



Neutral Citation Number: [2021] EWHC 1499 (QB)

Case No: QB-2019-002712

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/2021

Before:

MR JUSTICE CHAMBERLAIN

Between:

BB and Others

Claimant

- and -

Moutaz Al Khayyat
Ramez Al Khayyat
Doha Bank Limited

Defendants

BEN EMMERSON QC (instructed by **McCue & Partners**) for the **Claimants**
HANNAH BROWN QC (instructed by **Eversheds Sutherland**) for the **Defendant**

Hearing dates: 24 May 2021

Approved Judgment

Mr Justice Chamberlain:

Introduction

- 1 There were two applications listed before me for hearing on 24 May 2021:
 - (a) the application of the Third Defendant (“Doha Bank”) dated 18 May 2021 to strike out or exclude certain evidence served by the Claimants for the purposes of a hearing listed in October 2021 to determine Doha Bank’s application for a stay of proceedings on the ground of *forum non conveniens* (“the stay hearing”) and for certain associated directions; and
 - (b) the Claimants’ application dated 18 May 2021 for permission pursuant to CPR 32.7 to cross examine three individuals whose statements have been served by the Third Defendant for the purposes of the jurisdiction hearing.
- 2 The hearing on 24 May 2021 took place remotely, using a video-conferencing platform. It appeared on the cause list as a public hearing. An email address was given through which anyone who wished to observe it could obtain the link. Members of the press attended.
- 3 There was a third application, made orally at the hearing by Ben Emmerson QC on behalf of four of the Claimants, to withdraw their claims with no order as to costs.
- 4 This judgment deals with all three applications.

Doha Bank’s application for the hearing to be held in private

- 5 Hannah Brown QC, for Doha Bank, applied pursuant to CPR 39.2 for a direction that the hearing of these three applications be held in private. I heard submissions on that question in private at the start of the hearing.
- 6 Ms Brown said that the evidence before the Court contained highly damaging and defamatory allegations against various individuals who are not before the Court and – if the *forum non conveniens* submission succeeded – would never have the opportunity to respond in the context of these proceedings. Given that an important part of the purpose of this hearing was to determine Doha Bank’s application to strike out or exclude parts of that evidence, it was appropriate for the application to be held in private. Ms Brown observed that, at the last hearing before HHJ Coe QC, defamatory allegations had been made about efforts to interfere in these proceedings; these allegations had been widely reported; but many of them did not feature in the evidence which the Claimant was subsequently permitted to file.
- 7 Mr Emmerson did not actively oppose the application to hold the hearing in private, but did draw my attention to some relevant legal principles.
- 8 The public hearing then resumed and I read concise and cogent written submissions from Jess Glass of the Press Association, arguing that the principle of open justice required that the hearing be in public.

- 9 I refused Ms Brown’s application for the hearing to be held in private. I gave short reasons at the time but indicated that I would give fuller reasons in writing. I have included these at the end of this judgment. The hearing then proceeded in public.

The claim

- 10 The eight Claimants are Syrian citizens. They live in the Netherlands. They benefit from an anonymity order made on 29 July 2019. On 30 July 2019, they commenced a claim in this Court for damages in respect of loss which they claim to have suffered in Syria as a result of the unlawful actions of a terrorist group, the Al Nusra Front (“ANF”), which is active there.
- 11 The First and Second Defendants, “the Al Khayyat brothers”, are international businessmen based in Qatar. The Claimants say that they are closely connected to the State of Qatar and that, as part of a plan to which the State was party, they provided finances to the ANF by causing large sums of money to be withdrawn in Turkey and/or Lebanon and carried over the border to Syria. These finances are said to have been passed to ANF, facilitating their terrorist activities, including those which caused harm to the Claimants.
- 12 The Al-Khayyat brothers are alleged to have channelled these funds through their accounts, or accounts of entities associated with them, held with Doha Bank.
- 13 The Claimants say that the Defendants knew, or ought to have known, that the funds were intended for the ANF and that Doha Bank, in allowing such funds to pass through their accounts, acted contrary to international and Syrian law.
- 14 The claim has been served on Doha Bank. It is common ground that, until the morning of the hearing before me on 24 May 2021, it had not been served on the Al Khayyat brothers, although they are aware of it and indeed have made witness statements which have been filed by Doha Bank. I was told at the hearing by Mr Emmerson that, on that very morning, the claim had been served on a firm of solicitors representing the Al Khayyat brothers. Ms Brown submitted that the firm in question was not authorised to accept service, so the Al Khayyat brothers had still not been validly served. This dispute is not among those I have to determine.

