cover of memoranda and the third was delivered "informally to the BA team".

57. Sheikh Abdullatif made an affidavit in which he apologised for deleting from the first set of drives a "folder" (rather than the single document referred to in his affidavit of 28 September 2012). He also said that:

i) DAAR had tried to close the Website by engaging an Austrian firm, Information Security Consulting, who had suggested that Mr Al Refai's email details would be useful in applying "legitimate social engineering methods" to bring down the Website. He said that he therefore obtained from Dr Almajthoob the spreadsheet and sent it to Mr Alotaibi.

ii) As had become apparent from an investigation of Dr Harkan, a third hard drive had "arrived to DAAR in the post on 4 June 2012".

iii) He was "prepared to accept that the data contained in those envelopes [sent anonymously] may have been received by DAAR prior to those dates [when drives were received through the post]".

The claimants had not previously in these proceedings referred to attempts themselves to close the Website by such methods, although they had said that they obtained a ruling from the World Intellectual Property Organisation ordering the return of a domain-name, and with the assistance of the authorities in the Kingdom of Saudi Arabia and Bahrain, in March 2012 they were able to block access to the Website in those countries, but not elsewhere. Nor had they previously referred to the third drive, or indicated that they might have had data found on the drives before they received the drives through the post.

58. Mr Alotaibi made an affidavit in which he said that he did not hack emails belonging to Mr Al Refai. He did not further respond to the evidence in the Stroz report of his apparent association with downloading and copying hacked email, and said nothing about whether he had known of the hacking or knew who was responsible for it. With regard to suggestions of email data being copied on to the drives before the dates in April when they were said to have been received by DAAR, Mr Alotaibi confirmed that he had "conducted many copying activities; this was done in response to requests from different departments that were analysing the received data, which was done at different times using different computers and hard disks. Neither the accuracy of the timestamp nor the original source of the data can be confirmed." He confirmed that the spreadsheet had been authored by Dr Almajthoob and that later, he believed on around 4 or 5 March 2012, Sheikh Abdullatif had "handed [him] the document on a USB drive" since he was co-ordinating a "social engineering attempt to bring down the Website". He and others had modified the spreadsheet, and he provided the spreadsheet to investors or their "investor relations officers" to assist attempts by investors to bring down the Website.

59. The claimants also served a statement dated 15 October 2012 from Mr Alothaim, who describes himself as a Saudi Arabian businessman and shareholder in DAAR and who gave this account of his responsibility for sending DAAR the drives. On about 29 February 2012 he learned of the "Websites" at two website addresses, and on immediately viewing them saw that "each contained a number of very serious and damaging accusations about me and my businesses". He therefore sought to close the websites, and "put pressure on the Claimants to act" and also took steps of his own. As well as trying to involve regulatory authorities, he explored "technical means" to shut down the Website (or Websites), and he learned from DAAR that Mr Al Refai had probably launched it. Mr Salman, whom he described as "an IT expert employed by one of my businesses", told him that websites could be brought down

"remotely". Mr Salman's first attempts to bring down the Website were unsuccessful, and he advised Mr Alothaim that he needed passwords or some other way of impersonating the owner or administrator of the Website. "Within the first week of March" 2012 Mr Alothaim visited DAAR's offices and told Mr Alotaibi that "a friend" had offered to try to bring down the Website but needed detailed information about Mr Al Refai. Mr Alotaibi told him that he had a list of email addresses and provided him with a memory stick containing them. Mr Alothaim said that he passed the memory stick to Mr Salman without examining it. "Towards the end of March" 2012 Mr Salman told him that, while trying to find access codes for the Website, he had hacked into email accounts and come upon emails that suggested that Mr Al Refai and others were involved in a concerted effort to discredit Mr Alothaim, the claimants and others. He showed Mr Alothaim some 20 emails that indicated this and said that he had discovered many more. Mr Alothaim said that he sought advice from an internal legal adviser in around the first week of April 2012 and was advised that he was under an obligation to "turn over the material in [his] possession" to DAAR. He decided with the adviser that they should send the material anonymously. Therefore the material was transferred to a hard disc and on or around 10 April 2012 one of his staff sent the disc to DAAR by post. Mr Salman continued to find emails on Mr Al Refai's accounts and provided the data to Mr Alothaim, and "around 26 April 2012" Mr Alothaim posted it to DAAR in the same way as before. Mr Alothaim then instructed Mr Salman to stop his activities but "later in May" Mr. Salman reported that he had found more data and Mr Alothaim sent that too to DAAR's legal department anonymously. He did not tell the claimants that he was the sender of the drives until "late September 2012" when he telephoned Sheikh Abdullatif for information about these proceedings (his statement referred to legal proceedings that *he* had started in England but that, I think, must be a mistake) and Sheikh Abdullatif told him that DAAR were trying to learn who had sent the drives. Mr Alothaim did not respond on that occasion or in a later telephone conversation with Sheikh Abdullatif, but when he met Sheikh Abdullatif at a social event "around last week of September 2012" he told him that he had been responsible for sending the drives.

60. Dr Almajthoob in his affidavit confirmed that he was the original author of the spreadsheet: he said that he prepared a version of it in connection with Bahraini criminal proceedings against Mr Al Refai. He said that on 6 March 2012 he sent Sheikh Abdullatif an email to which he attached a version of it. A few days later Sheikh Abdullatif asked for a second version of the document and Dr Almajthoob provided it. Although he said that he was not the author of the document on HDD1 in its entirety, "the last few email addresses [which were specifically requested by Sheikh Abdullatif] may have been added by [him] when [he] gave [Sheikh Abdullatif] the List Document for the second time, although I am not certain of this".

61. I must consider whether the claimants have given a candid explanation of their failures to comply with their obligations to the court when handling the drives so as to comply with Popplewell J's orders. Mr Orr submitted that their evidence of 15 October 2012 about this and their evidence in cross-examination was untruthful and dishonest.

62. In his oral evidence Sheikh Abdullatif accepted that he was aware of the drives delivery order when it was made but he said that "our" understanding was that it was

directed to the "substance" or to the contents of the drives rather than to the drives themselves: that is to say, the obligation was not to deliver the physical drives but the data that had been on them when DAAR had received them. He said that on 2 July 2012 Mr Dutton came to DAAR's offices in Riyadh to collect the drives. Sheikh Abdullatif was in a meeting with about twelve of his "finance people": he was discussing the Website, the position of DAAR's investors and the need to raise funds to repay Sukuk II. Mr Balram, one of DAAR's lawyers (as I have said, he described himself as General Counsel, but Sheikh Abdullatif did not recall him having that title), came into the meeting with two hard drives. (Sheikh Abdullatif said that Mr Balram brought two hard drives only when he was cross-examined: in his affidavit he had referred only to the drive from which he deleted documents, HDD1.) Mr Balram asked Sheikh Abdullatif whether they were the drives that he should give to Mr Dutton. Sheikh Abdullatif said that he connected a drive to his laptop computer: he believed that he first disconnected the laptop because he was concerned that the drive should not contaminate the network. He said that he "reviewed the documents within that hard drive", but agreed in cross-examination that it contained 50,000 emails and that he could not have reviewed all the documents on the drive. He saw a folder marked "general", opened it, saw that it contained two documents and recognised them. They were a spreadsheet that Dr Almajthoob had sent him in March 2012 and the Webhosting document, which he had not previously seen but took to be a document of Mr Alotaibi or Dr Almajthoob. He did not know that Mr Salman, to whom the Website document referred, hacked computers. He described the spreadsheet and the Webhosting document as "irrelevant" to the documents that he had seen when the drive arrived with DAAR: it had contained emails and he "presumed" that this folder and these documents had been saved after the drive had been received. He therefore deleted them. He opened three or four other folders to check whether more documents had been loaded on to the drive since DAAR had received it. He saw that the drive contained Microsoft Outlook files. He opened and "checked" the second drive "at the same time". He did not tell Mr Balram, who was standing by him at the time, what he had done so, and he did not tell Mr Dutton. He explained his thinking on 2 July 2012 as follows:

> "… this was not really a big issue to us in many ways. In an innocent way, I thought these documents are really irrelevant to the case, and irrelevant even to the hard drive. I thought they were contaminating the hard drives in a way, or the data within that hard drive. Therefore I thought to remove them."

63. Sheikh Abdullatif said in cross-examination that at a meeting on 13 July 2012, after the first Grey Heron report had been received, Mr Dutton told him that two documents had been deleted from the drive, but he did not tell Mr Dutton that he had deleted them himself. His only explanation for this was that there had, he thought, been no discussion about who had deleted them. However, DAAR enquired of the legal department and the IT department about "the other original hard drives, that we believed to be the originals to be delivered to Mr Dutton", and they were provided to him.

64. Sheikh Abdullatif later read the report that Grey Heron made on 27 July 2012. He realised that they had identified the two documents that he had deleted, but, while he discussed this and the importance of the documents "internally", he still did not tell

Mr Dutton that he had deleted them or take any steps to have this explained to this court. He agreed that he admitted to deleting the documents only after the Stroz report had identified his SID and Teare J had on 21 September 2012 ordered disclosure of relevant documents. He then swore his affidavit in which he accepted that he had deleted "a file", by which, he told me, he meant a folder.

65. Mr Orr submitted that Sheikh Abdullatif's use of the expression "file" was dishonest because he deleted a folder containing two files. I am not impressed by that submission: I accept that Sheikh Abdullatif might simply have been imprecise in his use of the term "file": he said "My view of the file is being the general folder". There would have been no point after Mr Lynch's report in him accepting that he deleted the spreadsheet but not the Webhosting document.

66. However, I reject Sheikh Abdullatif's account of deleting the documents and his explanation for doing so, and do not accept that the claimants have now given a full and honest explanation about how and why they were deleted. This is not just because it is so remarkable that the two deleted documents both cast doubt upon the claimants' denial that they had had any association with the hacking of the emails of Mr Al Refai and others associated with him. I also find it impossible to accept:

i) That Sheikh Abdullatif would have interrupted a meeting of some 12 people dealing with what he described as "frantic, ongoing efforts to raise additional funds and manage damage caused by the Website" in order to review drives brought to him by Mr Balram. He himself explained in cross-examination he was "a managing director of a big institution" who "sit[s] on the board of various institutions" and was not "the policeman for the hard drive: I have many people that I employ, that actually work and assisting me in these things".

ii) Sheikh Abdullatif's evidence about disconnecting his laptop from DAAR's system. He said this, I infer, because, when explaining how the drives were handled when they were received by DAAR, he had given evidence that he was concerned that they should not contaminate DAAR's system. However, Stroz were able to ascertain that the documents had been deleted by someone using his SID because in fact Sheikh Abdullatif was logged on to the system when he deleted the files.

iii) That Sheikh Abdullatif looked at the hard drive as he described and happened to spot the folder. HDD1 alone contains some 50,000 files in many folders, but Sheikh Abdullatif told me that "I only been in that hard drive for, I believe, seconds". He sought to explain that he readily found the folder because it did not contain Outlook email files, but there were other folders on HDD1 comprising word files.

iv) His evidence about finding the Webhosting document, to which he had not referred in his affidavit of 28 September 2012 and which he told me he had not seen before 2 July 2012. If, as he said, he had then read the document for the first time, and seen that it showed who was hosting the Website and that someone called Bassam Salman had been in contact with them, this would have struck him immediately as important information and he would have

spoken to others about it. I find incredible his evidence that he have spent not "much time even looking at this document because I felt it's a copy and paste of a chat" and "part of … documentation that belongs either to [Mr Alotaibi] or to [Dr Almajthoob]".

v) That, if, as Sheikh Abdullatif said, Mr Balram had been standing next to him while he deleted the documents, he would have said nothing to him about what he was doing.

vi) His explanation for not telling Dechert what he had done.

