Neutral Citation Number: **[2022] EWHC 2786 (Comm)**

Case No: **CL-2021-000332**

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

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

Date: **31 October 2022**

Before :

His Honour Judge Mark Pelling KC

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Between :

A	**Claimants**
- and -	
B	**Defendants**

- -
- -

Ben Emmerson CBE KC and Kabir Bhalla (instructed by **King & Spalding International LLP**) for the **Claimant**
Daniel Toledano KC and James Ruddell (instructed by **Travers Smith LLP**) for the **First Defendant**
Hannah Brown KC, Sandy Phipps and Veena Srirangam (instructed by **Eversheds Sutherland (International) LLP**) for the **Second Defendant**
Ben Jaffey KC (instructed by **K & L Gates LLP**) for the **Eleventh Defendant**
Timothy Otty KC, Andrew Scott KC and Paul Luckhurst (instructed by **Macfarlanes LLP**) for the **Seventeenth Defendant**

Hearing dates: **31st October 2022**

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RULING 2

His Honour Judge Mark Pelling KC **Wednesday, 31 October 2022**
(**11:30**am)

Ruling by **His Honour Judge Mark Pelling KC**

1. The issues I now have to determine are whether or not to grant a certificate to the claimants pursuant to section 12 of the Administration of Justice Act 1969 permitting them to apply to the Supreme Court for permission to appeal; alternatively whether I should grant permission to appeal to the Court of Appeal.
2. I prefer to deal with the issues by considering first whether or not permission to appeal to the Court of Appeal should be given and then to turn to section 12 to the extent necessary to do so. In adopting this course, I am adopting a different approach to that adopted by the parties, but it seems to me this is the more logical and orthodox approach.
3. Turning first to the application for permission to appeal, as is well known, the test that a court applies in granting permission to appeal is to ask whether or not there are realistic prospects of the appeal succeeding on the grounds identified, or alternatively whether there is some other reason why permission to appeal to the Court of Appeal should be granted.
4. The arguments in relation to the application for permission to appeal to the Court of Appeal have been advanced exclusively by Mr Emmerson KC by reference to the first of these routes on the basis that it would be a waste of time to give permission to appeal to the Court of Appeal by reference to points which it maintains the Court of Appeal would be bound by authority to dismiss.
5. The substantive issue I had to resolve was whether or not the State Immunity Act precluded the bringing of the claims against the applicant defendants. There were four issues on which that question depended, being the issues I identified at the end of paragraph 21 of the judgment and which I reduced on a shorthand basis to the commercial transaction issue, the Government action issue, the UN resolution issue and the article 6 issue.I dealt with those issues again in a slightly different order to that adopted by the parties.

6. So far as the governmental action issue was concerned, that was concerned with whether (as the claimants contend) the state funding or support of international terrorism should not and cannot be characterised as state conduct or the exercise of sovereign authority as contended or whether such alleged conduct is self-evidently state conduct as contended for by the defendants. I determined that issue by reference to a series of authorities at Supreme Court or House of Lords level as set out in the judgment starting at paragraph 23.The key point, however, was a straightforward one and is that identified in paragraph 28 of the judgment:

> "The key point is that by definition a private citizen cannot provide support for terrorist activity that is 'state sponsored'. By definition, such support can be provided only by a state."

The contrary is not realistically arguable and therefore permission to appeal by reference to that issue is refused.

7. The next issue concerned what I described as the United Nations issue, which concerned a submission by the claimants that to extend the protection of state immunity to those involved, or allegedly involved in the terrorist funding arrangement alleged by the claimants would be contrary to the United Kingdom's obligations under Resolution 1373 of 2001 of the United Nations Security Council. The issue is dealt with at paragraphs 31 and following of the judgment. The central submission made on behalf of the claimants was that permitting state immunity to preclude a claim for damages in respect of what is alleged to be state-funded terrorism, is contrary to international law because it is contrary to the terms of the resolution. I rejected that on a number of different grounds starting at paragraph 36 of the judgment. The key point for present purposes, however, is set out in paragraph 38 of the judgment:

> " ... nothing within Resolution 1373 ... addresses either the question of civil jurisdiction by one United Nations member state over another concerning the alleged state funding of terrorism, nor does it address any issue concerning sovereign immunity, much less does it require sovereign

states not to afford immunity to a state facing a claim such as that advanced by the claimant as their primary claim ..."

I held specifically in relation to paragraph 2(e), upon which the claimants place special reliance, that that did not concern the assertion of civil jurisdiction by one state over another and was concerned exclusively with the requirement that states introduce legislative measures to criminalise the financing of terrorism by that state's citizens or within its borders. Although it was submitted that I was alone in reaching that conclusion, that is incorrect for the reasons identified in the final sentence of paragraph 38.In those circumstances it seems to me that any attempt to challenge my conclusions by reference to the United Nations issue must fail at that level.

