



Neutral Citation Number: [2023] EWCA Civ 253

Case No: CA-2022-001018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MR JUSTICE SWIFT
[2022] EWHC 904 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LADY JUSTICE ANDREWS

Between :

(1)-(8) BB AND OTHERS

Claimants and
Respondents

- and -

DOHA BANK LIMITED

Appellant
and Third
Defendant

-and-

(1) MR MOUTAZ AL
KHAYYAT

Defendants

(2) MR RAMEZ AL KHAYYAT

Hannah Brown KC, Sandy Phipps and Veena Srirangam (instructed by Eversheds
Sutherland International LLP) for the Appellant
Ben Emmerson KC and Kabir Bhalla (instructed by McCue Jury & Partners) for the
Respondents

Hearing date: 28 February 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. This is an appeal by Doha Bank Ltd, (“the Bank”), which is the Third Defendant to the underlying claim, against the order of Swift J granting permission to the Claimants to amend their Particulars of Claim and dismissing the Bank’s application to strike out the claim. Permission to appeal was granted by Snowden LJ on 12 September 2022.
2. The Claimants are Syrian citizens who allege that they were forced to flee their homes in Syria permanently in consequence of the unlawful actions of a jihadist terrorist group known as the al-Nusra Front, which is said to be affiliated to al-Qaida and has been proscribed by the UN Security Council, the EU, the UK, the USA, and other States. The Claimants have been granted anonymity on the basis that they have a genuine fear that they and/or their families will be at grave risk of serious harm, including of death, if the fact of their involvement in the proceedings becomes public.
3. The First and Second Defendants (“the Al Khayyat brothers”) are Syrian/Qatari businessmen who are alleged by the Claimants to “have a history of providing financial and other support to terrorist groups operating in civil conflicts in the Middle East”.
4. The Bank is incorporated in Qatar and has branches and representative offices internationally, including in London.
5. On 30 July 2019 the Claimants issued proceedings in the High Court claiming damages for “severe physical and psychiatric injuries, destruction of property, loss of profits and forcible displacement from their homes in Syria,” on the basis that the Defendants are liable under Syrian law for the damage caused by the unlawful acts of the al-Nusra Front because (in the case of the Al Khayyat brothers) they allegedly financed, or (in the case of the Bank) it allegedly facilitated the making of payments to that organisation.
6. The Al Khayyat brothers have yet to be served with the proceedings, and therefore have taken no active part in them to date. There is an order extending the time for service pending the outcome of a jurisdictional challenge by the Bank (which is the anchor defendant).
7. The Bank was served with the proceedings on 29 August 2019, but it has yet to file a defence to the claim because of what Swift J fairly described as its “lengthy and somewhat Byzantine history”. It is unnecessary to rehearse that history fully for the purposes of this appeal: it is set out in some detail in paragraphs 3 to 14 of Swift J’s judgment [2022] EWHC 904 (QB). Suffice it to say that the Bank applied for the proceedings to be stayed on grounds of *forum non conveniens*. The Claimants served evidence in opposition to that application. This included a witness statement from a man claiming to be a former Syrian intelligence officer (“S”), who alleged that he had first-hand knowledge of what he described as the “pivotal role” played by the Al Khayyat brothers in “enabling Qatar to direct many millions of dollars to opposition groups in Syria, including Islamic extremist and terrorist organisations such as the al-Nusra Front”.