67. I am no more convinced by Sheikh Abdullatif's explanation that he deleted the documents because he thought that the claimants were required to deliver to Dechert the data on the drives that they had received rather than the drives themselves. I do not accept that he or anyone at DAAR misinterpreted the preservation undertaking or the disc delivery order. Mr Trace told me that he did not contend that Sheikh Abdullatif (or any of the claimants' witnesses) was disadvantaged because English is not his first language, and my own impression is that this would not explain a misunderstanding on Sheikh Abdullatif's part: he had been educated in the USA. The background to Sheikh Abdullatif deleting the documents on 2 July 2012 was that, after the order of Popplewell J on 27 June 2012, S&M had written to Dechert on 28 June 2012 seeking their agreement that an independent forensic expert might examine "the disks", and Dechert replied on 30 June 2012 that they were taking instructions although S&M had given no reason that Kroll should be entitled to "examine the hard drives". Clearly S&M's request to examine the "disks" (not just data) was conveyed to DAAR. In any case, if Sheikh Abdullatif had thought that DAAR were to deliver the data that was on the drives when they received them, his response to finding the two supposedly errant documents would have been (i) to check whether the data on the drives had been altered in other ways, and (ii) to ask Mr Balram or Mr Dutton or both what he should do. He did neither of these things.

68. My conclusion that I should reject Sheikh Abdullatif's evidence about this is corroborated because, when he was told by Mr Dutton that Grey Heron had detected the two deleted documents, he did not explain that this was because he had misunderstood what the court orders required. If his account were true, he would have said that Dechert had not properly explained them. He certainly would have told Dechert what he had done when he read the reports of Grey Heron and Stroz. In fact, he explained this only when faced with the court's order of 21 September 2012.

69. I am driven also to reject as dishonest other parts of the evidence of the claimants' witnesses, including parts of their oral evidence when cross-examined. This too belies the claimants' contention that they are concerned now candidly to correct any errors or omissions in their evidence on the ex parte applications. I refer to (i) Dr Almajthoob's evidence about how the claimants obtained information about Mr Al Refai's bank accounts and (ii) the third drive.

70. As I have said, Dr Almajthoob referred to Mr Al Refai's bank accounts in his affidavit that was presented to the court in draft on 1 June 2012 and that he swore on 7 June 2012. He gave evidence about Mr Al Refai's property in support of the claimant's application for a freezing order, and in this context he said (in both the draft and the

sworn affidavit) that "enquiry agents engaged by the claimants" had informed him of details (including the numbers) of 17 bank accounts that were said to be "linked to or beneficially owned by Mr Al Refai". They included three accounts the holder of which was iLegacy Limited ("iLegacy"). I have referred at paragraph 18 above to Popplewell J's enquiry about this evidence on 14 June 2012. On 23 July 2012 S&M wrote to Dechert asking who the enquiry agents were, citing the judgment of the Court of Appeal in the Masri case (cit sup), but on 2 August 2012 Dechert responded that S&M's request was not supported by the authority. After further correspondence, on 6 September 2012 Kroll applied for (inter alia) disclosure of documents relating to the enquiry agents. The disclosure was resisted, the documents being described as "probably legally privileged material", but it was ordered by Teare J on 21 September 2012.

71. Although the claimants initially disclosed no documents in response to the order, Dr Almajthoob said in the affidavit served in draft on 28 September 2012 that:

> "Following a receipt of a request on behalf of [Kroll] for information regarding these enquiry agents, and on further investigation, I realised that this was an error in my affidavit, for which I apologise. Enquiry agents did not provide BA with that information. That information was in fact held on, and taken from, BA's IT systems."

He continued that BA had been advised that the Bahrain Economic Crime Unit would be unlikely to trace funds that BA said that Mr Al Refai had stolen from BA unless BA provided information about his assets, and that therefore "at the beginning of 2011" he gave instructions to his Special Projects team to put together a list of Mr Al Refai's bank accounts by searching emails and other data on BA's servers. The information that they found had been placed on the servers by Mr Al Refai, and the information in his previous affidavit had been so compiled legitimately under his supervision. In a further affidavit dated 15 October 2012 Dr Almajthoob said that the error in the first affidavit was "caused by miscommunications with the claimants' legal advisers", that his first affidavit was "an evolving document until the last moment" and that he did not notice the error.

72. I do not find this explanation convincing. Dr Almajthoob did not depose to the draft that had been produced on 1 June 2012 until 7 June 2012, and there are only minor differences between the draft and the sworn affidavit: it is misleading to describe the affidavit as "evolving" until it was sworn. But to my mind this is a relatively minor criticism of Dr Almajthoob, and it does not in itself indicate dishonesty.

73. On 2 October 2012 S&M wrote about the claimants not disclosing any documents despite Teare J's order; they pointed out that Dr Almajthoob referred to documents placed on BA's servers by Mr Al Refai and communications by email. In a letter dated 4 October 2012 Dechert wrote that details of the bank accounts were obtained "at the beginning of January 2011 by internal staff of [BA] from [BA's] computer servers". They also said that, although BA had not located any documents about this information by the date of 28 September 2012 specified by Teare J's order, they had since found an email and an attachment. Dechert enclosed an email dated 3 February 2011 to Dr Almajthoob sent from Mr Hamad and copied to Sheikh

Abdullatif and a spreadsheet attachment to it that they described as "the list of [Mr Al Refai's] bank accounts, in addition to his companies' & children's".

74. Mr Cotton pointed out in a witness statement dated 23 October 2012 that the accounts listed in the spreadsheet did not correspond with those identified by Dr Almajthoob in his affidavit of 7 June 2012. It included additional accounts and omitted eight accounts identified in the affidavit, including the iLegacy accounts. He also observed that, according to Mr Al Refai's evidence (which has not been disputed or criticised in this regard), iLegacy Limited was not incorporated until 5 April 2011, some 8 months after Mr Al Refai had left BA's employment. Their account with Noor Islamic Bank was not opened until 1 June 2011. Stroz had identified information about iLegacy in the data on the hard drives that had apparently been hacked and it all post-dated April 2011. In a witness statement dated 5 November 2012 Dr Almajthoob acknowledged and apologised for "an inadvertent error" about the iLegacy accounts, and said, "I now understand that the bank details relating to iLegacy were contained in the Email Data". He did not state the source of his understanding. (He did not refer in that witness statement to the other five accounts which were not included in the spreadsheet, but in a further witness statement dated 12 November 2012, after Dr Almajthoob and the claimants' other witnesses had been cross-examined, he produced further documents to show that those details were from BA's systems.)

75. Unsurprisingly Mr Orr cross-examined Dr Almajthoob about these contradictory accounts about the source of the details of Mr Al Refai's bank accounts. He confirmed that apart from the iLegacy accounts details of the other accounts referred to in the affidavit of 7 June 2012 were drawn from BA's system, but, inconsistently with his affidavit of 3 October 2011 and Dechert's letter of 4 October 2012, he said that, while some information about some accounts was collected at the beginning of 2011, further information was collected in 2012. He accepted that he had made a mistake in his affidavit and said he was "not so sure how the mistake happened". He accepted that BA had collated information from the system relating to the accounts other than the iLegacy accounts, and did not know why they had not been disclosed as required by the order of Teare J.

76. When Dr Almajthoob was asked about when he became aware of his error in his first affidavit about enquiry agents, he responded that "once [Dechert] had discussed the situation with me, I realised that there was a mistake, and I informed them and we worked to correct the mistake". However, he agreed that Dechert had passed to him the request by S&M in their letter of 23 July 2012 that they should disclose to which enquiry agents Dr Almajthoob was referring. Dechert conducted correspondence throughout August 2012 on the basis that the information about bank accounts had been obtained by enquiry agents and it was on this basis that the claimants' counsel conducted the hearing on 21 September 2012 before Teare J. Dechert cannot have been told that this was wrong and that the information was not from enquiry agents but had been obtained by BA's own staff from their own system.

77. Dr Almajthoob also had no cogent explanation for stating in his affidavits of 3 October 2012 that the information had been obtained from BA's systems in early 2011, and not (i) acknowledging that some of the information was collected in 2012 and (ii) stating that this explanation did not apply to the iLegacy accounts. He told

me when cross-examined that "some time in September or August" he realised that the reference to enquiry agents was an error and he "did quick investigation with my team". The focus of the enquiry, he explained, was that the information did not come from enquiry agents but from BA, and they did not do a "thorough job … until there was the second complaint". He said that the "thorough job" or the "more detailed investigation" was carried out by Mr Hamad in September 2012, and then he realised that the details of the iLegacy accounts were not from BA's own system. If this is so, he knew this before he swore his affidavit on 3 October 2012.

78. Had this been the only part of Dr Almajthoob's evidence that is open to criticism, I might have concluded, albeit hesitantly, that this history of misleading evidence might possibly be attributable to carelessness rather than to dishonesty designed to cover up the claimants' use of information from hacked emails. However, I cannot accept that Dr Almajthoob has been candid in his evidence on other matters: I have already referred to his part in compiling the spreadsheet sent to Sheikh Abdullatif on 4 March 2012, and I return to it below**.** I am driven to conclude that Dr Almajthoob was dishonest both in his evidence on the ex parte applications and afterwards in his evidence about how BA obtained details of the bank accounts. He was trying to conceal that the claimants were using evidence from hacked emails.