Doha Bank’s application for a stay

- 15 Doha Bank submits that it is domiciled in Qatar, where it has its headquarters; that England and Wales is not the appropriate forum for resolution of this claim and that Qatar is clearly and distinctly more appropriate. It points to the fact that none of the parties is domiciled or resident in England or Wales; none of the wrongful acts alleged took place here; none of the loss alleged was suffered here; all its witnesses are likely to be based in Qatar and speak Arabic; relevant documents are likely to be in Qatar; some of them will be protected by confidentiality obligations imposed by Qatar law; the Qatari courts are well-placed to apply Syrian law (which is likely to be the applicable law); and Qatar has a fully functioning and modern court system, which is well able to try the dispute.
- 16 For these reasons, on 24 December 2019, Doha Bank applied for a stay of the proceedings on the ground of *forum non conveniens*.
- 17 The Claimants do not accept that Qatar would be an appropriate forum. They submit that, given that the allegations are against individuals with a close connection to the State of Qatar

and allege the complicity of that State in terrorism, it would be impossible for the courts of Qatar fairly to try the claim.

- 18 The stay hearing was listed with a time estimate of 3 days between 16 and 19 November 2020.

The Claimants' application to adjourn the stay hearing in November 2020

- 19 A week before the listing window, the Claimants applied for an adjournment. That application came before HHJ Coe QC, sitting as a High Court Judge, on 11 November 2020. She explained in detail the circumstances in which the application to adjourn had been made and her reasons for granting it: see [2020] EWHC 3567 (QB). The following summary will suffice for present purposes.
- 20 Mr Emmerson told the judge that, in the period running up to the adjournment hearing, there had been a conspiracy, committed by agents of the State of Qatar, to pervert the course of justice and “derail” these proceedings. At [6] of her judgment, the judge described the alleged conspiracy as involving “significant, prolonged and determined attempts to identify the claimants; attempts to bribe and offer other inducements to people to supply information about the case and about the names of the claimants; approaches being made to a consultant with the claimants’ solicitors; approaches to a translator and, more recently; approaches to an individual who [had] provided a statement setting out the basis for some of the allegations which are made not only against the defendants but also against the Qatari state and Qatari officials generally”.
- 21 The judge considered that these allegations were pertinent to the stay application, because they would be relevant to the ability of the courts of Qatar to try the claim fairly. She therefore reluctantly took the view that the stay hearing should be adjourned.
- 22 In an order dated 11 November 2020 (“the Order”), the judge gave directions for the Claimants to file evidence by 8 January 2021 “limited to events said to have occurred prior to 9.00 am on 11 November 2020”. They were also given liberty to apply for permission to serve additional evidence “regarding events of a different character, or a different order of magnitude, from the events said to have occurred prior to 9.00 am on 11 November 2020”.

The Claimants' evidence

- 23 In January 2021, pursuant to the Order, the Claimants served a number of witness statements, with exhibits, from: Majed Saleh; Anas Idress; Roduan Kharoub; Wael Elkhaldy; Arthur Johan Willem De Leeuw; Basel Hashwah; and Matthew Jury (the Claimants’ new solicitor). Taken together, this evidence covers a very wide range of subjects and travels far beyond the alleged attempt to interfere with these proceedings. Much of it relates to things said to have been done by the Al Khayyat brothers and others on behalf of the State of Qatar many years before the proceedings began.

Doha Bank's application to strike out or exclude this evidence

Submissions for Doha Bank

- 24 For Doha Bank, Ms Brown submitted as follows. The Order, read in context, permitted the Claimants to file further evidence of the alleged attempts to interfere with the proceedings

taking place between 9 October 2020 (the date on which Doha Bank filed evidence in response to the Claimants' evidence for the jurisdiction hearing) and 9 am on 11 November 2020. The vast majority of the Claimants' evidence related to: the substantive merits of the claim; attempts to interfere with the proceedings which are alleged to have taken place before 9 October 2020; or the Claimants' inability to obtain a fair trial in Qatar.

