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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 2551 (QB)



No. QB-2019-002712

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 17 September 2021

Before:

MR JUSTICE CALVER

B E T W E E N :

BB & Ors.

Claimants

- and -

MOUTAZ AL KHAYYAT
RAMEZ AL KHAYYAT
DOHA BANK LIMITED

Defendants

MR B. EMMERSON QC (instructed by McCue & Partners LLP) appeared on behalf of the Claimants.

MISS H. BROWN QC and MR S. PHIPPS and MISS V. SRIRANGAM (instructed by Eversheds Sutherland) appeared on behalf of the Third Defendant.

J U D G M E N T

(via Microsoft Teams)

MR JUSTICE CALVER:

- 1 This is an application by the third defendant (“the bank”) for orders vacating the forthcoming hearing of and temporarily staying more generally a *forum non conveniens* application made by it in these proceedings, which I shall call (“the forum application”). The substantive claim is a foreign law tort claim for damages brought by a number of anonymised individuals.
- 2 The claimants are all said to be Syrian citizens who suffered loss in Syria during the ongoing Syrian civil war as a result of the actions of a terrorist group called the Al-Nusra Front. The claim is pleaded under Syrian law. The bank is a Qatari financial institution. The first and second defendants, whom I shall call “the Al Khayyat brothers”, are Syrian Qatari businessmen who are not domiciled in this jurisdiction and have not been served with the proceedings.
- 3 The proceedings against the three defendants were issued by a claim form dated 30 July 2019. The bank maintains that the claim has no material connections to this jurisdiction, and accordingly it made its forum application in December 2019. The forum application was listed for hearing in November 2020, but was vacated shortly before its hearing on the claimants’ application after a change of legal representation. Subject to the stay application presently before the court, the forum application is now relisted for three days in a window from 4 October 2021.
- 4 The particulars of claim were served on 29 August 2019 at a representative office which the bank maintains in London. The essence of the claim against the bank was that it assisted the Al Khayyat brothers to fund the Al-Nusra Front. In particular, I refer to paragraphs 4, 34, 44, 47(1), 54 and 55(4) in which, in particular, it is pleaded as follows. In para.4, it is pleaded that:

“The Al-Nusra Front received funds from the Al Khayyat brothers, including through accounts held by them and/or entities associated with them at Doha Bank and/or through other accounts held at Doha Bank in the circumstances set out below, as a result of which the Al-Nusra Front was able to finance its operations and cause loss and damage to the claimants.”

In paragraph 34, it is averred that the Al Khayyat brothers’ involvement in the financing of terrorism, which is the subject of this claim, has been, at least in part, both motivated and enabled by their connections to the State of Qatar, and I read into this judgment the other paragraphs of the particulars of claim that I referred to.
- 5 True it is that the particulars of claim made reference to the State of Qatar and to Qatari officials, but I agree with Miss Brown QC who appears on behalf of Doha Bank together with Sandy Phipps and Veena Srirangam that the claimants did not clearly plead that the alleged terrorist financing was undertaken on behalf of the State of Qatar. Instead, the central allegation as regards the State of Qatar was, as I have said, that the Al Khayyat brothers’ involvement in the financing of terrorism, which is the subject of this claim, has been, at least in part, both “motivated and facilitated” by their connections to the State of Qatar.

- 6 This allegation of motivation and enablement is somewhat ambiguous. Is this an allegation of conspiracy or not? To put it at its lowest, it was not clear whether it was being alleged that the Al Khayyat brothers were carrying out the alleged terrorist financing on behalf of the State of Qatar. It was not specifically alleged that their involvement was pursuant to a conspiracy organised by the state.
- 7 On 24 December 2019, the bank filed and served the forum application. The basis of the forum application was that Qatar, rather than England, was clearly and distinctly the more appropriate forum for the trial of the claim and that there was no basis on which the court could conclude that the claimants would be unable to obtain justice in the Qatari courts.
- 8 A directions hearing prior to the hearing of the forum application came on before Chamberlain J on 24 May 2021. He held in granting the bank's application at para.72(c) to (e) of his judgment dated 4 June 2021 that:

“The required understanding of the scope and nature of the underlying allegations can be gleaned from the pleadings. Their purpose is to set out what is alleged and against whom. That is all the judge needs to know about the underlying allegations to decide whether Qatar is an appropriate forum. There is no need for the judge to consider voluminous evidence about the underlying allegations when determining the application for a stay.