8. S also claimed that various attempts had been made by various “representatives of the State of Qatar” including State officials and members of the Qatari ruling family, to interfere with the proceedings and to stop him from giving evidence. He claims that the reasons for these attempts to preclude him from giving evidence are: “because I know that they know the truth about their financing and ideological support for the al-Nusra Front in Syria, truth which, in public, they have always denied.”
9. The Claimants’ case, as originally pleaded, alleged in paragraph 4 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”.
10. It was pleaded in paragraph 33 that “the Al Khayyat brothers are closely connected to the State of Qatar”, and in paragraph 34 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”. Paragraphs 45 to 48 set out details of the alleged funding. Paragraph 47(1) asserted that the Al Khayyat brothers received weekly bank transfers exceeding US\$8.3 million in value from various sources “including the office of the Emir of Qatar” into their personal accounts at the Bank. Paragraph 47(2) and (4) pleaded that this money was then transferred to accounts with banks in Turkey and withdrawn by the brothers in cash or withdrawn by cheque in Lebanon “for the ultimate benefit of the al Nusra Front”. It was pleaded in paragraph 47(3) that two named Bank officials were aware of the transfers but objected to the freezing of the relevant accounts. Paragraph 47(5) pleaded that the money brought into Turkey was then forwarded at the Turkish border to a named individual who purchased weapons and ammunition for terrorist groups operating in Syria.
11. Paragraphs 58 to 60 averred that the Bank was aware or ought reasonably to have been aware of the fact that the funds which passed through its accounts were used to make payments to fund terrorist activities, and set out the facts on which the Claimants relied in support of that allegation.
12. Whilst the office of the Emir of Qatar was specifically alleged to be the source of part of the funds allegedly used to finance terrorist activities, and it was pleaded elsewhere (e.g. in paras 45, 53, 54, 57(4) and 57(5)) that “Qatari intelligence and military personnel” were involved in the facilitation of the Al Khayyat brothers’ passage into Turkey and/or transfers of funds to the al-Nusra Front or affiliated groups in cash or from Turkish banks, the Particulars of Claim contained no clear allegation that the Defendants or any of them were acting on behalf of the Qatari State in allegedly financing the al-Nusra Front. However, that was the clear inference to be drawn from the evidence of S, who spoke in terms of the Al Khayyat brothers “enabling Qatar” to divert many millions of dollars to terrorist organisations. Indeed on S’s evidence, the involvement of the Qatari State provided the motivation for the alleged attempts by State agents to pervert the course of justice which are set out in his witness statement.

13. In July 2021, the Claimants indicated that they wished to amend the Particulars of Claim to plead expressly that the Bank had facilitated a conspiracy between the Al Khayyat brothers and “members of the Qatari ruling elite” to fund the al-Nusra Front (“the State Conspiracy case”). They relied upon evidence from a man named Basel Hashwah, which sought to implicate senior figures in the Qatari Government and the Engineering Office of the Emiri Diwan (the Emir’s “supreme executive authority”) in the alleged terrorist financing.
14. Mr Hashwah’s evidence, in summary, was that it was “inconceivable” that the alleged terrorist financing could have taken place without the express prior approval of the former Prime Minister and Foreign Minister of Qatar; that the former Head of State Security and head of the Private Engineering Office of the Emiri Diwan were at the “epicentre” of the financing; and that the Private Office of the Emiri Diwan set up construction projects as a “front” whose “principal purpose was to set up a conduit for funnelling cash to Syria.”
15. The proposed introduction of the State Conspiracy case by an amendment which the Bank indicated it would not oppose, was countered by the Bank’s contention that the court lacked jurisdiction to hear a claim put on that basis, on grounds of state immunity. That argument subsequently succeeded in very similar proceedings brought by different Syrian claimants, including the aforementioned Mr Hashwah, to which the Bank was also a defendant (“the Hashwah proceedings”): see the decision of HH Judge Pelling KC (sitting as a judge of the High Court) in *Hashwah and others v Qatar National Bank and others* [2022] EWHC 2242 (Comm). The claimants in the Hashwah proceedings were refused permission to appeal to this court against that decision. We were told by leading counsel for the Claimants, Mr Emmerson KC, that those claimants have issued fresh proceedings pursuing a claim on an alternative basis, which have been transferred to the King’s Bench Division.
16. In the present case, the Bank’s decision to raise the issue of state immunity caused the Claimants to reconsider their position. In August 2021 they withdrew the proposed amendment, but they did so in circumstances that led to considerable uncertainty as to the case which the Defendants had to meet, notwithstanding that the Claimants said they were reverting to their case as originally pleaded (to which no objection had been taken by the Bank). This was because the Claimants’ solicitors now appeared to be alleging in correspondence that their original Particulars of Claim already pleaded the State Conspiracy case. This was said by the Bank to have contradicted the position adopted by the Claimants earlier in the history of these proceedings.
17. On 17 September 2021, Calver J made an order enabling the Bank to seek 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.” Whilst Calver J was plainly right to say that the Claimants’ case as originally pleaded needed clarification, that objective was not attained. Instead, the Bank’s Request for Further Information and the Claimants’ response to it resulted in a 57 page document which succeeded in obscuring rather than clarifying what is in dispute.
18. The Bank’s application to strike out was issued on 11 November 2021, following the provision of that document. The material passages of the Claimants’ Response to the Request for Further Information are set out by Swift J in para 17 of his judgment. For present purposes, all that need be noted is that the Claimants expressly disavowed the