- 25 Ms Brown submitted that filing such wide-ranging evidence was an abuse of process and asked me to strike out or exclude the following:
- (a) paragraphs 7-90 and 95-98 of the Second Witness Statement of Majed Saleh dated 14 January 2021, along with any exhibits referred to exclusively in those paragraphs, namely exhibits MS5-MS15 and MS17-MS20;
 - (b) the entirety of the First Witness Statement of Anas Idress dated 14 January 2021, along with exhibits;
 - (c) the entirety of the First Witness Statement of Roduan Kharoub dated 14 January 2021, along with exhibits;
 - (d) the entirety of the First Witness Statement of Wael Elkhaldy dated 14 January 2021, along with exhibits;
 - (e) the entirety of the First Witness Statement of Arthur Johan Willem De Leeuw dated 15 January 2021;
 - (f) the entirety of the First Witness Statement of Basel Hashwah dated 15 January 2021, along with exhibits;
 - (g) paragraphs 4-9 and 26-28 of the Second Witness Statement of Matthew Jury dated 15 January 2021, along with any exhibits exclusively referred to in those paragraphs, namely exhibits MJ/5, MJ/6 and MJ/9;
 - (h) the entirety of the Third Witness Statement of Matthew Jury dated 29 January 2021 along with exhibits.
- 26 Ms Brown accepted that the Court would need to understand the scope and nature of the allegations forming part of the substantive claim in order to determine the jurisdiction issue. But this understanding could be gleaned from the Particulars of Claim. In response to a question from me, she accepted that these could be amended if necessary to incorporate matters contained in the new evidence, to the extent that those matters could properly be incorporated into a pleading. In this way, the Court could properly understand the nature and scope of the underlying claim, insofar as necessary to determine the stay application.
- 27 Ms Brown submitted that paragraphs 32-41 of the Second Witness Statement of Matthew Jury were also out of the scope of the Order, being "quasi-expert evidence... relating to the alleged inability of the Claimants to obtain a fair trial in Qatar". However, rather than seeking to strike it out, she sought permission to rely on evidence in response (the Supplemental Expert Report of Dr Yassin El Shazly dated 12 May 2021 and the Fourth Witness Statement of David Flack dated 14 May 2021) at the jurisdiction hearing.

Submissions for the Claimants

- 28 Mr Emmerson submitted that Ms Brown was interpreting HHJ Coe QC's order too narrowly. It was important to understand that there had been a change in the Claimants' legal representation shortly before the adjournment application. The former representatives had withdrawn on 26 October 2020 and the new ones (McCue & Partners) had been instructed on 5 November 2020. One of the purposes of the adjournment was to allow the new representatives time to review the claim and file any additional evidence relating to events prior to 9.00am on 11 November 2020. There was no basis for limiting the evidence to events which occurred before that date but after 9 October 2020 or to the allegations of perverting the course of justice.
- 29 Mr Emmerson drew attention to the submissions he had made before HHJ Coe. There had been a conspiracy on the part of the State of Qatar to pervert the course of justice. This would go to the heart of the jurisdiction hearing. It would have been extremely difficult for the Court to form a view on the allegations of interference with these proceedings based on the witness evidence which had been filed prior to 9 October 2020. He therefore sought an adjournment so that the allegations could be "properly investigated".
- 30 Mr Emmerson submitted that it was artificial to separate the parts of the Claimants' evidence which go to the substantive allegation of terrorist financing from the parts which go to the allegation of perverting the course of justice. Although the witness interference issue is important to, and if substantiated would be determinative of, the question whether a fair trial in Qatar is possible, it is not capable of being pleaded. Accordingly, the court will need to have regard to witness and expert evidence, including that contained in the Claimants' evidence served in January 2021 – and not just to the Particulars of Claim.

The Claimants' application to cross-examine

Submissions for the Claimants

- 31 The Claimants' application pursuant to CPR 32.7 to cross-examine relates to:
- (a) the Al Khayyat brothers (the First and Second Defendants, who have made statements on which Doha Bank relies, denying their involvement in terrorist financing and in the alleged conspiracy to interfere with these proceedings); and
 - (b) Dr El Shazly, an Assistant Professor at Qatar University, who has given expert evidence on the legal system of Qatar, upon which Doha Bank relies in support of its *forum non conveniens* application.
- 32 The evidence of the Al Khayyat brothers, Mr Emmerson submitted, would be important, not just to the substantive claim, but also to jurisdiction. There were two distinct but inter-related bases on which it could be said that the Claimants cannot obtain justice in Qatar: first, the State's role in financing terrorist organisations; second, its role in interfering with the present proceedings. If Qatar were involved in financing terrorism, that would give it a powerful incentive to interfere in these proceedings. If the Al Khayyat brothers were involved in terrorism, that was also relevant to their credit and thus to an assessment by the court of their denials of the allegations of interfering with the proceedings.