The Particulars of Claim already set out in some detail the allegations on which the Claimants rely. However, the Claimants should be given an opportunity to amend those Particulars to include any of the matters contained in the evidence served in January that can properly be included in a statement of case. The amended Particulars of Claim will provide an adequate summary of the nature and scope of the allegations underlying the claim.

The requirement that this summary should take the form of a pleading will serve two important purposes. First, it will focus the minds of the Claimants' representatives on the question of which material contained in the evidence can properly be pleaded. This will impose a salutary discipline on the way the underlying dispute is described to the judge.”

- 9 Further to this, the claimants duly made an amendment application on 2 July 2021, attached to which were draft amended particulars of claim. The amendment application was supported by evidence set out in the application notice itself and by a covering letter sent by the claimants' solicitors to the court on the same day the application was filed, 2 July 2021.
- 10 The relevant paragraphs of the draft amended particulars of claim for present purposes are 4, in particular 4(2), 32(1) and 51. In particular, para.4 reads as follows:

“The actions of the defendants in this claim formed part of a broader conspiracy to fund the Al-Nusra Front driven by ruling members of the Qatari ruling elite, including Sheikh Hamad bin Jassim bin Jaber Al Thani, the former Prime Minister and Foreign Minister of Qatar, and Sheikh Hamad bin Khalifa al-Attiyah, the former Head of Qatar State Security and the Head of the Private Engineering Office of the Amiri Diwan (the private office), the arm of the Emir's supreme executive authority that provides commercial funding to engineering and construction projects.”

- 11 So far as relevant to this claim, the defendants' participation in the conspiracy was as follows and, in particular, sub-paragraph (4)(ii) reads:

“The private office further commissioned overpriced construction contracts, including to construction companies run by the Al Khayyat brothers, the overpriced component of which was laundered through banks, including Doha Bank, and taken over the border to fund the Al-Nusra Front.”

- 12 Paragraph 32(1) inserted some wording in the last sentence of that paragraph as follows:

“The Al Khayyat brothers' role in providing this support [which is support to the State of Qatar] on the instructions of the State of Qatar was in part facilitated by Mr Tabbara, who attended organisational meetings with them, and members of the Syrian Intelligence Services, including the MID and military.”

- 13 In para.51, additional words were added into the plea there, so that that paragraph read, so far as Doha Bank's involvement is concerned, as follows:

“Doha Bank played an important role in facilitating payments to and/or financing the Al-Nusra Front and in facilitating the conspiracy pleaded at paragraph (4) above.”

Those last words, “and in facilitating the conspiracy pleaded at paragraph (4) above”, were added in in the draft amended pleading.

- 14 It can accordingly be seen that the claimants wished to go further than they had pleaded originally and to advance a case that the alleged terrorist financing (which forms the subject of the claim) was carried out as part of a broader conspiracy in which members of the Qatari ruling elite participated and, it appears, was carried out on behalf of the State of Qatar, and that the bank facilitated the conspiracy (which arguably raised issues of agency).

- 15 Indeed, by their letter dated 2 July 2021, in putting forward draft amended particulars of claim, the claimants themselves stated as follows:

“The full scope of the case to be presented at trial has been enlarged by further enquiries since the claim was originally lodged. Counsel for the claimants made it clear at the November 2020 hearing and in correspondence preceding that hearing that the claimants' case is that, in carrying out their terrorist funding activities, the first and second defendants were acting as agents for or with the consent and acquiescence of senior members of the Qatari government and their relatives and that they used various clandestine methods to divert state funds to the terrorist groups in Syria.”