8. I accepted that whilst state immunity is a fundamental norm of international law, it is capable of being qualified by other well established international legal rules, and I referred to Supreme Court authority to that effect; see paragraph 40 of the judgment. However, if a fundamental norm of international law such as that which relates to state immunity is to be qualified, then the existence of a countervailing principle must be established not by assertion or by the activities of particular states, particularly when enacting primary legislation applicable within the borders of those states, but is required to develop according to established rules by which customary international law can be identified.I summarise those principles in paragraph 40 of the judgment. It was submitted on behalf of the defendants, and it is not challenged by the claimants, that the claimants have not referred to a single judicial decision, treaty or the writing of a reputed publicist or jurist which undermine in a relevant way the fundamental norm of state immunity. For that reason too, the claimants' proposed challenge in relation to the United Nations issue is merely fanciful and cannot satisfy the test that has to be applied before permission to appeal to the Court of Appeal is given.

9. So far as the article 6 issue is concerned, it was submitted by the defendants, and again does not appear to be seriously in dispute, that the arguability of this point depends upon demonstrating that the United Nations resolution has the effect for which the claimants allege. I agree. I address that

issue in paragraph 46 of the judgment and concluded that the article 6 point was unarguable in the light of the conclusions I have reached concerning the United Nations issue. In those circumstances there is no reasonable prospect of the Court of Appeal coming to a different conclusion in relation to the article 6 issue.

10. So far as the commercial transaction issue is concerned, I resolved that by reference to the principles identified by Lord Millett in Holland v Lampen Wolfe, [2001] WLR, 1573 at 1587 at F-H – see paragraph 50 and following of the judgment. It was submitted that that was obiter. So it was, but it has been consistently followed in subsequent decisions, most recently by Mr Justice Stewart in Heiser v Islamic Republic of Iran, but previously by Mrs Justice Gloster, as she then was, in Svenska Petroleum Exploration v the Republic of Lithuania, and prior to that by Mr Justice Stanley Burnton, as he then was, in AIC v Federal Government of Nigeria.There is no realistic prospect, in my judgment, of the Court of Appeal taking a different view and departing from the analysis which has been consistently adopted over many years by the courts, particularly since it is consistent with the language used in the statute itself.
11. In those circumstances, permission to appeal in relation to the substantive state immunity issues must be refused.
12. So far as the question of whether permission to appeal from my refusal to grant the proposed amendment is concerned, I consider that is also bound to fail and has no realistic prospect before the Court of Appeal for the reasons identified in the judgment. The short point is that if the proposed amendment were to be permitted, then all that the court is required by the Act not to permit to happen would in fact happen. Although some reliance is placed on authorities in which judges have directed the trial of factual issues in relation to claims of state immunity, there is a fundamental difference between a judge requiring that particular issues of fact be resolved so as to enable the question whether or not state immunity applies to be resolved on the one hand and the notion that there should be a full trial of what the claimants' characterise as the primary case, which engages

front and centre the state immunity issue so as to decide whether or not relevant inferences can be drawn, and only if inferences cannot be drawn then to proceed to the secondary case. That is impermissible and the amendment as proposed permitted no other course.

13. In those circumstances, permission to appeal to the Court of Appeal is refused.

14. The next question which arises is whether or not I should grant a certificate under section 12 of the Administration of Justice Act 1969. Section 12.1 governs the circumstances in which a certificate by a trial judge should be granted. It provides:

> "1. Where, on the application of any of the parties to any proceedings to which this section applies, the judge is satisfied (a) that the relevant conditions are fulfilled in relation to his decisions in those proceedings or that the conditions in subsection 3(a), the alternative conditions, are satisfied in relation to those proceedings, and (b) that a sufficient case for an appeal to the Supreme Court under this part of this Act has been made out to justify an application for leave to bring such an appeal, the judge, subject to the following provisions of this part of the Act, may grant a certificate to that effect."

15. As will be apparent, therefore, the test which has to be satisfied is, first of all, a requirement that what are described as the relevant conditions must be satisfied, and secondly, that a sufficient case for an appeal to the Supreme Court must be made out. Once those conditions are satisfied then the court has a discretion, but not an obligation, to grant such a certificate as is apparent by the use of the word "may" in the concluding part of the section.

16. The submission made by Mr Emmerson KC on behalf of the claimant was that the relevant conditions were plainly satisfied. They are those set out in subsection 3 of section 12, the relevant part of which provides:

> "... the relevant conditions in relation to a decision of the judge in any proceedings are that a point of law general public importance is involved in that decision and that that point of law either (a) relates wholly or mainly to the construction of an enactment or of a statutory

> instrument and has been fully argued in the proceedings and are fully considered in the judgment of the judge in the proceedings, or (b) is one in respect of which the judge is bound by the decision of the Court of Appeal or the Supreme Court in previous proceedings and was fully considered in the judgments given by the Court of Appeal or the Supreme Court, as the case may be, in those previous proceedings ..."