- 33 If the Al Khayyat brothers or others closely connected to the State of Qatar had been involved in interfering with proceedings in this jurisdiction, it was obvious that the prospects of a fair trial in Qatar were non-existent. In the unusual circumstances of this case, it would be necessary for the Court to have a firm basis for considering the likelihood that the allegations of perverting the course of justice were true. There was no way to do that other than by cross-examination of the Al Khayyat brothers. Although they had not been served until the morning of the hearing, they had chosen to make witness statements for Doha Bank; and Doha Bank had chosen to rely on those statements. Having “put their hands into the hornets’ nest” in this way, the Al Khayyat brothers should have expected that they “might get stung”.
- 34 Dr El Shazly has provided expert evidence going to the question whether, if the stay were granted, the claim could be tried fairly by an impartial and independent tribunal in Qatar. The Claimants contend that his conclusion about the independence of the Qatari judiciary can be shown to be false by reference to previous cases where issues of importance to the ruling family have been at stake. They submit that Dr El Shazly’s report is “manifestly unconvincing” and ought to be “tested and challenged in cross-examination to enable the Court to have an accurate picture of the reliability of his evidence”. In oral argument, Mr Emmerson also submitted that the Claimants doubt Dr El Shazly’s status as an independent expert witness, although he did not elaborate on the basis for that doubt.

Doha Bank’s submissions

- 35 Ms Brown opposed the Claimants’ application to cross-examine the Al Khayyat brothers and Dr El Shazly. She relied on *Deripaska v Cherney* [2009] EWCA Civ 849, [2010] 2 All ER (Comm) 456 as showing that cross-examination is neither necessary nor appropriate in determining a jurisdiction challenge; and on *Bayer A.G. v Winter (No. 2)* [1985] 1 WLR 540, *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) and the recent decision of the Court of Appeal in *Stokoe Partnership Solicitors v Grayson* [2021] EWCA Civ 626.
- 36 Ms Brown submitted that, as a matter of principle, the stay application could and should be determined on the basis of written evidence. In this case, the application to cross-examine the Al Khayyat brothers was an attempt to ventilate the substance of the claim at a jurisdiction hearing, before a defence had been served, or disclosure given. To allow cross-examination to take place before this court on matters which will be at issue at the trial, in order to determine whether the courts of England and Wales have jurisdiction to try the matter would be, in Ms Brown’s submission, “the stuff of Alice in Wonderland” and entail a “Star Chamber interrogatory procedure”.
- 37 As to Dr El Shazly, Ms Brown submitted that there is no need for cross-examination. If the Claimants want to submit that his report was undermined by publicly available facts, they can do so without cross-examining. The judge will be able to determine the issue on the papers, in accordance with the usual procedure in applications for a stay on *forum non conveniens* grounds.

Discussion

The proper approach to these applications

- 38 The applications before me will not determine the outcome of Doha Bank’s application for a stay. They will, however, determine the shape and nature of the hearing of that application. This makes it important to understand the principles that will be applied at that hearing.

The principles to be applied when considering the stay

- 39 In *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, the House of Lords considered the proper approach applications for a stay on grounds of *forum non conveniens*. Lord Goff summarised the “basic principle” to be applied at 476:

“...a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”

- 40 He went on to say that the burden of proof lies on the defendant to persuade the court to grant a stay. But:

“if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.”

- 41 At 478, Lord Goff said that the court must first consider the “natural forum”, i.e. “that with which the action had the most real and substantial connection”. If there is no other available forum which is clearly more appropriate, the court will ordinarily refuse a stay. If, however, the court concludes that there is another available forum which *prima facie* is more appropriate for the trial of the action, it will ordinarily grant a stay unless there are special circumstances by reason of which justice requires that a stay should nevertheless not be granted. Here:

“One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the [The Abidin Daver \[1984\] A.C. 398](#), 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.”

- 42 In *Deripaska v Cherney*, the Court of Appeal upheld a decision of Christopher Clarke J. One of his reasons for concluding that England and Wales was the proper forum was that the risks inherent in a trial in Russia (assassination, arrest on trumped up charges and lack of a fair trial) were sufficient to make England the forum in which the case could most suitably be tried. At [6], Waller LJ (with whom Moore-Bick LJ and Sir John Chadwick agreed) noted that “litigants do often feel strongly about the place where cases should be tried but disputes as to forum should not become state trials.” He repeated this passage from Lord Templeman’s speech in *Spiliada* at 465:

“In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred

to other decisions on other facts; and that submissions will be measured in hours and not days.”