- 16 Then, in para.6 of the letter, they said:

“Whilst the claim remains a claim against the first and second defendants acting through the third defendant, the claimants' case is that the first and second defendants were not acting in an individual capacity, but as part of a much broader conspiracy involving very senior and exceptionally influential members of the Qatari royal family and individuals such as Sheikh al-Attiyah, who are directly connected to Qatari state security and directly accountable to the Emir. The present claim thus forms part of broader terrorist financing

conspiracy alleged against a wider group of individuals and entities with extremely close connections to the seat of power in Qatar. Whilst those other individuals are not named defendants in this action, evidence will be led at trial to prove that the first and second defendants were laundering terrorist funds [that is through the third defendant] on behalf of this wider group, who knowingly diverted state funds to Al-Nusra/ISIS using a variety of methods, entities and individuals.”

- 17 In other words, the enlarged case which had been threatened in submissions and correspondence was now to be advanced in the amended particulars of claim. Further still, the evidence in support of the amendment application specifically linked the amendments to the evidence in a witness statement made on 17 May 2021 by Mr Basel Hashwah, who is one of the claimants in the *Hashwah* proceedings, saying that it was “by virtue of” that statement that:

“The claimants are in possession of sufficient evidence to plead a broader terrorist financing conspiracy which implicates senior members of the Government of Qatar.”

Indeed, the claimants called the amendments the Basel amendments.

- 18 The *Hashwah* proceedings were commenced on 1 June 2021 and concerned parallel and related proceedings in the Commercial Court which have been commenced against these three defendants, amongst others. The brief details of claim in those *Hashwah* proceedings allege, amongst other things, that there was:

“... a clandestine conspiracy perpetrated by prominent individuals and entities associated with the State of Qatar to fund the Al-Nusra Front, a designated jihadist terrorist group in Syria, by a variety of unlawful means. The terrorist funding conspiracy is and was driven by high ranking members of the Qatari ruling elite, including certain defendants in these proceedings, to actively support and facilitate the actions of Al-Nusra in Syria on behalf of the State of Qatar. The terrorist funding conspiracy was carried out in conjunction with the Muslim Brotherhood and with the involvement of the Qatari Intelligence Services. Secondly, the bank facilitated payments and/or the financing of Al-Nusra. This included the transmission of funds to accounts in Turkey and/or Lebanon carried out at the behest of the Al Khayyat brothers.”

- 19 On 20 July 2021, the bank made an application in the *Hashwah* proceedings to challenge the court’s jurisdiction on state immunity grounds. This application, which is listed for a four day hearing in May 2022, is made on materially identical grounds to the SIA application in these proceedings.
- 20 In response to a request from the court for an indication of its position on the proposed amendments to the claimants’ particulars of claim in these proceedings, the bank wrote to the court on 9 July 2021 indicating that it did not oppose the original amendments, but did so expressly without prejudice to any of its rights to challenge jurisdiction and to assert state immunity under the State Immunity Act and/or to contest jurisdiction on any other grounds as appropriate.
- 21 On 5 August 2021, the claimants’ solicitors sent an email to the court stating that they had been informed by their counsel that “There [was] a very slight drafting error in the draft amended particulars,” which he had overlooked. This drafting error requires the insertion of

no more than two words in two places and the correction of one other drafting error. Thus, the claimants told the court that they would resubmit their amended particulars of claim in what they called a very slightly amended form and invited the court to not make an order on the amendment application in the meantime.