Mr Emmerson submitted on behalf of the claimants that those conditions were plainly satisfied in the circumstances of this case, and Mr Otty KC, who took on the burden of making submissions in response on the issue I am now considering on behalf of all the defendants, did not seriously challenge that issue.

17. The point which is made by Mr Otty and which Mr Emmerson must engage with if he is to succeed in passing the threshold requirements of the section is the requirement in section 12.1(b), which I characterised in the course of argument as a qualitative test; that is, the applying party must show a sufficient case for an appeal to the Supreme Court has been made out so as to justify an application for leave to bring such an appeal.

18. In my judgment the only answer to that issue must be a clear no by reference to the conclusions that I have reached in relation to the substantive issues that arise on the application for permission to appeal to the Court of Appeal. It follows that it is only if it can be shown first that the Court of Appeal would be bound to dismiss an otherwise arguable appeal, because the Court of Appeal would be bound to reach the same conclusions as I have reached by reference to Supreme Court authority and/or Court of Appeal authority binding on the Court of Appeal, and secondly that there is a realistically arguable prospect of the Supreme Court taking the view that those decisions should be qualified or overturned in relation to the issues that arise.

19. The central point made by Mr Emmerson is that no court has had to consider whether or not the state funding of terrorism engages the issue of state immunity and that, therefore, whilst the authorities upon which I have relied say what they say, and the Court of Appeal would be bound by

the same authorities as me, nonetheless by the time the case reached the Supreme Court, as it were all bets would be off and the Supreme Court would be able to vary or set aside its decisions in effect at will if it considered that it was wrong in principle for the State Immunity Act to apply in circumstances such as this.

20. In my judgment, there is no realistic prospect of the Supreme Court taking that view for at least the following reasons. First, most of the decisions upon which I relied have been decided in the recent past following a comprehensive review of all the applicable principles. Secondly and fatally for the claimants, in the end this point depends critically on the terms of the Security Council resolution to which I referred earlier in this judgment. So far as that is concerned, for the reasons I have explained, it does not even arguably carry the construction for which the claimants contend, and therefore and on that basis any challenge in the Supreme Court is bound to fail.
21. In those circumstances and for those reasons I refuse to grant the certificate sought.
22. The final issue which arises, therefore, is this: what should be done in relation to these proceedings having regard to the stay which applies to the further proceedings issued by the claimants in which the claimants seek to advance against the defendants a claim which it is said is advanced exclusively on the basis that the defendants were private actors. I mention this point because earlier I ruled that the stay issue would be determined following determination of the permission and s.12 issues.
23. So far as that is concerned, the current state of play in relation to those proceedings is they are stayed by a consent order made by Mr Justice Andrew Baker on paper on 5 September 2022, by which at paragraph 1 he directed that:

> "The proceedings be stayed until 28 days after (a) the final determination of ... [these proceedings], or (b) further order of the court."

24. The submission which is made by Mr Emmerson on behalf of the claimants is that I should lift that stay, transfer those proceedings into the general list of the Queen's Bench Division, which everybody is agreed is the appropriate course either now or in the future, so as to allow the

claimants to proceed with that action. He submits that there can be no possible prejudice to the defendants because the reason for the stay was the continued state immunity issue, and the effect of the decision I have reached is that that is at an end.

25. But that is only so if there is no application for permission to appeal to the Court of Appeal. I have heard no undertaking or even indication from the claimants that they do not intend to apply to the Court of Appeal for permission to appeal, and in those circumstances it seems to me there is an obvious prejudice to the defendants because as long as these proceedings remain subject to the appeal the defendants remain subject to the risk that they will have to proceed with the dispute as between them and the claimants in two separate actions engaging largely the same issues.

26. If and when either permission to appeal by the Court of Appeal is refused or any appeal is dismissed, then at that point, the stay can safely be lifted. What I do not see at the moment is how it can be right to lift the stay so as to allow the defendants to be vexed with both fighting an appeal in these proceedings and attempting to defend the other proceedings at the same time. That would be wrong.

27. Therefore, what I propose to direct is that the stay be lifted upon the expiry at the later of either expiry of the time for the claimants to apply to the Court of Appeal for permission to appeal or final determination of any such application or appeal if permission be granted, with any further application for the lifting of the stay in the meanwhile to be made to the Court of Appeal. This will not involve a lengthy period of time or period of delay as Mr Emmerson suggests. The period involved will be 21 days or such further time as I am asked to grant for the lodging of an application for permission to appeal. If an application for permission to appeal is made to the Court of Appeal what happens thereafter will be dependent on what the Court of Appeal orders. I will give liberty to apply to the Court of Appeal for a variation of this order in relation to the stay so as to give the claimants the comfort of that protection in the event that it is needed. But the principles that led to the granting of the stay in the first place continue to apply unless there is no application to the Court

of Appeal or until final determination of the application for permission to appeal or appeal if permission be granted.