- 43 At [24] and following, Waller LJ considered the proper approach if the defendant identifies an alternative natural (or available) forum but the claimant alleges that he will not obtain justice there. In that situation, Waller LJ explained at [27] that the claimant must provide “cogent evidence” of the inability of the forum to provide even-handed justice. As to how the judge should go about doing that, Waller LJ said this at [29]:

“...the judge is not conducting a trial. It is not a situation in which he has to be satisfied on the balance of probabilities that facts have been established. He is in many instances seeking to assess risks of what might occur in the future. In so doing he must have evidence that the risk exists, but it is not and cannot be a requirement that he should find on the balance of probabilities that the risks will eventuate, e.g. as in this case that assassination will occur. He has only statements and experts’ reports on which he is not going to hear cross examination. He is able, of course, to take a view as to the cogency of the evidence at that stage. But then he has to make an evaluation taking account of all factors as to whether the claimant (despite Russia being the ‘natural forum’) has discharged the burden of showing that England is ‘clearly the proper forum’. That involves (1) assessing whether on the evidence a trial would be likely to take place in Russia; (2) if not, because Mr Cherney says he will not go there, whether Mr Cherney has shown that he has well-founded reasons why he will not go to Russia and (3) whether in any event Mr Cherney has shown on cogent evidence that there is a real risk that he will not get a fair trial there.”

- 44 This approach is consistent with the recent decision of the Court of Appeal in *Stokoe Partnership Solicitors v Grayson*, where at [17] Bean LJ (with whom Peter Jackson and Coulson LJ agreed) noted that “English law does not generally permit, save by consent, depositions, in other words oral interrogation of an opposing party, except at a trial where that party has chosen to give evidence”. Bean LJ considered some of the exceptions to this principle, but none is applicable here.

How to approach the stay application: general

- 45 These passages draw attention to the need to ensure an application for a stay on *forum non conveniens* grounds does not turn into a mini-trial of the claim. The purpose of such an application is to advance the contention that it is more appropriate for the claim to be tried in another forum. It would defeat the point of the application if, in order to determine it, the court had to try the underlying allegations forming the substance of the claim. This would also be procedurally inappropriate and unfair, because the court would be trying those allegations before a defence had been served, before the disclosure process had been undertaken and on incomplete evidence.
- 46 In any event, as Waller LJ made clear in the passage cited at [39] above, the task of the court on a stay application is not to make findings of fact applying a standard of proof, but rather to consider in a more open-textured way the risks if the trial were to take place in another forum. With all this in mind, as Lord Templeman said, submissions on stay applications ought generally to be “measured in hours, not days”. This accords fully with the overriding objective and, in particular, ensuring that claims are dealt with “expeditiously and fairly”

and allotting to them “an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”: CPR 1.1(2)(d) and (e).

How to approach the stay application: this case

- 47 The time estimate for the stay application in this case (3 days) is already generous. That time estimate no doubt reflects the unusual facts and the complexity of the issues likely to arise. Mr Emmerson submits that it can be seen from HHJ Coe QC’s judgment that she understood that the time estimate would allow for some cross-examination if that were permitted. That may be so, but it is also plain both from the judgment and from the Order, that she was not deciding whether cross-examination should be permitted on any particular topic or at all. She left that to be determined at the directions hearing which was later listed before me.
- 48 One matter relevant to both applications, and vigorously disputed between the Claimants and Doha Bank, is the extent to which the underlying allegations forming the substance of the claim (i.e. that the State of Qatar, through the Defendants, was involved in financing the ANF) can be separated from the allegations that agents of the State of Qatar, including the Al Khayyat brothers, have interfered with these proceedings.
- 49 It is undoubtedly correct to say, as Mr Emmerson did, that, if the court were to find that the Al Khayyat brothers had been channelling money to the ASF on behalf of the State of Qatar, that would be relevant to the weight to be given to the interference allegations. But the Court could not realistically make such a finding at this stage of the litigation (before service of a defence, before disclosure and on incomplete evidence) and, as the authorities make clear, it is neither required nor entitled to do so. So, even if there were an unlimited number of days available for the hearing of the stay application, it would be inappropriate for me to make directions designed to enable findings on the underlying allegations to be made.
- 50 The fact that 3 days have been allocated (and that the hearing has already been adjourned once) supplies an additional reason to ensure that any directions made at this stage are apt to keep the hearing within reasonable and proportionate bounds. Like HHJ Coe QC, I am acutely aware of the potential in a case such as this for the hearing to stray beyond manageable limits. I must tailor my directions with the aim of imposing procedural rigour, so that this does not happen.
- 51 With that in mind, I turn to the Claimants’ application for permission to cross-examine, which as a matter of logic seems to me to arise first.