79. I come to the third drive. There was no evidence before Popplewell J about this third drive which according to the claimants DAAR received through the post on 4 June 2012, and it was not mentioned to him. It was first mentioned in the proceedings when Dr Harkan said in his affidavit of 28 September 2012 that it had "come to [his] attention that, in addition to the envelopes [containing the first two drives], an envelope was received on 4 June 2012 which *may have* contained a hard drive". (Emphasis added: the reason that it was put so tentatively was not explored when Dr Harkan was cross-examined.) In his affidavit of 15 October 2012 he said that he was told by Mr Al-Rasheed about when it was received, but that he had learned that Sheikh Abdullatif had become aware of the third drive "sometime around mid-June 2012". Mr Al-Rasheed also told him that a copy of the third drive was delivered "informally" to "the BA team", and, as he explained when he was cross-examined, by this he meant that a copy was delivered without a covering letter, DAAR keeping the original drive.

80. Sheikh Abdullatif said in his affidavit of 15 October 2012 that, "From the investigation conducted by Dr Harkan, it *now* appears that a third hard drive arrived to DAAR in the post on 4 June 2012" (emphasis added). However, when he was cross-examined, Sheikh Abdullatif admitted that he did not learn about the third drive through Dr Harkan's investigation but said that "I believe that I learned somewhere in June about the third hard drive". Moreover he said that, when he learned of it, he had the drive analysed to discover what "new information" might be obtained from it, and that he believed that the new information was "split and included in the third and fourth hard drive that had been delivered to Dechert", that is to say HDD3 and HDD4. However, according to Dr Harkan's evidence, DAAR cannot say what has become of the third drive and so this cannot be verified. I found this evidence unconvincing and cannot accept that Sheikh Abdullatif had any reason to suppose that any new information on the third drive was saved because it was transferred to the second set of discs.

81. As I have said, Dr Harkan's evidence was that a copy of the third drive was delivered by DAAR to BA, albeit informally. However, Dr Almajthoob, when asked about this in cross-examination, said that he did not receive the third drive and did not think that it was sent to BA. He told me that he had asked "his team", and specifically Mr Hamad, who was "handling the hard drive issues", about it and that "their understanding … without doing a thorough investigation" was that they did not receive it. I do not believe that, if DAAR received a third drive through the post and sent a copy of it to BA, Dr Almajthoob would not have known this.

82. I cannot tell whether DAAR never had a third drive or whether Dr Almajthoob is not telling the truth in denying any knowledge of it, but I cannot accept that all the claimants' evidence about this is honest: at least one of their witnesses has been untruthful.

83. Mr Trace argued that it is a measure of the claimants' honesty that they volunteered the information that they had received the third drive. I do not accept that submission. Nothing was said about it until Mr Lynch had pointed out in his report of 7 September 2012 that data had been loaded on to HDD4 only on 30 May 2012, and that it contained data from five hacked emails accounts that was not on the other drives. These findings were inconsistent with the claimants' account that they obtained the data on drives received in April 2012, and they gave evidence about the third drive only when the data on HDD4 needed to be explained.

84. Mr Trace advanced three other reasons that I should accept that the claimants' witnesses were honest: that they were voluntarily tendered for cross-examination, that the witnesses were not present in court when others were being cross-examined and so had no opportunity to tailor their evidence to be mutually consistent and that Sheikh Abdullatif 's professed concern to protect the integrity of DAAR's system from contamination from the drives was convincing. I consider these general matters outweighed by the more specific considerations to which I have referred, and by other matters to which I refer below.

85. I return to Mr Trace's reasons that I should excuse any breach on the part of the claimants of the preservation undertaking or the drives delivery order. I have already commented on the first reason, that a breach would not mean that the claimants' proceedings on the ex parte applications were an abuse of the court's process. I reject the submission that the failures were not deliberate: I conclude that Sheikh Abdullatif deleted the documents knowing that this was a breach of the preservation undertaking and that he did so because they would reveal that DAAR and BA had had the drives, or at least HDD1, before April 2012. For the same reason, I reject the submission that the failures were understandable. Although the claimants have proffered apologies for not complying with the court's requirements, I cannot accept that the apologies were sincere because they have still not given an honest and candid explanation for their actions. There remains the submission that the failures have not caused the defendants prejudice: it is true that the two deleted documents have been recovered and their metadata is apparently no less susceptible to analysis than it would have been if the documents have not been deleted. However, the claimants are not able to show that they have delivered the Original Drives to Dechert, and say that they cannot now be traced. I am inclined to accept that the defendants will probably not suffer prejudice because of this, but it is impossible to be certain. More

importantly, the court cannot excuse deliberate breach of orders and undertakings simply because in the event those guilty of breach did not destroy evidence that might have assisted their adversaries or otherwise prejudice them.

86. The claimants' position is summarised in Mr. Trace's skeleton argument as follows: "The [defendants] have seized on some discrepancies in the data contained on the IT hardware brought to London. This has led to a chain of inquiry which [the defendants] say demonstrates lying by the [claimants], but which in fact demonstrates, at worst, ineptness on the part of the [claimants] in their handling of the email data when received (for which apologies have been given and embarrassment expressed)". I reject that submission: in my judgment the defendants, and in particular Kroll, have identified matters that belie both the evidence that the claimants presented to Popplewell J and the account that they have presented to me. I am unable to attribute this to ineptness and can only attribute it to dishonesty.

87. I come to the defendants' arguments that the claimants did not fulfil their responsibilities to the court as applicants for orders without notice. I heard detailed submissions about the nature and extent of the obligations on applicants for ex parte relief. It suffices here to say that they are responsible for presenting the case fairly, and therefore fail in their responsibility not only if they materially misrepresent matters to the court but also if they do not present fairly factual or legal difficulties in the way of the application. The main complaints about the claimants' presentation can be seen, I think, as falling into four groups:

    i) Complaints about the presentation of how they had received and handled the drives and the data on them (the "data complaints");

    ii) Complaints about the presentation of financial consequences of what the defendants were said to have done, including in particular how it would affect the claimants in the London market (the "financial complaints");

    iii) Complaints about the presentation of the information on the Website (the "Website complaints"); and

    iv) Complaints about the presentation of legal questions raised by the applications (the "legal complaints").

88. The first group of complaints includes these:

    i) That the claimants did not disclose that they had dealt with data that was on the drives before April 2012 (when on their account they received the two drives).

    ii) That the claimants were connected with the computer hacking, but said that they were not.

    iii) That the claimants' account of receiving drives through the post was untrue.

    iv) That the claimants' evidence that their information about Mr Al Refai's bank accounts had been obtained through enquiry agents was untrue.

v) That the claimants' evidence about introducing a careful regime to handle the drives was misleading.

89. I can take the first two points together. The defendants' contentions are really based on the evidence of Mr Lynch about the drive HDD1, which, they say, differs from the other drives in that, according to the forensic evidence, during March 2012 emails that had been hacked were loaded in large number on to the drive on different occasions, whereas the data on the other drives was copied to them in a single batch. I have already referred to some of the evidence which, in my judgment, establishes that in March 2012 DAAR had access to HDD1 and email data on it. In particular, it shows that on 20 March 2012, while the computer was attached to DAAR's network, someone loaded on to HDD1 28 files, many of which were attachments to hacked emails, and copied them into a folder entitled "Majid". Shortly afterwards someone using Mr Alotaibi's password opened one of those files. It also shows that others at DAAR had access to HDD1 and hacked emails on it. In particular:

i) SID 5775 was used to create about 14,000 files on HDD1, and this was the password of a Mr Zaid Al Sultan, a computer analyst at DAAR.

ii) On 7 March 2012 SID 1732, the password of a Mr Kalid Al Shammari, who works for DAAR, was used to gain access to HDD1 through DAAR's system.

90. I should refer to further confirmation that HDD1 was in the claimants' possession before 10 April 2012: Mr Lynch discovered another deleted document on the drive. It was created in December 2011 by someone who used Dr Almajthoob's SID, and apparently is a note in Arabic of a meeting about Mr Al Refai between the claimants and the Bahraini investigating authority. Dr Almajthoob did not dispute that he created the document, but neither he nor anyone else has explained why it was on HDD1.

91. As I have pointed out, in his evidence Mr Alotaibi did not deny that he knew about the hacking of email accounts associated with Mr Al Refai and that he was in contact with the person who hacked them, nor that he copied emails on to the drives before, on the claimants' account, they were received by DAAR in April 2012. He did not dispute Stroz's conclusion that he was the "owner" of the spreadsheet and the Webhosting document (that is to say, that he created copies of them), and that he placed them in a folder on HDD1, nor that he modified the Webhosting document shortly after the exchange between Mr Salman and Hostkey support. He does not engage with any of the findings of Mr Lynch, except to deny in bald terms that he himself hacked the email accounts. It is, to my mind, clear that, if he was not himself hacking email accounts associated with Mr Al Refai, he was in close contact with the person who was doing so, knew that the hacking was taking place and was receiving the information that was so obtained.

92. Mr Trace submitted that, even if this is so, Mr Alotaibi's knowledge of these matters is not to be "attributed" to DAAR for the purpose of deciding whether DAAR (and BA) made full and frank disclosure on the ex parte applications. He argued, relying on the decision of the Privy Court in Meridian Global Funds Management Asia Ltd v Securities Commission, [1995] 2 AC 500, that the disclosure required of DAAR and BA depended on the knowledge of "those involved in gathering together the material

for the ex parte application". He cited the judgment in Marlwood Commercial Inc v Kozeny and ors, [2006] EWHC 872 (Comm), in which Mr Jonathan Hirst QC, sitting as a Deputy Judge in the Commercial Court, when refusing to set aside a freezing order on the grounds that it had been obtained ex parte without proper disclosure, observed that "On the claimants' case, no-one involved in the applications for freezing orders … had any actual knowledge or suspicion of illegality or corruption" (at para 189). Accordingly, Mr Trace submitted that, because no deponent to evidence before Popplewell J or other person "involved in" the ex parte applications had actual or attributed knowledge of the provenance of the email data on which the claimants relied, the claimants were not in breach of their duty whatever knowledge of the hacking Mr Alotaibi might have had.

93. In response to this argument Mr Orr first submitted that it is impossible to suppose that Mr Alotaibi would have acted on his own initiative and arranged to have emails hacked without his superiors at DAAR being party to what he was doing, or at least knowing of it. If there were no evidence of the involvement of others at DAAR, I would have rejected that submission. Mr Alotaibi was DAAR's head of IT, and he was tasked with trying to close the Website. There is no dispute that Sheikh Abdullatif, and no doubt others, knew (as he put it in cross-examination) that "our IT department, including Mr Olayan Alotaibi, has been doing a lot of effort to bring down the Website". I readily accept that it is unlikely that Mr Alotaibi would have gone about trying to close the Website of his own initiative, but, having been given this task, I do not think it inherently improbable that he, as Head of IT, would have taken it upon himself without reporting to his superiors how he was doing so, or that he was using hacked emails for this purpose.