State Conspiracy case that they had sought to amend their statement of case to raise, and any wider case than the originally pleaded case that may have been articulated in correspondence. They said that they would be “bound at trial by the case set out in the original Particulars.”

19. They then said that they had “elected” to confine their allegations against the Defendants to an allegation that they participated in terrorist funding arrangements “on the factual premise that these were arrangements unauthorised by the Emir of the State of Qatar, which involved *dishonest and corrupt misappropriation* of funds (*including state funds*) by individuals acting without the authority (or purported authority) of the State.” [Emphasis supplied]. At the same time the Claimants sought to confirm that they still wished to rely on the evidence of S “relating to attempts to pervert the course of justice in these proceedings” in answer to the *forum non conveniens* application, but not for any other purpose.
20. One of the submissions that the Bank made at the hearing of its strike-out application, which was accepted by Swift J (see paragraph 21 of his judgment) – rightly, in my view - was that the further information had not provided the clarification intended, but rather, appeared to provide detail of a different (and diametrically opposite) case which had not yet been pleaded. The new case (“the Misappropriation case”) appeared to be based upon the “factual premise” that the Al Khayyat brothers were using money which had been misappropriated, i.e. stolen from the State by dishonest and corrupt individuals (who, it was to be inferred, were officials of the State because it was alleged that they were acting without authority), and laundered through the bank accounts of the brothers and their companies, to finance terrorist activities.
21. This led Swift J to adjourn the hearing in order to give the Claimants a final opportunity to provide a clear statement of case. That resulted in the production of the draft Amended Particulars of Claim (“APOC”) for which he granted permission after hearing further legal argument.
22. The *forum non conveniens* application, in respect of which Swift J gave further directions, remains unresolved.

THE AMENDED PARTICULARS OF CLAIM

23. The amendments for which permission was granted include, pertinently, a new paragraph 9, which is worth quoting in full:

“The Claimants in these proceedings allege that the Defendants participated in terrorist funding arrangements in their individual (whether that be personal or corporate) capacities. In that regard:

(1) The Claimants’ claims do not implead the State of Qatar nor any servant, official or agent of the State of Qatar. The Claimants advance no positive case with respect to authorisation of the terrorist funding arrangements by the State of Qatar, *which in any event is immaterial to the cause of action as against the Defendants under Syrian law.*

(2) In the absence of (i) any positive case of state authorisation by the Claimants; and (ii) any responsive assertion or evidence of state

authorisation by the Defendants, *it is a necessary inference that any funds* which flowed from the State of Qatar to the Defendants (and were subsequently transferred to terrorist organisations in Syria) *were misappropriated.*”

[Emphasis supplied].