- 22 The claimants later served a further revised version of their amended particulars of claim, but they did not set out the changes that they had made to the original amendments. Accordingly, upon the bank's request, the claimants identified the proposed revisions by email dated 6 August 2021, and I read into the judgment the contents of the email at bundle C, tab 10, page 534.
- 23 Those changes make the case that the claimants wish to advance less clear still. What is the purpose of the deletion of the word "ruling", for example, in relation to para.4 where that word was deleted from the text which read "*driven by ruling members of the Qatari ruling elite, including Sheikh Hamad bin Jassim bin Jaber Al Thani*"? Is it to distance the claim from the Qatari state? It remains unclear.
- 24 The bank then wrote to the claimants and the court saying that these revised amendments could not have been as a result of drafting errors, but instead appeared to be an attempt by the claimants in response to the SIA application to water down the explicitness of their allegations against the State of Qatar. The bank accordingly stated that it opposed the revised amendments on the basis that, in summary, they did not fairly reflect the claim that the claimants intended to advance at trial.
- 25 In these circumstances, Chamberlain J gave his provisional view that the amendment application should be determined at this hearing. The parties agreed that that was a sensible course, and the court later directed that the amended application be so listed. However, on 31 August 2021, the claimants unexpectedly wrote to the court entirely withdrawing their amendment application and stating that they would proceed on the basis of their original unamended particulars of claim because they said it would "simplify the procedural position and make the future conduct of these proceedings manageable." The claimant suggested that the unamended particulars of claim did, in fact, embody the broader case that they had pleaded in their draft amended particulars of claim (see, in particular, paras.12 and 13 of their letter of 31 August 2021).
- 26 Mr Emmerson QC who appears on behalf of the claimants likewise submits that:

"The facts relating to the conspiracy and the involvement of the State of Qatar upon which the third defendant now seeks to assert immunity are not new. They have been known since the outset of the claim."

He submits that this much is clear from the unamended particulars of claim alone. These, he says, state in no uncertain terms that the State of Qatar and members of its ruling elite, including the Emir, were a "source, enabler and motivator" of the alleged terrorist financing, and he refers, in particular, to the passages in paras.34, 47(1), 54, 55 and 55(4) of the particulars of claim.

- 27 I do not accept that submission. I consider that the claim advanced in the draft amended particulars of claim is indeed a broader one than the one advanced in the particulars of claim specifically alleging that there was a conspiracy involving and at the behest of the Qatari ruling elite and that the claimants themselves recognised that at the time by considering it necessary to serve these draft amendments.

28 The allegation is not that the Al Khayyat brothers acted as terrorist financiers in an individual capacity, albeit motivated by their connections to the State of Qatar and enabled by their connections to the State of Qatar, whatever that may mean. Rather, the plea in the draft amended particulars of claim is of a broader kind. It is that there was a conspiracy to fund the Al-Nusra Front driven by the State of Qatar in which the defendants were participants, and it appears that the Qatari state's terrorist financing was organised through the agency, in particular, of the bank.

29 In para.21 of his skeleton argument on this application, Mr Emmerson states as follows:

“The scope of the claim and the nature of the allegations vis-à-vis the State of Qatar and members of its ruling elite were clear from the original unamended particulars of claim and remain materially the same today. However, if there remains any doubt as to whether this was known to the third defendant in August 2019, there can no doubt that this was the case when, in June 2020, the claimants submitted and filed evidence in response to the third defendant's *forum non conveniens* application.”

30 He then goes on to rely upon the correspondence and witness statements in which the broader case is advanced. In particular, at para.28 of his skeleton, he says this:

“At the hearing on 11 November 2020, counsel for the claimants made submissions which laid bare the involvement of the State of Qatar and its ruling elite in the underlying terrorist financing conspiracy. As set out in the transcript [which is then quoted] as follows:

‘Can I put it this way at the outset, that this is no procedural hearing that we are faced with today? This is a situation involving, we say, very serious allegations not only of the state funding of acts of terrorism, but also of a state sponsored conspiracy to pervert the course of public justice in this jurisdiction. You may think at first sight that the third defendant's *forum non conveniens* argument is an uphill struggle given that the nature of the allegation in this case is that the Qatari state itself is responsible for funding Al-Nusra and has done so through the medium of the first two defendants and the companies that they own together with the accounts that they hold at Doha Bank.’”