94. However, there is evidence that Mr Alotaibi was not acting alone. As I have said, on 4 March 2012 Dr Almajthoob sent to Sheikh Abdullatif as an attachment to an email a spreadsheet setting out personal data about persons who might have information relevant to BA's dispute with Mr Al Refai. All that the covering email said about this attachment was "Also see attached file for other". It was put to Dr Almajthoob in cross-examination that Sheikh Abdullatif requested the information and he knew that the purpose was to hack emails associated with Mr Al Refai. Dr Almajthoob insisted that Sheikh Abdullatif had not requested the information on the spreadsheet: that Sheikh Abdullatif had asked for other information given in the email (email addresses for a Mr Baseer and a Mr Falah al Falah) and Dr Almajthoob attached the spreadsheet "voluntarily" (by which he meant without being asked for it) simply because he "wanted to let him know that if he needs information, there is this valuable document". To my mind this beggars belief. Dr Almajthoob would have had no credible reason to send to DAAR information collated for the purposes of BA's dispute with Mr Al Refai unless it had been requested, and even if he had decided to send it unasked, the email would have reflected this and not referred to the attached spreadsheet in the terms that it did.

95. If, as I am driven to conclude, Sheikh Abdullatif and Dr Almajthoob were complicit with Mr. Alotaibi in the hacking, then Mr Trace's argument that Mr Alotaibi's knowledge is not attributable to the claimants does not arise. Mr Orr also argued, however, that it is bad in law. He argued that since Mr Alotaibi was DAAR's Head of IT until June 2012 (and, whatever the precise date when he left, he was therefore apparently in that post when the ex parte applications were first made) Mr Alotabi's

knowledge of what he did in that capacity in relation to computers and computing data is to be attributed to DAAR. He submitted, citing the judgment of Collins LJ in Hamlyn v Houston & Co, [1901] 1 KB 81,85, that, since it was within Mr Alotaibi's authority to obtain the information about Mr Al Refai by legitimate means, the law would attribute to DAAR such information, whether or not he obtained it unlawfully.

96. To my mind, these questions are a distraction: the duty on a (corporate or other) applicant is to make a fair presentation and so to make "a full and frank disclosure of all the material facts": R v Kensington ITC, ex p. Princess Edmond de Polignac, [1917] 1 KB 486, 514. The real question is not about what knowledge is "attributed" to the claimants but whether they fulfilled this duty. (This starting point is, I think, in line with the judgment of Mr Geoffrey Vos QC in the St Merryn Meat case (cit sup, at para 77) on which Mr Orr relied.) Although the duty is not unqualified, the disclosure required is not defined by (actual or attributed) knowledge but by what the applicant could have presented had he made the inquiries that were proper in all the circumstances. Here DAAR were presenting to the court information about data that they had, on their account, received and which upon receipt had been reviewed by their IT department. Mr Trace's argument that the claimants were not at fault in not disclosing matters known to Mr Alotaibi appears to assume that nevertheless DAAR are not to be criticised if they made no enquiries of Mr Alotaibi about what he knew of the data on the drives. Mr Trace confirmed that the claimants could have asked Mr Alotaibi about this, but he told me that they did not do so. Nor would I accept, if it were suggested, that had DAAR inquired of Mr Alotaibi, he would have said nothing of his involvement with material on HDD1 in March 2012.

97. An applicant for an ex parte order has, as I have said, a responsibility to make proper inquiries before making his application. The extent of the inquiries required of him depends upon (i) the nature of his case when he makes his application, (ii) the order for which the application is made and the probable effect of the order on those against whom it is to be made, and (iii) the legitimate urgency and the time available for inquiries: see Brink's Mat Ltd v Elcombe and ors, [1988] 1 WLR 1350, 1357A-B. The claimants made serious allegations of misconduct against the defendants. The orders that they sought included one for a worldwide freezing order against Mr Al Refai, for which the court requires particularly full disclosure: Bank Mellat v Nikpour, [1985] FSR 87, 92. Mr Trace accepted that the claimants' applications were not so urgent as to justify them in proceeding ex parte: the need to avoid giving the defendants advance notice, he said, justified the ex parte applications (see paragraph 140 below). In my judgment, had they conducted proper inquiries before making the applications or even before the orders were made on 18 June 2012, the claimants would have asked Mr Alotaibi what he knew about the data on which the claimants relied in support of the applications and what he had done to close down the Website. If, as they say, they did not do so, I conclude that this was a breach of their responsibilities as ex parte applicants. I also conclude that it was a breach of their duty not to tell the court that DAAR had dealt with data on at least one of the drives and that Mr Alotaibi was closely connected with hacking emails that were on it.

98. Mr Orr submitted that the claimants' presentation about the drives and the data on them was more fundamentally misleading: he invited me to conclude that the

evidence about HDD1 and the other drives being received anonymously through the post is simply untrue. Sheikh Abdullatif had exhibited to his affidavit of 7 June 2012 a copy of the envelope in which, he said, HDD1 had been received. On 21 September 2012 Teare J ordered that the claimants produce "Forensic copies of the original electronic files containing photographs of any envelopes in which hard drives were received by [DAAR]". On 12 October 2012 there were produced such copies of three envelopes said to have contained the two drives received in April 2012 and the third drive. On them were receipts completed by a clerk at the post office that recorded the weights of the packages (or purported to do so): 40 grams on the envelope said to have been received on 10 April 2012, 70 grams on the envelope of 26 April 2012 and 40 grams on the envelope of 4 June 2012. The first and third receipts also recorded that the envelopes contained documents (although the form of receipt required this information only for international shipments). There is no dispute that portable hard drives weigh much more than the weights recorded, between about 140 and 200 grams. The defendants say that the drives cannot have been sent in these envelopes.

99. In answer to this Sheikh Abdullatif said in a witness statement dated 5 November 2012 that details recorded by the post office in Saudi Arabia are not reliable: all mail weighing under 500 grams attracts the same charge and so it is not important how much lighter packages weigh; and post office clerks do not examine the contents of sealed packages to check whether they contain documents or something else. He described an experiment whereby a member of his staff sent through the Saudi postal system three packages for which weights were wrongly recorded: a package of two hard drives weighing 375 grams was recorded to weigh 30 grams, a package containing a document of 750 grams was recorded at 40 grams and one containing a document of 940 grams was recorded at 40 grams.

100. I do not find this evidence convincing. It is not clear whether in the experiment the DAAR employee told the post office clerks false weights, but this might explain the results. There would have been no reason for anyone sending DAAR the drives anonymously to have given false information of this kind, and there is no suggestion of this in Mr Alothaim's evidence. The fact remains that the receipts shown on the copies of all three envelopes are inconsistent with the account given by the claimants of how the drives were received.

101. Two other considerations cast some doubt on the claimants' account of the drives being received by DAAR through the post.

i) In his affidavit of 7 June 2012 Sheikh Abdullatif said that he had asked "the legal team" to take photographs of the drive received on 10 April 2012 (and the later evidence was that other drives were handled in the same way as the first drive). On 2 August 2012 S&M asked Dechert for copies of the photographs in colour hard copy and in a forensic image copy, so that the metadata could be inspected. Dechert replied on 24 August 2012 that their clients had informed them that the reference to photocopies of the hard drive was a "mistake" and that "Such photographs were never taken".

ii) The uncertainty about whether DAAR did receive the third drive, that I have already examined.

102. I see force in Mr Orr's submission, and I regard the claimants' account that they received the drives anonymously with a good deal of suspicion. If they did not, it would mean, of course, that Mr Alothaim was simply lying in his statement, but I do find his account curious in some ways: for example, he said that he looked at "the Websites" on about 29 February 2012, although the claimants plead that the Website had a second address only from about 24 April 2012; there is no apparent reason for him to have passed the information to Mr Salman on a memory stick, or why he decided to send the drives anonymously, or why he kept what he had done secret from Sheikh Abdullatif and why he decided to tell him when he happened to "bump into him" at a social event towards the end of September 2012; and his evidence that one of his businesses, which are based in Saudi Arabia, employed Mr Salman is not easily reconciled with Mr Hinton's report that Mr Salman advertised himself as a "freelancer operating from Manama, Bahrain". That said, however, I do not think it fair to reach a concluded view about this without a full trial, and I need not do so. I do not rely upon this part of the applicants' argument in determining the applications before me.

103. The fourth matter in this group of complaints is Dr Almajthoob's evidence about enquiry agents being the source of his information about Mr Al Refai's bank accounts. The importance of this evidence was that it distanced the claimants from any improper hacking: as I have said, Dr Almajthoob himself gave evidence in his affidavit of 7 June 2012 that BA had not broken the laws of Bahrain in receiving and reviewing material "as it was not obtained at BA's request". I have concluded that Dr Almajthoob's evidence about the enquiry agents was deliberately untruthful.

104. Finally as far as concerns this group of criticisms, the claimants painted a picture before Popplewell J of a conscientious and careful regime that they had introduced (i) so as to preserve the integrity of the drives as evidence in the proceedings, and (ii) so as to keep confidential Mr Al Refai's private information that had been obtained by hacking. When he was cross-examined, Sheikh Abdullatif himself explained that DAAR's concern in handling the drives was to protect their own system from contamination rather than to protect the integrity of the drives or the data on them: when I asked him, "So your instructions weren't to protect the hard drive: they were to protect your system from the hard drive", Sheikh Abdullatif answered "yes". Indeed, Mr Trace invoked this in support of his submission that the claimants' witnesses were honest: see paragraph 84 above. It is clear from Dr Harkan's evidence that the claimants had never put in place the regime described to Popplewell J: the claimants gave him a completely false picture about this.

105. The second group of criticisms of the presentation on the ex parte applications concern the financial consequences for the claimants of the defendants' activities and in particular the implications for them with regards to the London market. (I have explained at paragraph 17 above why the applicants sought to establish that they suffered loss in England.) There are a number of related complaints.

106. In his affidavit of 7 June 2012, Sheikh Abdullatif explained "the importance which DAAR places on Sukuk finance traded out of London", and said that DAAR had been advised by Deutsche Bank before the first sukuk was issued in 2007 that they ought to access the capital markets in London in order to obtain financing there. He continued, "… London's status as the leading global financial centre meant that the endorsement of London-based financiers would be required if institutions in other

jurisdictions were to regard DAAR as an attractive proposition. It was very much for this reason that DAAR listed its first Sukuk (Sukuk I) and then its Sukuk IV in London". (Much the same was said by Sheikh Yousef in an affidavit dated 15 October 2012.) In his submissions on 14 June 2012 Mr Trace specifically relied on the fact that DAAR had listed sukuks in London to support his argument that DAAR was suffering damage in England. In fact, sukuk I was listed on the Dubai International Financial Exchange, and not in London: this is clear not only from the offering memoranda for both sukuk I and sukuk IV but also from information from the London Stock Exchange. The evidence about this presented to Popplewell J was misleading, but I do not conclude (if it be so suggested) that it was deliberately misleading.