24. The original paras 33 and 34 have been removed, as have the various references to Qatari intelligence and military personnel, and certain other references from which it might be inferred that the Claimants were asserting that the Qatari State was knowingly involved in financing terrorism. However, the allegations in original paras 47(1) and (2), now renumbered as 46(1) and (2), remain.
25. Viewed in isolation, paragraph 9 begs the question whether it is part of the Claimants’ case that (as a matter of fact) funds did flow from the State to the Al Khayyat brothers and then on to the al-Nusra Front. However paragraph 46(1) makes it plain that it has always been and remains part of their case that a source of the substantial funds allegedly transferred on a regular basis by the Al Khayyat brothers from their accounts with the Bank to the al-Nusra Front by various means was “the office of the Emir of Qatar”.

THE APPLICATION TO STRIKE OUT

26. The Bank’s application to strike out the claim was brought on two bases, namely: (a) that the Particulars of Claim disclosed no reasonable grounds for bringing the claim; and (b) that the proceedings were an abuse of process, though the latter argument assumed greater prominence both at the hearing before Swift J and on appeal.
27. The way in which the matter was put before Swift J was that the alleged “inference” pleaded in paragraph 9(2) of the APOC could not be drawn, and that on the evidence currently available to the Claimants the only inference that could properly be drawn was precisely the opposite, namely, that the Qatari State actively sought to make its funds available to the al-Nusra Front.
28. In rejecting that submission, Swift J said that it was too soon to know if there was necessary inconsistency between the case as now put and the totality of the evidence. He put the matter in this way at paragraph 29 of his judgment:

“Whether some or all of the persons concerned, referred to in the evidence which the Claimants no longer seek to rely on, are to be taken as actors within the scope of section 14(1) [of the State Immunity Act 1978] will be a matter of evidence, including evidence as to the authority on which they acted. The evidence will determine whether the conclusion to be drawn from the matters set out in the totality of the Claimants’ evidence is that the Qatari state was “victim” of events or itself a perpetrator. For now, any/all of this is unknown. That being so, there is no necessary inconsistency between the case as now put in the proposed Amended Particulars of Claim and the totality of the evidence to date. The same matters also address the criticism levelled by the Bank that the Claimant’s position in

response to the *forum non conveniens* application is inconsistent with their pleaded substantive case.”

29. In its Grounds of Appeal, the Bank criticised Swift J’s reasoning. It contended that the Misappropriation case was wholly inconsistent with the State Conspiracy case and with the evidence served by the Claimants in the proceedings thus far; that the Claimants had previously attested to the truth of the State Conspiracy case; and that both cases could not be true. It also pointed out that the Claimants had failed to identify any evidence in support of the Misappropriation case, and thereby the basis on which they could have an honest belief in that case.
30. The Bank also stated in its Grounds of Appeal that the Misappropriation case was being advanced purely as a tactical attempt to avoid the application of the doctrine of state immunity to the proceedings. The Claimants were not entitled to devise a new case in an attempt to achieve a tactical goal in circumstances in which they had no evidence to support it and had no honest belief in its truth. This was one of two matters on which Ms Brown KC, leading counsel for the Bank, concentrated in her oral submissions, relying upon the recent judgment of this Court in *Wittgenstein-Sayn v His Majesty Juan Carlos* [2022] EWCA Civ 1595 (“*Wittgenstein-Sayn*”).
31. The claim in that case was an allegation that the defendant, the former King of Spain, had engaged in conduct amounting to the harassment of the claimant, with whom he had previously been in an intimate relationship. The claim as originally pleaded contained allegations that the Head of the Spanish National Intelligence Agency, a General, had placed the claimant and others with whom she was associated under surveillance, trespassed on her property, tapped her telephone and hacked into her computer. This conduct was alleged to have been carried out “under the direction of the defendant or with his consent” in the period prior to the defendant’s abdication, when he was still sovereign and head of state.
32. The defendant made an application for a declaration that the court had no jurisdiction to try those allegations because he was entitled to state immunity. The High Court judge who dismissed the application said in his judgment that he considered that parts of the original pleading were ambiguous as to the details of the pre-abdication acts and the role of the General in particular. He gave permission to amend the Particulars of Claim on the basis of an undertaking by the claimant’s counsel, without seeing a draft. The Amended Particulars which were served alleged that the General “acted in his personal capacity on behalf of the defendant and not in any official capacity.” The Court of Appeal allowed the defendant’s appeal. In relation to the allegation that the General acted in a private capacity, Simler LJ said, at [58], that:

“... a private individual could not ordinarily have procured the use of state machinery by the head of the state intelligence and security service. A clearly pleaded evidential basis to support a conclusion or inference that these were acts of a private individual was required but was not advanced.”
33. Ms Brown drew particular attention to the following observations of Simler LJ, which she submitted were of direct application in the present case:

“[63] .. in general, there is a merits test to overcome in obtaining permission to amend. The pleading must not only be coherent and properly particularised, it must plead allegations which if true would establish a claim that has a real prospect of success. This means that the claim must carry a degree of conviction, and the pleading must be supported by evidence which establishes a factual basis which meets the merits test: see *ED& F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41] and [42]; *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18].

...

[65] There are cases in which the court can dispense with formalities and treat a deficit in a pleading as capable of being cured by amendment where it is obvious that to require an application and evidence would be a formality. But this was not such a case. Given the stark timing of the suggested amendments, and their stark inconsistency with the existing pleading, it is not, and was not obvious that the respondent could meet the merits test in this case; there was a real question whether the proposed amendments were simply a device to meet the state immunity arguments ... The respondent herself accepts that in considering her amended pleadings the court is required to consider whether the amendments are contrived purely to avoid immunity but fail to do so or, as she contends, whether they simply plead a more developed understanding of her case.

[66] Moreover the respondent’s approach, in the face of the immunity application, in seeking to disavow, or characterise as ambiguous, allegations made against [the Spanish National Intelligence Agency] was directly contradicted by her statement of truth on her original pleading, and by her sworn affidavit evidence deployed in Spanish proceedings...”

34. Ms Brown submitted that the question whether there is an abuse of the process of the court admits of only one answer – either yes or no. That is an anterior question to the question whether, as a matter of discretion, an amendment to a pleading should be permitted. As in *Wittgenstein-Sayn*, the amendments in the present case were contrived purely to avoid immunity, when in truth the Claimants could not do so. There was no evidence to support a case of misappropriation, and the allegation of misappropriation was directly contradicted by the statement of truth on the proposed amended Particulars of Claim which sought to raise the State Conspiracy case, and by the evidence of S and Mr Hashwah.
35. The second matter on which Ms Brown placed specific reliance in her oral submissions was the selective excision of various passages from the original Particulars of Claim which suggested State involvement, a process she described as “State-washing”. She submitted that the case against the Bank was heavily dependent upon the so-called “Cash Withdrawal Arrangements” pleaded in what was now

paragraph 52 of the APOC. That paragraph stated that the “best particulars of the Cash Withdrawal Arrangements which the Claimants can currently provide are as follows”, but then only one example was given, and a specified instance of the use of the arrangements was deleted because it implicated the Qatari State. Self-evidently, therefore, the particulars being provided were not the “best particulars” which the Claimants could currently provide. Moreover, if the Bank requested further information, Ms Brown submitted that it was inevitable that the allegations which had been removed would return in the answers to the requests, raising the issue of state immunity again.