31 As I say, Mr Emmerson QC relies upon this in support of his submission that the defendants knew that this was the claimants' case as long ago as November 2020 and so they have submitted to the jurisdiction by not alleging state immunity earlier, and yet, in submissions before me, Mr Emmerson now says he does not advance a case on these lines and he only relies upon his *original* particulars of claim and so, he argues, the matter is simple. The original particulars of claim plead neither an allegation of agency or sovereignty, and so he says no issue of state immunity can arise.

32 Finally in this respect, I refer to the claimants' solicitor's recent letter of 31 August 2021, in particular, paras.5, 11, 12 and 13, as well as their letter of 23 August 2021, in particular, at paras.8 and 9, where, as Miss Brown QC suggests on behalf of the third defendant, there is no suggestion in these letters of any rowing back from the broader conspiracy allegation.

33 In my judgment, this leaves the defendants in a state of uncertainty. This is not a case, as Mr Emmerson submits in para.34 of his skeleton argument, of the bank seeking to take advantage of an opportunity to assert state immunity in circumstances in which it would be otherwise

out of time to do so. Whether it is out of time or not is a separate issue, but the bank is entitled to advance its state immunity case on a clear understanding of the basis of the case which the claimants are actually intending to advance at trial.

- 34 The bank is concerned that, whilst the claimants have now reverted to their original particulars of claim and Mr Emmerson asserts that they do not, therefore, allege the broader conspiracy plea, which, as I understand it, is alleged in the *Hashwah* case, such that these are acts undertaken by agents of a foreign state which are attributable to that foreign state and so barred by state immunity (see *Jones v Ministry of Interior of Saudi Arabia* and *Pinochet (No 3)*), the matters relied upon by the claimants in correspondence, witness statements and Mr Emmerson's skeleton argument suggest that, in reality, that is indeed the true nature of the claimants' case. I have some considerable sympathy with that concern.
- 35 In the light of these contradictory positions, it is critical, in my judgment, that the defendants are properly informed of the case which they will have to meet at trial. Indeed, this was the very point that Chamberlain J made clear in his judgment at the directions hearing, to which I have already referred. It is especially true in a case which such serious allegations are being advanced. These are allegations of conspiracy to commit very serious criminal offences. Is this said, for example, to be state funded terrorism? What is the level of involvement of the Qatari state which is alleged?
- 36 I do not think it is fair to criticise the third defendant as not having asked for further and better particulars for two years, as was posited in submissions by Mr Emmerson. First, to do so would be inconsistent with the third defendant's forum application, but, secondly, in any event, the need for further information arises as a result of the differing ways in which the claimants' case has been put over a long period of time before now reverting back to the case which it advanced at the very outset, abandoning the ways in which that case had been put inbetween. The claimants' case, in my judgment, does cry out for clarification, particularly as it is now being said that it does not raise the same issues as the *Hashwah* claim when the claimants had originally said that the very evidence in that case would be relied upon in this case.
- 37 Furthermore, the precise nature of the case which the claimants wish to advance will influence two matters. First, it will influence the shape and precise nature and ambit of the case that state immunity is engaged. Second, the way in which the case is pleaded and the extent of the divergence of that case from the case as originally pleaded will feed into the question of whether and how state immunity has been waived or not. That is whether the bank has submitted to the jurisdiction of this court by the steps which it has already taken in the action. The issue of waiver or submission necessarily follows on from a determination of the prior question of whether state immunity exists at all and, if so, in what form.
- 38 In these circumstances, it would be entirely wrong to address the issue of waiver or submission, what the parties call the entitlement issue, prior to the claimants making clear what their pleaded case is and prior to the court determining whether the bank can assert state immunity at all in the light of that properly pleaded case. It follows that it is neither sensible nor desirable to embark upon a hearing of the merits of the waiver arguments at this hearing, tempting as it may be in order to assist the parties in clearing away one of the issues between them.
- 39 I bear in mind in this respect the observations of Elias J sitting in the Employment Appeal Tribunal in the case of *Mauritius Tourism Promotion Authority v Wong Min* UAEAT/0185/08/LA in paras.49 to 50 where it is said as follows:

“Mr West submits that these cases show that considerable latitude is given to foreign states to ensure that they are not subject to the jurisdiction of the courts unless they have had a full opportunity to establish the facts in support of their state immunity claim. There is no doubt that there is a considerable leeway which is given. The court is under a duty when the issue of state immunity arises to consider the position carefully and make appropriate enquiries to satisfy itself that the court can properly exercise jurisdiction. It must allow the state to appear and submit evidence and argument with respect to any disputed issues of fact.”