107. Next, the defendants contend that the claimants exaggerated their difficulties in raising finance after the Website was launched and that they did not disclose that DAAR had some success in raising funds or at least had reason to think that they would be able to secure funding. I have already referred (at paragraph 8 above) to Mr Daredia's evidence about the impact of their "inability to raise funding". Sheikh Abdullatif said in his affidavit of 7 June 2012 that:

> "Ordinarily, DARR would have raised further financing from institutions to repay Sukuk II, which matures in July 2012. DAAR has approached eight different institutions in an effort to secure this financing without any success. As a result, DAAR is being forced to dispose of illiquid real estate in order urgently to raise funds. Such sales are taking place at a discount and are resulting in financial loss. More significantly, and contrary to its long term business model, DAAR is also losing the opportunity to generate very significant profits from the development of the land."

Dr Almajthoob said that it was "proving practically impossible" for DAAR to raise funding.

108. This evidence did not present the full picture, at least as it had developed by the time of the hearings on 14 and 18 June 2012. The evidence before me is that by 11 June 2012 DAAR had secured a new Deutsche Bank facility of $150 million. Although Mr Daredia said in an affidavit dated 15 October 2012 that the facility was not closed until 7 July 2012, this does not meet the point: he acknowledged that the prospect of this facility had become clear by mid-May 2012, and he did not dispute that by 18 June 2012 DAAR expected to raise this funding (and moreover DAAR had the prospect of further funds from the same source, albeit that would not be available by the time that the sukuk fell due for repayment). Moreover, since April 2012 DAAR had been in negotiations with Goldman Sachs for a facility of $125 million specifically for repayment of sukuk II (which was ultimately secured in the first week of July 2012), and further facilities were available to them from Morgan Stanley and UBS, albeit DAAR rejected these proposals because they were thought too expensive.

109. I add for completeness that DAAR obtained further funding soon after Popplewell J's orders: by 11 July 2012 they had from the Samba Financial Group, a Saudi Arabian bank, funding of SAR 375 million (about $100 million). But there is no evidence

that at the time of the ex parte applications DAAR were aware that they would, or were likely to, secure that facility.

110. There is an associated complaint: that the claimants did not present a fair picture of the likelihood of DAAR repaying sukuk II despite difficulties created by the Website and other activities of the defendants that the claimants allege. Mr Trace emphasised that the claimants never contended on the ex parte applications that DAAR would default in repaying sukuk II, and I accept that. But they did paint the picture that they might be compelled to sell "illiquid" land in order to do so.

111. There are two aspects to this complaint about the claimants' presentation that seem to me to be justified. The first is that they should have disclosed public statements that DAAR had made that they were confident of raising funds to repay sukuk II. For example, on 25 March 2012 there were published reports (that were not disputed and that I therefore accept were correct) that Yousef stated that he was "extremely confident" that DAAR would be able to repay sukuk II: "Frankly, I have no worries about repaying the sukuk on its due date, as this is already factored into our financial plans, and we are accordingly building up cash reserves from our operation". Mr Trace rightly observed that DAAR would not be expected to express public concerns that it would default on repaying the sukuk, but that is not the point. The contention is that the court should have been told that DAAR had made such statements after the Website had been launched, and I agree, although to my mind this is not the most important financial complaint.

112. Secondly, as the defendants contend on the basis of press reports, DAAR had built up cash to redeem sukuk II and were not reliant upon raising funds in the market or at least not as reliant as Popplewell J was led to believe. Thus, for example, Reuters and the Financial Times reported in March 2012 that Mr Anand Raheja, DAAR's Chief Financial Officer, claimed that DAAR had by the end of 2011 built up cash reserves of SAR2.5 billion to be used for this purpose, together with the outstanding receivables of SAR1.2 billion. His statement also is inconsistent with Sheikh Abdullatif 's description of DAAR's real estate as "illiquid": he said that their "land bank can be liquidated at very short notice to achieve any liquidity objectives we have".

113. Next, I have already referred to Sheikh Abdullatif's statement in his affidavit of 7 June 2012 that S&P had reduced their rating of DAAR to B+ and placed them under "CreditWatch". On 11 June 2012, while maintaining the B+ rating, S&P removed DAAR from CreditWatch. DAAR of course knew this and apparently attached importance to it: on 12 June 2012 Mr Raheja spoke of rating agencies "recognizing the strength of our balance sheet". Popplewell J was not told about S&P's revised views, despite the focus of the hearing on 18 June 2012 being on whether DAAR had suffered damage in London and despite their reliance on the FRA report which emphasised the importance of credit ratings. He should have been.

114. I consider the financial complaints justified.

115. The Website complaints were presented by Mr Anthony Peto QC, who was instructed on Mr Richardson's behalf. The core of his argument was that the claimants did not draw to the court's attention that "there was strong corroborative evidence displayed

on the Website which tended to prove the truth of the publications"; and so Popplewell J was not in a position to understand the background to the dispute between BA and Mr Al Refai, and assess the iniquity defence. The defendants say that this failure was aggravated by the claimants' failure to draw to Popplewell J's attention section 12 of the Human Rights Act, 1998 ("HRA") and to give proper assistance about the so-called "rule against prior restraint" established in Bonnard v Perryman, [1891] Ch 269. I come to those points later.

116. As for the dispute between BA and Mr Al Refai, it was argued that Popplewell J should have been told that under his contract of employment Mr. Al Refai was entitled to be paid $25 million if he was dismissed "with cause except where such dismissal related to the commission by [Mr Al Refai] of an indictable offence relating to [BA] or its activities, provided that such exception shall only apply if the relevant authorities have formally charged [Mr Al Refai] with the commission of such offence within six (6) months of the date of the … dismissal…". It is said that this provides the probable motivation for BA pressing for the proceedings in Bahrain against Mr. Al Refai. I am not impressed with this criticism, and do not consider the claimants at fault in not referring Popplewell J to this. The claimants made him aware that there was a background of litigation in Bahrain, and Mr. Trace observed in his skeleton argument of 1 June 2012 that the defendants might say that there was "[n]o real conspiracy" and "at all times, [Mr. Al Refai] was acting merely defensively. While it is right that he had a "counter-strategy" he was never the aggressor". I do not criticise the claimants for not speculating further about what arguments might be made by the defendants about their motivation in their dispute with Mr. Al Refai. That would be to fall into the trap of using hindsight, about which the courts are particularly wary on applications of this kind: see, for example, Alphasteel Limited v Shirkhani and anor, [2009] EWHC 2153 (Comm) at para 34.

117. However, this was not Mr. Peto's main point. His real criticism was that Mr Trace presented the applications to Popplewell J without introducing him even in general terms to what documents were displayed through the Website that supported the allegations made on it; still less was he taken through any part of the Website. Certainly Sheikh Abdullatif's affidavit of 7 June 2012 gave some indication of what the allegations were: he said that DAAR's position was that the allegations were "entirely without foundation" and reflected a "fundamental misunderstanding on the part of those responsible for the creation and maintenance of the Website … of the nature of DAAR's relationship with other parties"; and he went on to deny that there were "nominee agreements with other shareholders designed to disguise the true size of Sheikh Yousef's shareholding [in BA]", to deny "alleged related party transactions", and to deny that there were a "number of individuals connected with [Sheikh Yousef] who are acting for him in an undisclosed fashion". There were in the exhibits documents that might have told Popplewell J more about wrongdoing on the part of the claimants to which the Website referred, but he told Mr Trace on 14 June 2012 that he had not read exhibited documents but had read only the affidavits and some of the documents to which Mr. Trace had directed him in his skeleton argument. The duty of disclosure is not met by "the mere exhibiting of numerous documents:" Siporex Trade SA v Comdel Commodities Ltd, [1986] 2 Lloyds's Reports 428, 437.

118. These points were not much developed by Mr Trace on the ex parte applications. His skeleton of 1 June 2012 did not refer to a possible iniquity defence or to documents on the Website that supported the allegations, although he did say that Mr Refai might say that he "is the real victim and is simply defending himself"; that he "is in truth akin to a whistleblower and there was wrongdoing and improper conduct at [BA] and its customer [DAAR]"; that "[Sheikh Yousef] is guilty of criminality, not [himself]"; and that "the only conspiracy is against [Mr Al Refai], not one led by him". Orally on 1 June 2012 he simply said that, "in terms of full and frank disclosure obviously at the moment it will be said on the other side all one has is the word of various representatives of the bank who, according to Mr Al Refai, have done various naughty things themselves and that is what the Website says it is all about". In his supplementary skeleton argument of 17 June 2012 Mr Trace said that a possible defence was "[t]hat the words were true in substance and in fact", although he also said, "Plainly, in this case, there has been publication (on the Website) of false statements". The only material to which he was referred was the evidence in Sheikh Abdullatif's affidavit of 7 June 2012 that I have described and Sheikh Abdullatif's statement that he had asked "DAAR's internal legal team to review the Website" and that they had told him orally (and without any written report) that there was "no substance to any of the allegations that they reviewed". (He acknowledged that they did not review "every single allegation" but only those that they regarded as "the most serious ones".) On 18 June 2012 Mr Trace specifically drew the court's attention to a paragraph in Mr Tuddenham's affidavit in which he said that it was expected that "the Defendants will seek to argue in defence to the claims for malicious falsehood and defamation that the statements which appear on the Website … are true (or, in the case of malicious falsehood, at least not manifestly false)".

119. The home page of the Website was headed "[DAAR] & [Sheikh Yousef]: Their Related Parties, Fraudulent Misrepresentation and the Funding Crisis". It had sixteen other pages, including an "Executive Summary" which stated that the site had been "put together by a number of investors in [DAAR] following extensive research by them into the group of investors and companies connected to it and its chairman, [Sheikh Yousef]". There were four pages grouped together under the label, "Undisclosed Related Parties" and ten pages under the label "Transactional Abuse". Finally there was a page about "Regulatory Breaches" which identified requirements that were said to have been contravened, including listing rules of the Saudi Arabian Capital Markets Authority, regulations of the CBB, a provision in BA's Articles of Association, International Financial Reporting Standards, Central Bank of Malaysia Related Party requirements and Listing Rules for the London Stock Exchange. There were links from the Website pages to documents which were said to corroborate the allegations that were made.