DISCUSSION

36. The Bank did not need to put its case so high, since it is obvious that the APOC contains passages which are wholly irrelevant to the Claimants’ cause of action against it and which should be struck out because they are embarrassing (in the legal sense) and abusive.
37. The particulars of claim is the means by which the claimant sets out the facts on which they rely in order to establish the essential elements of the cause of action, so that the defendant knows the case that they have to meet. It will be embarrassing if it contains irrelevant matters, and may be struck out in whole or in part for that reason alone. As James LJ in *Davy v Garrett* (1878) LR 7 Ch D 473 said, at 483:
- “... if the Defendant is embarrassed by the Plaintiff’s mode of stating his case he is entitled to be relieved from his difficulty. Now nothing is more embarrassing to a Defendant than a number of statements which may be irrelevant, and with which he therefore does not know what to do.”
38. In *Tchenguiz v Grant Thornton LLP* [2015] EWHC 405 (Comm); 1 All ER (Comm) 961 Leggatt J (as he then was) said this at [1]:
- “Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.”
39. That summary of the basic principles of pleading was endorsed by Males J (as he then was) in *Grove Park Properties Ltd v Royal Bank of Scotland plc* [2018] EWHC 3521 (Comm) at [24]. He added:
- “It is wrong in principle to plead matters which do not support or relate to any of the remedies sought and to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered: *Charter UK Limited v Nationwide Building Society* [2009] 1002 (TCC) at (the second) [15]. To do so is likely to complicate or confuse the fair conduct of proceedings.”

40. Those observations, with which I respectfully agree, were approved in this Court by Snowden LJ in *Re Kings Solutions Group Ltd* [2022] 2 BCLC 464. Applying them to the present case, all that the Claimants needed to establish to found their cause of action under Syrian law was that the Al Khayyat brothers transferred funds from accounts held by them or by entities associated with them at the Bank, or through other accounts at the Bank, to the al-Nusra Front, and that the Bank knew or ought to have known that the funds were intended for the al-Nusra Front.
41. Obviously it was incumbent upon the Claimants to plead how and when the funds were transferred to the terrorists and all the facts relied on in support of the assertion that the Bank knew or ought to have known that they were destined for a terrorist organisation. However, for the purposes of the cause of action it was irrelevant whether the source of the funds was payments made to the Al Khayyat brothers by the State (for construction projects or otherwise), or money they had acquired by some other means. What matters is where it went, not where it came from.
42. Once that basic premise is established, it is plain that paragraph 9 of the APOC is embarrassing (and so are a number of other passages which plead irrelevant facts). Indeed paragraph 9(1) explicitly states, after disavowing any positive case with respect to “authorisation of the terrorist funding arrangements by the State of Qatar,” that [such authorisation] “in any event is immaterial to the cause of action as against the Defendants under Syrian law.” If it is immaterial to the cause of action it should not be in the pleading.
43. I agree with Mr Emmerson’s submission that a claimant is not obliged to plead their case at its highest. So, for example, even if one has the evidential basis for pleading that a misrepresentation was made fraudulently, one might choose to plead that the statement was made without reasonable grounds for believing it to be true. It is also well-established that if the claimant does not know which of two possible scenarios is true, they may advance alternative cases based on each scenario, provided that it is made clear in the statement of case that the cases are alternatives, and the premise upon which the alternative case is advanced is identified. A claimant can also advance an alternative case based upon the defendant’s case, even if they dispute the factual premise of the defendant’s case, on the basis that if (contrary to the claimant’s case) the court finds those facts, certain legal consequences would still arise. However, the pleading must still meet the merits test described by Simler LJ in *Wittgenstein-Sayn*.
44. In the present case, the Claimants are not seeking to run alternative cases on the basis that they do not yet know which of two possible factual scenarios is correct. By introducing paragraph 9, they seek to run a case for which they have no supporting evidence, because they do not wish to run a case for which they do have evidence, but which will give rise to a defence based on state immunity. Moreover, the averment in paragraph 9(2) that because the Claimants are not making any positive case of State authorisation of terrorist funding: “it is a necessary inference that any funds which flowed from the State of Qatar to the Defendants (and were subsequently transferred to terrorist organisations in Syria) were misappropriated” is based on a non sequitur, and is incoherent.
45. Far from being “necessary” that inference does not even arise from the abandonment of the State Conspiracy case. It does not follow from the fact that a claimant who has the evidence to support an allegation that the State was complicit in its funds being

used to finance terrorism chooses not to make that allegation, that it is to be inferred that the State did not authorise or condone their use for that purpose, let alone that it is to be inferred that the funds were stolen from the State or diverted from their intended legitimate purpose. If the funds emanated from the State, then there are a number of different possibilities, including that the State paid what it had agreed to pay for construction work performed by the Al Khayyat brothers' companies, and the Al Khayyat brothers then used the money for purposes of which the State was unaware. That is not a misappropriation of State funds, nor is it an authorised use of State funds for unlawful purposes.