- 40 Accordingly, I consider, in the light of the claimants’ change of case and in the light of the unusual circumstances of this case which I have outlined in this judgment, that the third defendant should be given the opportunity to ask for further information of the original particulars of claim in order that the precise ambit of the case to be advanced at trial by the claimants is clearly defined and understood. They should be given a period of time to formulate those requests, and I have in mind 21 days, but I will hear argument on that if necessary, and that will obviously be without prejudice to their forum and state immunity applications and objections.
- 41 The claimants should then answer those requests, and they should have a similar period of time in which to do so. There should then be fixed a one day CMC hearing in November or December at which, if it is pursued, the claimants’ alleged knockout blow to the state immunity argument can be determined. What I mean by that is whether it can be shown that it is arguable that state immunity applies and whether it can be shown that it is arguable that it has not been waived. The court can also determine at that hearing whether or not to transfer this action into the Commercial Court for the case to be managed with the *Hashwah* case. That can obviously be determined at the conclusion of the CMC once the position concerning state immunity has been ascertained.
- 42 I accept Mr Emmerson’s concerns that there should not be unnecessary delay in the resolution of these claims, and accordingly I consider that the substantive hearing of the state immunity application should be listed for May 2022 at the same time that the *Hashwah* state immunity application is to be determined and, of course, that hearing can then be vacated if indeed the application before or after the CMC is no longer on foot.
- 43 I also consider that the forum application should be stayed until the conclusion of the CMC, so that the judge who hears the CMC can determine how to deal with it after the state immunity arguability application is resolved. He or she may well list it for hearing either immediately after the state immunity hearing or shortly thereafter, but that decision will be dictated, it seems to me, by the strength or otherwise that the judge forms of the state immunity argument. It also follows that the October hearing of the forum application, that is the hearing that was fixed for three days in the window from 4 October, will be vacated.
- 44 Accordingly, at this stage, I do not transfer this action into the Commercial Court, although that is obviously a distinct possibility for the judge to do that at the CMC hearing. But I think that the precise nature of the claim and its relationship to the *Hashwah* case needs first to become clear.
- 45 There is a separate application for an extension of time that the bank has made, and Mr Emmerson QC has helpfully indicated that the extension of time applications - I think there are two applications - are not opposed. Yes, there are two evidence deadlines in relation to the forum application which are not opposed, and accordingly I grant those extensions of time.

LATER

- 46 So far as the costs of the application are concerned, I accept the submissions of Mr Phipps on behalf of the bank that the bank should get I think, in any event, the costs of the amendment application and the stay application, and the reason I say that is that the stay application was, as he says, applied for and obtained and, in any event, it seems to me that that application required to be stayed in order to determine the state immunity argument first, in any event.
- 47 As to the amendment application, I agree for the reasons that he has given that the bank should get the costs of that. So far as the extension application is concerned, I think those costs, which presumably are relatively trivial, should be reserved to the CMC as Mr. Emmerson submits, and the costs of the state immunity application it is agreed should be reserved to the CMC.
- 48 So far as a payment on account is concerned, I do not get much help from the statement of costs that the bank has put before me because it is very short on detail. I appreciate that it is not intended to be a full breakdown of costs, but it sufficient at least for me on a very cautious basis to order a payment on account. But I think, at this stage, I am not willing to order anything more than £50,000, which is the order that I make on account.
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CERTIFICATE

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This transcript has been approved by the Judge.