120. Mr Richardson has set out in a series of annexes to a witness statement dated 1 October 2012 reasoning that, he contends, "reveals variously fraudulent and serious misrepresentations to the investing public and/or breaches of" the requirements to which I have referred. He illustrated his contention by explaining in detail in respect of seven pages of the Website the documents available through links that, he says, justify the allegations (and in an eighth annex relevant regulatory requirements). I do not propose to deal with all that material in this judgment, and shall only consider two of his illustrations (which I regard as fairly representative) in order to give flavour of the detailed material to which, as Mr Peto submitted, Popplewell J should have been

introduced. In broad summary, the main wrongdoing that according to Mr Richardson is demonstrated by the Website is:

i) That Sheikh Yousef controlled BA through nominee agreements, signed off transactions for BA without board approval and controlled how DAAR's shareholdings were arranged;

ii) That Sheikh Yousef had misled the CBB by stating that nominee agreements exhibited to the Website were forged; and

iii) That Sheikh Yousef used his position at BA to provide DAAR with large sums that were channelled secretly through related parties so as to deceive both regulators and investors; and sometimes related parties used loans from BA to invest in DAAR's sukuks so as to make them appear to be more successful than they were.

121. The claimants responded to Mr Richardson's evidence with an affidavit dated 15 October 2012 by Ms Mirza. She said that she had "undertaken a review of the voluminous Website allegations and materials to the greatest extent possible in the relatively short period of time since the Website's launch": nevertheless, I consider that, since she swore her affidavit more than six months after the launch of the Webite, it is unlikely that she had not had enough time for her review to reveal anything of significance for present purposes. She pointed out that, although the CBB was aware of the allegations on the Website shortly after its launch, they have taken no "adverse action" against BA.

122. I refer first to a page of the Website headed "Nominee control of Unicorn BSC", which stated that, in contravention of the requirements of the CBB, Sheikh Yousef controlled through "undisclosed nominees who held shares in [BA] on his behalf" over 90% of BA's voting shares, and had not made disclosure of this to the CBB. It listed persons who were alleged to hold shares in BA as nominees for Sheikh Yousef, and said that these arrangements were not disclosed to CBB or to BA's other shareholders. After the Website had been launched and had published what were said to be drafts in similar terms of seven nominee agreements, Sheikh Yousef denied in the CBB letter that there were any such nominee agreements and said that the "template document of a nominee agreement" was forged. The significance of the allegation about nominee arrangements was that the CBB Regulations included, for example, a provision that "A natural person will not be allowed to own or control more than 15% of the voting capital of a Bahraini Islamic bank licensee".

123. In these proceedings the claimants have adopted a different and inconsistent position about this. Ms. Mirza's evidence is that the arrangements derive from a plan before BA was established for the bank to be owned by a Cayman Island company, with three other companies (the "Companies") each contributing 30% of the capital in the Cayman Island company. When this plan was abandoned, certain investors expressed interest in investing in BA but did not have available capital to do so. The Companies agreed to provide funding for the investors and in return "the investors entered into "nominee" agreements with [Sheikh Yousef] and [Sheikh Yousef] in turn entered into "nominee" agreements with the companies. Thus, although titled "nominee agreements" these agreements were in fact pledge agreements designed to secure

loans by the companies to the individual investors". Ms Mirza said that the investors had repaid the funding provided by the Companies and the "pledge agreements were dissolved upon repayment". Ms Mirza also said with regard to an agreement that Sheikh Yousef had with Mr. Al Refai that one investor who obtained funding from the Companies did not "want to hold the shares outright" and so entered into a nominee agreement whereby Mr Al Refai would hold the shares on his behalf.

124. Mr. Peto made some apparently cogent criticisms of this explanation: for example, the agreements are not on their face for pledges or any sort of security arrangement; in an email dated 29 March 2004 a Mr Rob Little, a legal adviser to BA, asked for details of a "3rd Al-Shalash company" in order to "finalize the nominee agreements", and there is no obvious commercial purpose in the arrangement described by Ms Mirza. However, Mr Trace did not fully engage with this part of Mr Peto's argument and it is not for me to determine on these applications whether or not Sheikh Yousef had entered into the nominee arrangements alleged on the Website or any nominee arrangements. What matters for present purposes is that (i) in view of the documents shown on the Website about this allegation, the position should have been explained to Popplewell J more fully than it was, and (ii) since the CBB letter was put before Popplewell J, he should have been told that it contained a statement about this allegation that Mr Trace frankly accepted is, on the face of it, a lie.

125. Secondly, the Website had a page headed "Dar Sukuk III: Undisclosed Funding Support". The defendants say that it is an example of BA lending to parties related to them without making this known to the CBB or the markets and without making disclosure of this in their accounts, and that the purpose was to make it appear that the sukuk III issue was more successful than it was. He contended that the lending enabled DAAR, having issued the sukuk by offering memoranda dated 17 March 2009, to declare on 13 May 2009 that it was fully subscribed, and this was achieved by BA making available three facilities to two Saudi Arabian companies called Marafe Al Kaleeji Trading Company BSA ("Marafe") and Nawasi Al Saudih Trading Company KSA ("Nawasi"), both of which were controlled by the claimants, Sheikh Abdullatif or Sheikh Yousef. The Website stated, "Three facilities granted by [BA] to Marafe and Nawasi, undisclosed related parties of [DAAR], between 29 April and 12 May 2009 would appear to have been invested in [sukuk III]…. Marafe and Nawasi together subscribed for SAR 475 million or 63% of the total SAR 750 million issued, …".

126. The claimants have not presented evidence from Ms Mirza or anyone else in response to what Mr Richardson said about this. However, in the CBB letter BA stated that "In relation to the so claimed undisclosed related party transaction, we are pleased to highlight that the Bank via its risk and audit department confirms that no related party transaction has occurred which has not been disclosed".

127. Mr Richardson alleged that there were three relevant arrangements:

i) BA lent Nawasi SAR 180 million for five days following a credit proposal dated 23 April 2009 which simply stated that it was "for an investment deal". It said that Nawasi was introduced to BA by DAAR and, despite the size of the facility, that "due to the urgent need for this facility" the arrangement should proceed "without financials". BA's "Know Your Client" document stated that

the principal of Nawasi was Sheikh Abdullatif and that he had introduced Nawasi to BA.

ii) A similar credit proposal, also dated 23 April 2009, was made for a facility of SAR 195 million for Marafe for five days, the purpose again being "an investment deal". The proposal was not to be supported by financial statements "[d]ue to the urgent need of this facility", but the credit proposal said that BA was proposing to "help Marafe at the request of [DAAR]".

iii) A further SAR 100 million was lent for 90 days to Nawasi, BA's investment committee in their minutes recording that a meeting was arranged to "consider the proposal to provide Nawasi Trading with a SAR 100m credit facility" and that it would be used "to participate in the private primary issuance of DAAR sukuk III".

128. In support of the contention about Sheikh Abdullatif's involvement with the two companies, Mr Peto referred to two emails from Mr Philip Stockburn, BA's Chief Financial Officer:

i) In an email dated 2 October 2009 he asked Sheikh Abdullatif to ensure that BA received funds from the two companies on the due date.

ii) In another email dated 31 October 2009 he wrote in these terms about Nawasi and Marafe (and another company that the defendants say was another related party) in these terms:

> "The supporting documentation re Marafie, Nawasi & Ayan is weak … as the supporting analysis does not explain why such unknown entities would command such a large placement, when there is little to justify the credit. All rests on having Board approvals in place, without support of adequate credit analysis. … The risk is that these transactions are seen as related party transactions, no matter the lack of direct involvement of [DAAR]. The Bank would face serious censure, if this occurs. Please arrange for the immediate settlement of the outstanding transactions in order to avoid this risk. Sheikh Abullatif, I apologize for the direct nature of this email, however it is best that you understand the weakness of the Bank's position regarding these contracts and [BA's] position with the regulator"

129. I need not and do not decide whether the arrangements were made between related parties, and were designed to mislead about the success of the Sukuk III issue or were otherwise improper. It suffices to say that in my judgment, given the documentary support for the allegations available through the Website, Popplewell J should have been told more about them.

130. These and other illustrations were given by Mr Richardson and presented by Mr Peto to demonstrate the defendants' contention that there was convincing support for the

allegations on the Website generally. I was concerned that illustrations chosen by Mr Richardson might give a distorted picture and distract from other allegations on the Website for which there was no possible justification. I therefore invited Mr Trace to identify the main points on the Website that the claimants considered manifestly untrue. (I acknowledge that the claimants pleaded in their particulars of claim that fourteen of the seventeen pages were published in breach of confidence and were defamatory and false, but I was seeking what the claimants regard as their strongest complaints in that regard.) Mr Trace responded with two points: that the Website referred to a "funding crisis", particularly on the home page, and that it described some arrangements as "money laundering", with connotations, Mr Trace submitted, of criminal offences. Ms Mirza had denied categorically and without qualification that BA had any involvement in criminal activities of this kind, and, as I understood their submissions, the defendants did not argue before me that they did.

131. I was not much impressed by these examples. They are not examples of factual misrepresentations on the Website about BA's arrangements and transactions, but complaints that the Website presented unjustified inferences from factual allegations. Mr Peto identified material said to support the reference to a funding crisis, and I am not in a position to assess how far it does so. As for the reference to money laundering, Mr Trace's point was apparently that the transfers of funds so described would not be criminal under English law, but it is not obvious to me that this would be the connotation of the term on an international Website referring to a foreign company. These points do not indicate to me that Mr Richardson's detailed evidence directed to particular pages of the Website gave a distorted picture of the Website as a whole.

132. I recognise that the claimants could not be expected on the ex parte application to take the court through all material relevant to the potential iniquity defence. I also acknowledge that there is room for debate whether the iniquity defence would answer the claim against Mr. Richardson and other defendants, even assuming a factual basis for it were established. I do, however, consider justified the defendants' complaint that the claimants did not give the court a fair understanding of the extent and nature of the material that might be deployed by the defendants in order that the court could form some preliminary view about whether the defendants might make good an iniquity defence to some or all of the claimants' contentions. I therefore consider that the claimants did not fulfil their responsibility in this respect. This failure was the more significant in view of section 12 of the HRA, to which I refer at paragraph 135 below.

133. The Applicants' last group of complaints is about the presentation of the relevant law. It is well established that the applicant on an ex parte application owes a duty to provide to the court proper guidance as to the relevant law as well as to make a proper presentation of the facts: Memory Corporation Plc and anor v Sidhu and anor., [2000] 1WLR 1443, 1453-1455. There are four complaints:

i) That the claimants did not properly draw to the court's attention the rule against prior restraint;

ii) That the claimants failed to refer the court to section 12 of the HRA;

iii) That the claimants did not properly assist the court about when compensation for damage to reputation is recoverable, and

iv) That reference was not made to the so-called Dadourian guidelines.