46. Mr Emmerson very fairly accepted that he was responsible for the language of the pleading, and that "misappropriation" was inapt to describe a use of State funds in a manner which was not authorised by the State. But however one interprets paragraph 9 of the APOC, the Claimants have not pleaded any case (let alone adduced any evidence) that such funds had actually been misappropriated by anyone, nor have they pleaded that any state official who was involved in any transactions with the Al Khayyat brothers or their companies was acting in a private capacity rather than as an agent of the State. Indeed they have removed from the APOC all references to any individual who might be characterised as an officer of the State.
47. For all those reasons, as the APOC currently stands, I would accept the Bank's submission that the Judge was wrong to permit the amendment, and that the claim should be struck out. However, if the problems are susceptible of cure by removing those passages which cause the APOC to be embarrassing or which fail the merits test, as I consider they are, I would allow the Claimants to do so.
48. If the involvement of the State (or lack of it) had been an essential element of the claim, as it was in *Wittgenstein-Sayn*, then there might have been some force in the Bank's criticism of the fundamental inconsistency with the case previously advanced and with the evidence adduced thus far. However, once it is appreciated that the source of the Al Khayyat brothers' funds is irrelevant, the question whether the Claimants are advancing a case which is inconsistent with their previous case and whether it is abusive to do so falls away. The inconsistencies only go to matters which are immaterial and should not have been pleaded.
49. Mr Emmerson contended that paragraph 9(1) was pleaded for the avoidance of doubt. However, there was no need to do so, and that paragraph does seem to me to have served as the springboard for the incoherent pleading in paragraph 9(2). In any event, Mr Emmerson has now made the Claimants' position crystal clear in open court both before Swift J and on this appeal. The Bank can be in no doubt that the Claimants do not wish to contend that the Qatari State was involved, because they do not wish to enable the Defendants to raise the issue of state immunity. They do not need to make the allegation that the State was involved, even if some or all of them believe that to be true. There is a viable and coherent claim without it.
50. The whole of paragraph 9 should be excised. I would also strike out the words "including the office of the Emir of Qatar" from paragraph 46(1), because the source of the funds is immaterial, and the words "assisted the State of Qatar" from paragraph 33(1), since the allegation that Qatar was involved in the alleged activities of the Al Khayyat brothers in 2004 and 2005 referred to in that paragraph has no bearing on the Claimants' claim in these proceedings. Mr Emmerson agreed that the latter words

should be replaced by “were involved”, since this paragraph is designed to set out the facts relied on by the Claimants relating to the personal involvement of the Al Khayyat brothers in supporting terrorist activities.