The application to cross-examine

- 52 The basis for Mr Emmerson’s application to cross-examine the Al Khayyat brothers was not set out in any skeleton argument. It was advanced on the basis of the contents of the fourth witness statement of Mr Jury (the solicitor with conduct of the case for the Claimants). At paragraph 3 of that statement, Mr Jury said this:

“Counsel for the Claimants should be permitted to cross examine [the Al-Khayyat brothers] at the hearing of the jurisdiction application because both witnesses are relied upon by the third defendant as the basis to challenge the evidence adduced by the Claimants to the effect that the Al Khayyat brothers acted as terrorist financiers on behalf of the Government of Qatar. It is one of the central issues in the substantive case, but it is also of central importance to

the *forum non conveniens* argument. It is the Claimants' case that the Al-Khayyat brothers financed ISIS/the Al-Nusra Front (ANF) to commit terrorist acts in Syria are using a variety of means, including the transfer of funds via Doha Bank. Clearly, if this allegation is or may be true, the prospect of a fair trial of their claim in Qatar would be remote in the extreme. It would involve a Qatari court being called upon to determine that the State of Qatar has unlawfully financed international terrorism through the medium of the Al Khayyat brothers and, inter alia, Doha Bank. As a direct attack on the central authorities of Qatar for their involvement in a conspiracy to fund international terrorism, it is apparent that this litigation could not be fairly tried in the courts of Qatar."

- 53 Mr Jury went on to note at paragraph 4 that Doha Bank had advanced a positive case, for the purposes of the *forum non conveniens* hearing, to the effect that the Al Khayyat brothers have never been involved in the preparation, instigation or commission of acts of terrorism anywhere and have also not been involved in the funding of terrorism. As to this:

"There is overwhelming evidence available to prove that this... is false. By adducing witness statements containing a statement of truth from the Al-Khayyat brothers on these key issues, [Doha Bank] squarely put the guilt of the Al-Khayyat brothers at the centre of the *forum non conveniens* issue."

- 54 At paragraphs 5 and 6, Mr Jury made reference to a witness statement from a Basel Hashwah not currently in evidence in these proceedings, but which would form the foundation for the cross-examination of the Al Khayyat brothers. It is said to show that they "were active supporters of terrorism in Syria until their involvement in the instigation, preparation and commissioning act of terrorism was discovered by the Syrian authorities" and that they continued their terrorist funding activities on behalf of the Government of Qatar from that State. Mr Jury gave particulars of these activities at paragraphs 7-16.

- 55 At paragraph 17 of his statement Mr Jury added:

"This line of cross-examination can also be reasonably expected to provide weighty corroboration to the allegations made by the Claimants and their witnesses that various individuals purporting to act on behalf of the State of Qatar have attempted to pervert the course of public justice in the present proceedings by attempting to bribe or intimidate witnesses, and attempting to obtain the names and addresses of the Claimants who are the subject of anonymity orders made by this Court precisely in order to protect them against reprisals for their involvement in these proceedings."

- 56 Finally, at paragraph 18, Mr Jury adds that Doha Bank might wish to cross-examine Mr Hashwah and that he would be willing to attend for that purpose.

- 57 To my mind, a close reading of Mr Jury's fourth statement, together with the statement of Mr Hashwah, makes it very clear that the main purpose of the proposed cross-examination of the Al Khayyat brothers is to establish, or at least to ventilate, the allegations underlying the claim: i.e. that the Defendants have been involved in the funding of terrorist activities. The cross-examination would be relevant to the interference allegations only indirectly, on the basis identified in paragraph 17 of Mr Jury's statement: if the underlying terrorist

financing allegations are true, that would undermine the credibility of the Al Khayyats' denial of involvement in that interference.