134. The "rule against prior restraint", or the principle in Bonnard v Perryman, is the well-established rule that in cases of defamation and malicious falsehood the court will not grant an interim injunction unless there are no grounds for concluding that the statement might be true. It became relevant in this case once, after the hearing on 14 June 2012, the claimants asserted these causes of action. It was not overlooked: in the supplemental skeleton of 17 June 2012 Mr Trace twice referred to Bonnard v Perryman, when identifying possible defences to a malicious falsehood claim and when referring to remedies available for a defamation claim. The complaint is that he should also have referred to it in his oral submissions on 18 June 2012, but I do not agree that the claimants were in breach of their duty in this regard. The new causes of action were included in the skeleton argument after Popplewell J had on 14 June 2012 invited the claimants to consider whether they had a claim for damage to reputation on these grounds. However, in his oral presentation on 18 June 2012 Mr Trace's argument returned to the causes of action originally invoked by the claimants, and he concentrated on his submission that the claimants could establish that (or had a sufficient argument that) they had suffered recoverable financial loss in London on that basis. Mr Trace did not disavow the claims in defamation and malicious falsehood, and they are reflected in Popplewell J's ruling to which I referred at paragraph 24 above: "a good arguable case of damage sustained in London by reference to the re-financing as well as by reference to reputation". That said, the form of order that he made is, I think, more naturally referable to a claim based on the original causes of action rather than defamation or malicious falsehood. However that may be, to my mind the highest that this complaint might be put is that it would have been preferable for Mr Trace to have made some oral reference to the rule, and I regard even that mild criticism as unrealistic in view of how the argument proceeded on 18 June 2012. This was not a breach of the duty of full and fair disclosure.

135. Section 12 of the HRA was not drawn to Popplewell J's attention. Mr Trace acknowledged that it should have been, and he simply overlooked it. I am bound to say that I can understand how it escaped his attention, given the number of points that the claimants' representatives had to consider. (It is fair to say that this point was raised by the defendants relatively late, and the claimants' suggestion that it did not initially occur to any of the defendants' lawyers was not refuted.) The section is headed "Freedom of expression" and provides as follows:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied –
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or

> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression …
>
> (5) In this section –
>
> …
>
> "relief" includes any remedy or order (other than in criminal proceedings)".

136. In their skeleton argument the claimants said that it is "far from obvious" that this case involves human rights so as to engage section 12, but at the hearing Mr Mark Warby QC, who presented this part of the claimants' argument, acknowledged that the section covers some parts of Popplewell J's order of 18 June 2012. The concession is rightly made: after all the section applies where an order *might* affect the Convention right of freedom of expression. In any case, strictly it is not for me to decide whether the section was engaged: it is certainly sufficiently arguable that it does to mean that Popplewell J should have been reminded of it.

137. Had the section been drawn to his attention, Popplewell J would have been bound to consider:

i) Since the claimants had not taken steps to notify the defendants of the applications, whether there were compelling reasons for this; and

ii) Whether he was satisfied that the claimants were likely to establish that publication of the material on the Website should not be allowed.

138. CPR 25.3(3) provides that "If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given". The claimants' evidence did not do so, but in the skeleton argument of 1 June 2012 Mr Trace referred (i) to evidence that before leaving BA Mr Al Refai had destroyed documents, and said that if the defendants had notice of the application "there is a high risk of the destruction of documentation and evidence"; (ii) that, although the claimants had had the emails for some weeks, "this remains a highly urgent matter"; and (iii) they were seeking a freezing order against Mr Al Refai and, if given notice of the application, he would make arrangements for asset movements. It does not seem to me that the claimants were justified in proceeding ex parte on the other applications just because they were applying for a freezing order: that application could have been determined ex parte and notice given of the other applications. At the hearing before me, Mr Trace accepted that the matter was not so urgent as to justify dispensing with notice. He submitted that the ex parte applications were justified by the risk of destruction of documents. I was not wholly convinced of this: even if the claimants were justified in proceeding ex parte against

Mr Al Refai, Mr Peto pointed out that this did not necessarily mean that it was appropriate to do so against the other defendants, who there was no reason to suppose would destroy documents. He suggested that, having applied ex parte against Mr Al Refai, they could and should have proceeded on notice against the others. That may be so, but what matters is that in effect the applications were presented to Popplewell J on the basis that there had to be compelling reason to grant relief ex parte, and the omission to refer him to the statutory requirement in section 12(2) of the HRA to that effect was of no consequence.

139. The claimants submitted that similarly it was of no consequence that the court was not referred to section 12(3) of the HRA because the statutory provision about when the court can properly grant relief to restrain publication is no more demanding, and is if anything less demanding, than the common law approach to granting such orders that Popplewell J was invited by Mr Trace to adopt. I do not accept that submission. The requirement of section 12(3) was considered by the House of Lords in Cream Holdings Ltd and ors v Banerjee and anor, [2004] UKHL 44, and Lord Nicholls, with whom the other Law Lords agreed, explained (at paragraph 22) that there is not a single, rigid standard governing all applications for interim restraint orders, and that the section required the court not to make an order "unless satisfied the applicant's prospects at trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case". However, "the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at trial", although Lord Nicholls acknowledged that the circumstances of a particular case might justify departure from that general approach.

140. I do not accept that Popplewell J was invited by the claimants so to approach the applications in this case. It is true that in his skeleton argument of 17 June 2012 Mr Trace referred to the Femis Bank case (cit sup). He had already on 14 June 2012 specifically referred the court to the passage of the judgment of Browne-Wilkinson V-C in that case (loc cit, esp at p.400H) in which the public importance of freedom of speech was emphasised. But having done so, Mr. Trace submitted that, "The question is should injunctive relief be granted in the particular circumstances of this case and that will of course depend on the nature of the allegations and the extent to which your Lordship is satisfied that there is a good arguable case". Popplewell J's ruling reflected Mr. Trace's submission. This is not the test required by section 12(3) of the HRA, but a less demanding one. The omission to refer the court to the statutory provision was material, and, had the court been referred to it, it might well have focused attention on whether the iniquity defence was "likely" to succeed.

141. Next, the question about when damages are recoverable for damage to reputation. The complaint is that, after Popplewell J had sought assistance through his message of 15 June 2012, "instead of providing the Court with a thorough and objective statement of the relevant principles governing the recoverability of reputational loss, the [claimants] argued that such loss is generally recoverable in tort (the precise reverse of the true position) and contrived a distinction between "airy-fairy" and "specific" reputational loss (which has no support in the case law or commentaries) in order to circumvent the effect of Lonrho v Fayed (No 5) and Khodaparast". I cite from Mr Orr's skeleton argument, where he was referring to Khodaparast v Shad, [2000] 1 WLR 618, a case in which the Court of Appeal decided that, although the tort of

malicious falsehood is a species of defamation and damages are recoverable for injured feelings, damages for injury to reputation are not, and Lonrho plc and ors v Fayed and ors (No 5), (cit sup), in which the Court of Appeal determined that, in the words of Clerk & Lindsell on Torts (20th Ed, 2012) at para 24-111), "Damages for injury to feelings or to reputation, however, cannot be recovered in an action based upon a "lawful means" conspiracy to injure". The origin of the distinction between "airy fairy" and "specific" reputational loss derives from the judgment of Dillon LJ in the Lonrho case, (loc cit) at p.1496F. Having stated that "… if the [claimants] want to claim damages for injury to reputation or injury to feelings, they must do so in an action for defamation, not in this very different form of action. Injury to reputation and to feelings is, with very limited exceptions, in a field of its own …", he continued:

> "To prove loss of orders and loss of trade is another matter: that is recognisable pecuniary damage … Such loss of orders, for example, would involve injury to the goodwill of a business which may be one of the most important assets of the business. [Goodwill] cannot mean some airy-fairy general reputation in the business or commercial community, which is unrelated to the buying and selling or dealing with customers, which is the essence of the business of any trading company".

142. I do not agree with the submission in the claimants' skeleton argument of 17 June 2012 that "reputational damage" is, generally and in principle, a recoverable head of loss in a tortious claim: it is certainly not "plainly" so. There might be more room for debate about the position where an entity loses business and so suffers financial loss as a consequence of damage to its reputation. The more conventional view is, I think, that the recognised claim is for the financial consequences of reputation being damaged rather the damage to reputation, reflected in and quantified by reference to the financial consequences: see, for example, the much-cited judgment of Atkinson J in Aerial Advertising Co v Batchelors Peas Ltd (Manchester), [1938] 2 All ER 788, 796. But the point is put rather differently in the footnote to the sentence in Clerk & Lindsell to which I have referred in the previous paragraph (and which Mr Orr cited in his skeleton argument), in which the general proposition is qualified with the words, "at least in the absence of proof of pecuniary loss, since that would allow the claimant "to circumvent the requirements of a defamation action" and the judgment of Dillon LJ in the Lonrho case is referred to. Often it will not matter whether the compensation is for the loss of reputation or the financial consequences thereof, particularly in the case of a corporate claimant which suffers loss, even in a defamation action, only by reference to its business: "A company cannot sue either for libel or slander unless it is defamed in the way of its business", D&L Caterers Ltd and Jackson v D'Ajou, [1945] KB 364, 367 per Du Parcq LJ. It mattered here because Mr Trace was seeking to harness the concept of a "local" reputation to his argument that the claimants had sustained damage in England.

143. I agree that Popplewell J should have been given more assistance on the point, but it is clear that he was acutely aware that the claimants' legal argument that they had suffered recoverable damage in England was fraught with difficulty. Much as I disagree with the legal analysis of this point in the skeleton argument of 17 June 2012, I am not convinced that I should characterise therefore the presentation as amounting

to a breach of the duty of full and fair disclosure, and I need not do so in order to decide the applications before me. I say no more about it.

144. In his application Mr. Al Refai stated as a ground for his application that "The Claimants failed to comply with the guidelines in Dadourian Group International Inc v Simms, [2006] EWCA Civ 399 at para 25 when applying for permission to enforce the Freezing Order out of the jurisdiction". Mr. Daniel Toledano QC, who represented Mr. Al Refai, did not develop that submission, and he was right not to do so. The judges of this court are well aware of the Dadourian guidelines, and there was no reason that Mr. Trace should have rehearsed them on the ex parte application.

145. I have dealt with the defendants main complaints. Other matters were mentioned by them: to take just two examples, Mr. Peto said (i) that the claimants did not accurately disclose the true position with regard to delay, and that Mr. Al Refai had made it known two years before the applications that he had Proprietary Information; and (ii) that the claimants did not draw to the court's attention that the definition of "Proprietary Information" was not sufficiently certain to make clear to the defendants what the order of 18 June 2012 required of them. However these additional points were not developed before me, they seem to me to add nothing significant to the defendants' arguments, and they do not require further consideration.