51. Ms Brown objected to the striking out of the words “including the office of the Emir of Qatar” from paragraph 46(1) on the basis that they were bound to be reintroduced if the Bank requested further information of the APOC in its adjusted form. She pointed out that in order to establish the Bank’s knowledge that the funds were being used to finance terrorism, the Claimants were placing reliance on the Bank’s anti-money laundering policies (see paras 56-58 of the APOC), and had specifically pleaded in para 58(d) that senior employees at the Bank were aware or ought to have been aware of “the unusual patterns and amounts of transfers *into and* out of the bank accounts of the Al Khayyat brothers and their businesses”. The words “into and” were added by the amendment and (unlike the transfers out) are not further particularised. Therefore, the Bank would be entitled to ask for further information about what was said to be “unusual” about the patterns and amounts of transfers *into* the accounts, which might be difficult if not impossible for the Claimants to provide without identifying their source.
52. Whilst it is possible that a future request for further information might result in the Claimants having to identify the State as the source of some of the transfers into the account, that is by no means certain. Even if they do identify the State as a source, they may not assert that the amounts coming in to the accounts from that particular source were “unusual” or that the pattern of those payments was unusual. The reintroduction of an allegation that the State was one source of the funds may or may not raise the issue of state immunity. All that is for the future. I do not consider that it should inhibit the Court from requiring the removal from the APOC of those matters which currently make it embarrassing and abusive.
53. As to the Bank’s reliance on *Wittgenstein-Sayn*, I have already indicated that the material distinction between that case and this is that the alleged acts which formed the basis of the cause of action were acts of the head of the state intelligence agency for which the sovereign was said to be vicariously liable. The reason that it was an abuse of the process to seek to make the amendment in order to avoid a plea of state immunity was that it was impossible to achieve that objective on the facts of that case.
54. In the present case, the cause of action is not, and does not have to be founded upon any action by the State of Qatar or an organ or officer of the State. The Claimants do not need to raise an issue as to whether the Al Khayyat brothers were acting as principals or agents. If they choose not to allege that the Al Khayyat brothers were acting for or on behalf of the State, it is not an abuse of process for them to bring a claim based on the transfer of funds from the brothers’ own accounts or the accounts of their companies to Turkey and Lebanon and from there into the hands of the terrorists.
55. I do not consider that there is a need to make any further adjustments to paragraph 52 of the APOC because the “best particulars” that the Claimants state they are providing in that paragraph are particulars of the Cash Withdrawal Arrangements themselves, not of circumstances in which those arrangements were implemented or used.

56. Finally, I return to the circumstances in which a lengthy document which served to obscure rather than clarify the Claimants' case came to be produced in response to the Bank's Request for Further Information following the order of Calver J. In *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd* [2020] EWCA Civ 11; [2020] 1 WLR 2298, this Court (in a constitution that, as it happens, included both Lewison LJ and Males LJ) took the opportunity to remind the parties of the terms of CPR 18 PD 1.2 which provides that:

“A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party [i.e. the party making the Request] to prepare his own case or to understand the case he has to meet.”

At [20] my Lord, Males LJ, described the Requests that were served in that case as “prolix, repetitive, unnecessary and disproportionate”, and observed that such an interrogation should have no place in modern commercial litigation. Unfortunately that message does not appear to have yet been taken to heart.

57. The Request in the present case and the Response to it also fit that description. They represent the type of procedural game-playing by both sides which ought to be a thing of the past. Rather than attempting the exercise of trying to sift out which responses can remain and which should be treated as abandoned, I would strike out the whole of the Response to the Request for Further Information. If the Bank serves another Request in respect of the revised APOC, it will do well to bear these observations in mind, otherwise the court may take the step that it did in *Raiffeisen Bank* and direct that the Request need not be answered.

CONCLUSION

58. For the reasons set out above, I would allow this appeal. I would strike out paragraph 9 of the APOC and the whole of the Response to the Request for Further Information. I would also strike out the words “including the office of the Emir of Qatar” from paragraph 46(1), and the words “assisted the State of Qatar” from paragraph 33(1) of the APOC, replacing the latter with “were involved” to make sense of that sentence. Subject to those changes, the APOC sets out a coherent and viable claim capable of being supported by a statement of truth, which should be allowed to go forward.
59. For the avoidance of doubt, nothing in this judgment is to be interpreted as deciding what evidence will or will not be admissible on the Bank's *forum non conveniens* application, or what the consequences will be if the Claimants rely on the kind of evidence on which they have indicated they propose to rely. Those are matters for another day.

Lord Justice Males:

60. I agree.

Lord Justice Lewison:

61. I also agree.