- 58 In my judgment, it would be inappropriate to allow cross-examination for this purpose for three reasons.
- 59 First, it would amount to a deposition of the Al Khayyat brothers before it has even been determined whether the claim should be heard in this jurisdiction. This would be contrary to the general policy of English law that depositions are not permitted, subject to exceptions not material here: see *Stokoe*, [17].
- 60 Second, and relatedly, if cross-examination were permitted, it would be taking place before service of a defence, before disclosure and on incomplete evidence. It would therefore provide a patently inadequate basis for making findings of facts or even for assessing the risks that might eventuate if the trial were held in Qatar.
- 61 Third, contrary to the clear guidance given by Lord Templeman in *Spiliada* and Waller LJ in *Deripaska v Cherney*, it would turn the stay hearing into a mini-trial of the claim. As Mr Jury implicitly accepted in paragraph 18 of his Fourth Witness Statement, if cross-examination of the Al Khayyat brothers were permitted on the allegations in Mr Hashwah's statement were permitted, fairness would require me to permit cross-examination of Mr Hashwah too. Given the extent of the allegations contained in Mr Hashwah's statement, that would inevitably take the hearing over the current 3-day time estimate, which – as noted above – is already generous for a stay hearing.
- 62 I have considered whether I should permit cross-examination on a much more limited basis: namely, on the Al Khayyat brothers' denial that they were involved in interfering with these proceedings. In my judgment, it is not appropriate to order cross-examination even on that basis. The evidence filed by the Claimants in support of the application to cross-examine does not suggest any proper basis for cross-examination on the brothers' denial of the interference allegations, other than by reference to the facts underlying the claim. That being so, and given that I have decided that cross-examination on the underlying allegations would be inappropriate in an application of this kind, cross-examination would not be likely materially to assist the judge in determining the matters that fall to be considered on the stay application, even if it could be done without turning the hearing into a mini-trial.
- 63 I therefore refuse the application to order cross-examine of the Al Khayyat brothers.
- 64 Dr El Shazly is an expert. It is not usual to allow cross-examination of experts on an application for a stay: see *Deripaska v Cherney*, [29]. If cross-examination of Dr El Shazly were permitted, it would inevitably be necessary to permit cross-examination of the Claimants' experts. This would fundamentally alter the nature of the stay hearing. Although the matters to be debated would not relate to the allegations underlying the claim, cross-examination of experts on the suitability of Qatar as an alternative forum would inevitably mean exceeding the currently listed 3-day time estimate and would turn the stay hearing into a mini-trial on the suitability of Qatar. This is contrary to the clear guidance in the authorities.
- 65 In his submissions before me, Mr Emmerson explained that the treatment by the Qatar courts of other cases involving the interests of Qatar's ruling family showed how obviously flawed Dr El Shazly's conclusions were. If so, there is nothing stopping him from making this

submission to the judge at the stay application. There is no need for him to cross-examine Dr El Shazly in order to do so. More generally, courts are well accustomed to making the kind of assessment required on a stay application (i.e. an assessment “seeking to assess risks of what might occur in the future”) on the basis of written evidence, even where – as here – the evidence is contested.

66 I therefore refuse the application to cross-examine Dr El Shazly.

Doha Bank’s application to strike out or exclude evidence

67 CPR 32.1 gives the Court power to control evidence. By CPR 32.1(2), this includes the power to exclude evidence that would otherwise be admissible. That power must be exercised in accordance with the overriding objective which, as noted above, includes ensuring that a case is dealt with expeditiously and fairly and allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

68 There was a debate before me about precisely what HHJ Coe QC intended by her Order. Mr Emmerson submitted that she had in mind the need for the Claimants’ new representatives to have time to consider the case and to file further evidence generally, not limited to the interference allegations. Ms Brown submitted that the intention was to limit the permission given to evidence relating to events taking place in a particular time window and that, in context, this means the interference allegations.

69 I do not regard it as necessary or helpful to parse the judge’s judgment – and still less the transcript of the hearing – with the aim of inferring precisely what she had in mind. Three matters are clear. First, the judge was reluctant to adjourn the stay hearing, in circumstances where doing so would inevitably lead to considerable delay. Second, she was persuaded to adjourn the hearing in large part because she was concerned that, if she did not, the interference allegations – which she considered potentially centrally relevant to the stay application – would not be before the Court. Third, she envisaged a further directions hearing before the stay application was considered.

70 I approach Doha Bank’s application to strike out or exclude parts of the Claimants’ evidence served in January 2021 on that basis, bearing in mind that HHJ Coe QC had not seen the evidence that I have seen. It is for me to decide whether any parts of it should be excluded from the materials before the court at the stay hearing.

71 One approach might have been to decline to strike out or exclude any part of the evidence filed, leaving it to the judge hearing the stay application to decide whether and to what extent it was relevant. I have not adopted that approach because I do not think it would be conducive to the parties’ or the Court’s efficient preparation for the hearing. I have now heard fairly extensive argument and am in a position to form a view about the material that ought to be before the Court at the stay hearing. There is considerable overlap between the issues which arise on Doha Bank’s application to strike out or exclude evidence and those which arise on the Claimants’ application to cross-examine.

72 In my judgment, the proper approach is as follows:

- (a) It is vital that the judge who hears the stay application should understand the scope and nature of those allegations. A party might be perfectly able to secure justice in a

particular forum in respect of (for example) a private commercial dispute with another party, but unable to do so where (for example) the dispute implicates persons with strong links to the Government of the forum State.