146. To summarise my conclusions about the presentation of the ex parte applications: of the legal complaints, I am persuaded of the complaint that the court's attention was not drawn to section 12(3) of the HRA and it should have been. This was the result of an understandable oversight on the part of the claimants' lawyers, and the only consequence was that this mistake might have aggravated the inadequacies of the presentation of the potential iniquity defence. I consider that the claimants were in breach of their duties on the ex parte applications with regard to the Website complaints, and although they largely result from inadvertence on the part of those acting for the claimants, they also include complaints about BA's misleading CBB letter. The claimants' more culpable failings relate to the data complaints and the financial complaints: here I conclude that the claimants were in breach of their duties not only by failing to make proper disclosure but because some of their evidence, including that of Sheikh Abdullatif and Dr Almajthoob, was misleading. Their evidence was dishonest.

147. I therefore uphold both the grounds for the defendants' applications: the defendants have established both that the claimants were in breach of their duties as ex parte applicants, and in breach of their duties thereafter in that they neither corrected the deficiencies in their ex parte presentation, nor complied with the preservation undertaking and were probably in breach also of the drives delivery order.

148. The principles about how the court should respond to a breach of the duties of an ex parte applicant were usefully set out by Mr. Alan Boyle QC, sitting as a Deputy High Court Judge, in Arena Corporation Ltd v Peter Schroeder, [2003] EWHC 1089 (Ch) at para 213. The general rule is that the court will discharge any orders that were granted and will not renew them until trial. In Millhouse Capital UK Ltd v Sibir Energy Plc, [2008] EWHC 2614 (Ch) Christopher Clarke J said (at para 104) that "such is the importance of the duty that, in the event of any substantial breach, the Court strongly inclines towards setting its order aside and not renewing it, so as to

deprive the defaulting party of any advantage that the order may have given him". However, the court has jurisdiction, albeit one which it exercises sparingly, to continue an order or to replace an order that it discharges with a new order to similar effect. While the court must have proper regard to the need to protect from abuse the administration of justice and in particular its jurisdiction to grant orders ex parte, it will not apply the general rule so rigidly as to allow it to work injustice.

149. When making decisions of this kind the court should, of course, weigh all relevant considerations, and they include importantly these:

i) The culpability of the applicant (and his advisors) with regard to the breach, and in particular the extent of the breach and whether it was deliberate;

ii) The importance and the significance to the outcome of the application of matters not disclosed to the court;

iii) The merits of the applicant's case; and

iv) The nature of the order obtained ex parte.

When assessing this last consideration, the court has regard to the consequences of the order for the person(s) against whom it is to be made: see Payabi v Armstel Shipping Corp (The "Jay Bola"), [1992] QB 907, 918B-D. Christopher Clarke J observed in the Millhouse Capital case (loc cit at para 104) that the general rule is applied particularly strictly in the case of freezing and seizure orders. On the other hand, with regard to orders for service of proceedings out of the jurisdiction the cases referred to in Gee, Commercial Injunctions, (5th Ed, 2004) para 9.001, fn6 make it clear that "In principle the same duty arises in relation to [an order to serve out of the jurisdiction]. But in practice such oversights are more likely to be penalised only in the form of costs, since it would not be right to drive the [claimants] to an inappropriate jurisdiction or to bar a bone fide claim from a proper one. To that extent the practice may be different in relation to [order for service out of the jurisdiction] from cases involving injunctions": A/A D/S Svendborg v Maxim Brand, (CA, unreported, 23 January 1989), per Kerr LJ. More specifically, in these cases the court will not readily treat a failure to anticipate potential defences as a breach of the duty to make full and frank disclosure: see Ophthalmic Innovations International (UK) Ltd v Ophthalmic Innovations International Inc, [2004] EWHC 2984 (Ch) at para 44. As far as concerns the order for service on Mr Al Refai, I do not give great weight to the Website complaints.

150. In this case my conclusions mean that the claimants' breaches of duty on the ex parte applications were extensive and culpable, and their culpability was aggravated by their subsequent conduct, in particular the breach of the preservation undertaking by deleting documents from HDD1 and the claimants' dishonest evidence on these applications. Mr. Trace submitted, nevertheless, that the merits of the case are such that the orders should be continued or at least renewed.

151. The claimants argue that the matters about which they are criticised are not ultimately important to their claims. The evidence of what the defendants did, even if obtained unlawfully through hacking, is admissible and the defendants have not challenged or given any indication as to how they might challenge it. Equally, the financial complaints do not answer the claimants' argument that DAAR suffered financially in

England because of the defendants' wrongdoing, and in any case the claimants might have claims under foreign laws which would overcome any need to prove damage in the London markets. Even if the allegations on the Website were true, this would not, it is said, provide the defendants with an answer to the claims, in particular, Mr Trace submitted, to the claim of conspiracy to injure; and in any case the iniquity defence only leads to the question how much disclosure was required in the public interest and does not justify public disclosure: see Imutran Ltd v Uncaged Campaigns Ltd, [2001] 2 All ER 385 at para 20: "… the court will … consider how much disclosure the public interest requires; the fact that some disclosure may be required does not mean that disclosure to the whole world should be permitted". (Mr Trace told me that, although the present orders would restrain the defendants from bringing matters to the attention of the relevant regulatory authorities, the claimants would accept that the defendants should be free to disclose information to regulatory bodies with authority over them and that the orders should be varied to that extent.) I recognise the force in these arguments, notwithstanding they are in sharp contrast with what was said on the ex parte applications. Then it was emphasised to the court (i) that the evidence from the drives was admissible because it had been lawfully obtained; (ii) that the allegations on the Website were untrue; and (iii) that damage was suffered in London and the claims were brought under English law. It might be that the orders would still have been granted had the applications been otherwise and properly presented, but it cannot be said in view of how the ex parte applications proceeded that the claimants' breaches of duty were not important to their outcome.

152. Mr. Trace summarised this part of his argument in five main submissions:

i) That the claimants still need injunctive relief in order to protect themselves from financial damage through the dissemination of their confidential information.

ii) That the claimants have a powerful case (an "absolutely compelling" case) on their claim that the defendants entered into a conspiracy to do them damage, and this is so regardless of whether what was said on the Website is true or false. That question does not affect the underlying "flavour" of the case against the defendants: see National Bank of Sharjah v Dellborg and ors, [1993] 2 Bank LR 109.

iii) That the case for injunctive relief is so compelling the court should not avert its eyes from it even if the claimants were complicit in the computer hacking.

iv) That, however the claimants' evidence was obtained and whether or not it was lawfully obtained, that has no bearing on the claims against the defendants: the court should in any case determine the claim on the evidence before it.

v) That the defendants would suffer no prejudice if the court makes injunctions to "hold the ring" until the trial.

153. The defendants, or at least Kroll and Mr. Richardson, dispute the first of these propositions: that the claimants still need injunctive relief against them. They have delivered many documents to the claimants pursuant to the orders of Popplewell J: according to Mr. Trace, Kroll have delivered some 133,000 documents and Mr. Richardson has delivered some 50,000. Further they have ceased to work for Mr. Al

Refai and, I was told, have no intention of doing so in the future. These observations do not, I think, apply to orders against Mr Al Refai, but they go some way to answer the case for continuing or renewing orders against Kroll and Mr Richardson. However, my decision does not depend upon this point, and I shall suppose that without orders against all the defendants the claimants are at risk that confidential information will be disseminated and that this will cause them financial damage.

154. The defendants have not engaged with the merits of the claim except by way of their arguments about the iniquity defence, and it is not disputed that the claimants have a good arguable case and that there is a serious issue to be tried on their claims. I am prepared to suppose on these applications that they have a powerful case.

155. The essential question is whether in these circumstances the public interest that there should be a proper response to the claimants' conduct is nevertheless outweighed. The public policy was aptly expressed by Mr Geoffrey Vos QC in the St Merryn Meat case (cit sup, at para 107) in terms of "the necessity to demonstrate to the claimants (and other applicants for without notice interim orders) the gravity of their duty of disclosure and the consequences of ignoring it". He discharged ex parte orders because he concluded that in view of the claimants' "breach of their obligations of absolute good faith", it was not unjust to deprive them of the relief that they have obtained, taking into account that thereafter the claimants had "sought to maintain and advance what I have decided to be a deliberately false and dishonest case." Those observations in my judgment apply in this case, and to my mind they outweigh the merits of the claimants' case, the risk of them sustaining financial damage as a result of confidential information being made known to others, the fact that the claims do not depend upon how the data was obtained or the claimants' role in obtaining it, and the argument that the defendants would not be prejudiced by orders designed to maintain the status quo pending trial. In my judgment, the public interest requires that the claimants' conduct should deprive them of the relief that they obtained ex parte, either through continuing the original orders or through making renewed ones. Although I have put my decision on the basis of the breach of duty on the ex parte applications, the claimants' deliberate breach of the preservation undertaking to my mind confirms that it would be wrong to continue or renew the relief.

156. Therefore, subject to two qualifications to which I shall refer, I shall discharge and not renew orders obtained from Popplewell J on 18 June 2012, specifically these: the non-disclosure orders, the document delivery orders, the disclosure orders and the freezing order. I refer to the permission for service out of the jurisdiction below. The defendants applied to have other orders set aside, including the DPA orders, and I invite further submissions about them.

157. The two qualifications are these: Mr Trace made some reference to the position of third parties if the defendants are free of all restraint with regard to publishing confidential documents concerning BA's affairs. This point was not developed before me, but I am concerned that my order should not lead to unwarranted prejudice to innocent third parties in this way: I have it in mind in particular that BA is a bank and its customers have, I would suppose, the right to keep their banking affairs confidential. I do not consider that this concern should detract from my conclusion that the public interest demands that the claimants should not significantly benefit

from continuing or renewed relief, but I invite the assistance of counsel about whether some provision should be made to meet it.

158. The second qualification concerns the service of the proceedings on Mr Al Refai. For the reasons that I have explained, I conclude that I should set aside the order made by Popplewell J. I *might* have renewed it but for this: the claimants propose to amend the claim form and to introduce further causes of action. I do not accept that in these circumstances I should give permission for service out of the jurisdiction of the present claim form, only for the claimants to ask the court to revisit the question of service out of the jurisdiction of the amended form. I consider that the appropriate course is for the claimants (if so advised) to bring an application in respect of a claim form including all claims that they (presently) intend to pursue, and to invite the court to consider that. I prefer to put my decision not to renew the permission for leave to serve out of the jurisdiction on this narrow basis, and to say nothing about whether or not otherwise I would have renewed it. (As I understand it, Mr Richardson does not apply for the permission for service on him to be set aside, but if I am wrong about this, the same applies to him.)

159. I therefore largely grant the defendants' applications. I should be grateful for counsels' help on the remaining questions and in drafting an order to give effect to this judgment.