- (b) However, as noted in relation to the application to cross-examine, it is no part of the court's function on the stay application to make findings of fact in relation to the allegations underlying the claim. Nor would it be possible fairly to do so at this very early stage in the litigation.
- (c) 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.
- (d) 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.
- (e) 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. Second, it will relieve the judge of the need to read large quantities of evidence about the underlying issues and enable him or her to concentrate on the evidence about the suitability of the forum (which itself is extensive).
- (f) However, evidence which relates not to the underlying allegations but to the alleged interference in these proceedings by the Defendants or agents of the State of Qatar should be before the judge, because this evidence is directly relevant to the suitability of the State of Qatar as a forum. I will not limit that evidence to matters occurring since 9 October 2020, because HHJ Coe QC's Order did not contain any such express limitation. I will permit all of the Claimant's evidence which relates to alleged attempts by the Defendants or others on behalf of the State of Qatar to interfere with the course of justice in these proceedings. At present the Claimants have not identified any parts of their evidence going to these issues beyond those referred to in paragraph 30 of Doha Bank's skeleton argument, but I will give a further opportunity to the Claimants to do so, and for Doha Bank to respond, in the light of the approach I have outlined in this judgment.

73 For these reasons, Doha Bank's application succeeds in principle. I will set out the precise passages of the Claimants' evidence which will be excluded from consideration at the stay hearing once I have received the parties' submissions, as indicated at paragraph 72(f) above.

The application by four claimants to discontinue their claims with no order as to costs

- 74 CPR 38.2(1) confers a right to discontinue a claim at any time. The procedure for discontinuing a claim involves filing and serving a notice of discontinuance: CPR 38.3. The ordinary consequence of discontinuance, absent a different order by the court, is that the claimant is liable for the costs incurred on or before the date of service of the notice: CPR 38.6. A party who wishes to avoid a costs order may make an application under that rule: see White Book §38.6.1.
- 75 In this case, no application notice has been filed. It would not be appropriate to dispense with the need to file such a notice. Contrary to Mr Emmerson's submissions, it is not obvious that it would be right to make no order as to costs against the four claimants who are discontinuing. It may well be that there are no costs attributable specifically to them, but that does not necessarily mean that Doha Bank should be denied the opportunity to enforce any order made in its favour against them, as well as the other claimants, insofar as such costs relate to the period before they indicated their intention to discontinue.
- 76 I therefore refuse Mr Emmerson's oral application for an order permitting the four claimants to withdraw with no order as to costs. If they wish to apply for such an order, they should do so formally. The proper time for their applications to be determined is at the end of the stay hearing.

Reasons for refusing Doha Bank's application for the hearing to be held in private

- 77 My reasons for refusing Doha Bank's application for the hearing to be held in private were as follows:
- (a) CPR 39.2 establishes a general rule that a hearing is to be held in public. The general rule reflects the constitutionally fundamental principle of open justice, which encompasses the right of the media to impart and the public to receive information in accordance with Article 10 of the European Convention on Human Rights ("ECHR"). The exceptions to this principle are, and must be, closely limited: *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2011] QB 218, [38]-[40].
 - (b) Reputational interests can in principle engage rights protected by Article 8 ECHR. In an appropriate case, these can and must be weighed against the rights and interests of the press and public under Article 10 ECHR which are protected by the open justice principle: see e.g. *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, [52].
 - (c) Although neither Article 8 nor Article 10 as such has precedence over the other, that does not mean that in given situations – for example where open justice falls to be balanced against reputational damage – one will not generally trump the other. In general, the open justice principle will prevail: *Global Torch Ltd v Apex Global Management Ltd* [2013] 1 WLR 2993, [25].
 - (d) One reason why this is so is that, at least in cases where parties are legally represented, the professional obligations of those instructed provides some protection. It would be professionally improper for a legal representative to plead a serious allegation against an individual in the absence of sufficient evidence to do so. It would be equally

improper to use the privilege which attaches to statements made in a court hearing to make public allegations which are not of genuine relevance to an issue in the proceedings. A second reason is that the privilege which attaches to reports of legal proceedings applies only to a “fair and accurate” report of such proceedings: Defamation Act 1996, Sch. 1, para. 2. A fair and accurate report would include any response to the allegation.

- (e) In this case, the extent of any reputational damage likely to occur as a result of *this* application being heard in public is limited in two ways. First, there has already been a hearing at which both the allegations underlying the claim and the allegations of interference with the course of justice in these proceedings have been ventilated in public. Both sets of allegations were widely reported. The repetition of these allegations is unlikely to add materially to any reputational damage. Second, insofar as the evidence which Doha Bank has applied to strike out includes new allegations or allegations against individuals not previously named, Mr Emmerson helpfully indicated that it would not in any event be necessary for him to refer to these allegations in his submissions. He did not in fact refer to them.
- (f) In the light of these features, the reputational interests of those against whom allegations have been made in the evidence are not sufficient to outweigh the importance of open justice in this case. This is so even though these are interlocutory proceedings where the evidence in question may fall to be excluded and even though the allegations underlying the claim may never be tried in this jurisdiction.