Neutral Citation Number: [2022] EWHC 2242 (Comm)

Case No: CL-2021-332

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 30/10/2022

Before :

HIS HONOUR JUDGE PELLING
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

BASEL HASHWAH and others	**Claimants/ Respondents**
- and -	
(1) QATAR NATIONAL BANK (Q.P.S.C.)	
(2) DOHA BANK LTD	
(11) CHRISTIAN COMAIR	
(17) ABDULHADI MANA A AL-HAJRI	**Defendants/ Applicants**

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

Hearing dates: 3,4, 5 and 6 May 2022

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Approved Judgment

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

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the hearing of applications by the first, second, eleventh and seventeenth defendants ("defendants") for orders under CPR rr.11(1) and 11(6) declaring that the court has no jurisdiction to hear the claimants' claims on grounds of state immunity and setting aside the Claim Form and its service on those defendants. The defendants are to date the only defendants on whom the proceedings have been served. The applications give rise to identical or closely related issues. The claimants also apply for permission to amend their Claim Form. That application is opposed by the defendants.

2. The defendants are individuals and entities associated with the State of Qatar. The first defendant is a Qatari bank incorporated pursuant to Emiri Decree No 7 of 1964. The second defendant is incorporated and headquartered in Qatar and is a private company listed on the Qatar Stock Exchange. Its largest shareholder is the Qatar Investment Authority (Qatar's sovereign wealth fund) and members of the ruling Al Thani family sit on its board. The eleventh defendant is a Canadian and Lebanese businessman. He is the Chairman of Generic Engineering Technologies WLL, a large civil engineering and construction company. The seventeenth defendant is a Qatari citizen and the brother-in-law of His Highness the Emir of Qatar, the Head of the State of Qatar.

3. Although it will be necessary to consider the allegations made against the defendants in more detail below, in essence the claims are in respect of injury, loss and damage alleged to have been caused by the defendants' alleged participation in an alleged terrorist funding arrangement, by which funds were allegedly channelled to the Al-Nusra Front in Syria.

4. The only statement of case formally served to date is the Claim Form with Brief Details of the claim set out in it. A draft Particulars of Claim has been produced but not served. The claimants have since then served the application for permission to amend the Claim Form referred to earlier and have produced an amended draft Particulars of Claim ("ADPC") which the claimants propose to serve in the event that they are granted permission to amend the Claim Form in the terms applied for. As I have said the application for permission to amend is opposed and all the defendants submit that the application should be considered only once the defendants' applications have been determined. For reasons I explain below, I consider this submission to be correct. Nonetheless, it would be unreal to determine this application without having regard to the way the claimants seek to put their case as set out in the ADPC and I do not understand the defendants to suggest otherwise.

5. As the claim is formulated in the ADPC and the proposed amendments to the Claim Form, the claimants seek to advance as their primary case that the alleged terrorist financing occurred with the direct or indirect authority or acquiescence of the Emir of Qatar or someone acting on his behalf. This is in essence the sole case currently pleaded in the Claim Form. The claimants' alternative case (which they state they will rely on only if their primary case is not made out at trial) is a claim advanced against the defendants in their personal (whether individual or corporate) capacities.

The alternative case is premised on the absence of any authority from or acquiescence by Qatar's Head of State. The claimants submit that whatever the outcome in relation to their primary case, there is no plausible state immunity answer to their alternative case.

6. The defendants submit that the amendment application cannot be heard until after determination of the jurisdiction applications and that it should be dismissed in any event because (a) the primary case is bound to fail applying state immunity principles, just as the original case was bound to fail and (b) the alternative case is bound to fail because it is relied on only if the primary case fails at trial – see paragraph 71 of the ADPC, paragraph 4 of the proposed amendment to the Brief Details set out below and paragraph 8.2 of the claimants' skeleton for this application. The defendants maintain that if, as the defendants submit, the primary case cannot be allowed to proceed to trial then the alternative case cannot arise and therefore permission to amend (at any rate in the form currently proposed) must be refused. It is because this is the basis on which the application for permission to amend is opposed that it would be wrong in principle to decide the claimants' application for permission to amend before turning to the defendants' applications. Whether permission should be refused on that basis is an issue I determine at the end of this judgment having first determined the defendants' applications.

7. I should make clear at the outset that the claimants' allegations are strenuously denied by all the defendants. However, each defendant accepts, correctly, that for the purposes of deciding the state immunity issues, I must proceed on the basis that the claimants' allegations can be made out. I should also make clear that nothing in this judgment is concerned with a moral or ethical judgment as to the claims advanced or the conduct alleged. Deciding whether a claim is precluded by sovereign immunity does not involve an exercise of discretion. It depends exclusively on the application of the law relating to sovereign immunity to the facts alleged by the claimants.

8. The claimants oppose the application on the grounds that:

   i) the financing of terrorism by Qatar is, as a matter of international law, outside Qatar's sovereign authority, such that there is no obligation under customary international law to give the defendants the benefit of sovereign immunity;

   ii) if (contrary to the claimants' primary submission) the financing of terrorism is within the sovereign authority of the State of Qatar, this creates a conflict with the UK's obligation under a binding resolution of the UN Security Council that must be resolved so as to afford precedence to the Security Council Resolution and displace or suspend the obligation to afford immunity to the State of Qatar; and/or permitting the defendants to rely on state immunity would in all the circumstances amount to a breach of the claimants' rights under Article 6 of the European Convention on Human Rights ("ECHR") and/or the Human Rights Act 1998; or

   iii) the commercial transactions exception at section 3(1) of the State Immunity Act 1978 applies to these proceedings and the claims made in them; and / or the proceedings do not relate to anything done by the defendants in the exercise

of sovereign authority such that they might benefit from immunity as separate entities or agents of the State of Qatar.

Factual Allegations by the Claimants

9. In so far as is material for present purposes, the claimants' claim as set out in the proposed amendment to the Brief Details of Claim on the Claim Form includes the following key allegations (with the deletions being those to be made by way of amendment if permission to amend is granted):

> "1. These claims concern a clandestine ~~conspiracy~~ arrangement, 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 ("Al Nusra"), by a variety of unlawful means (the "Terrorist Funding ~~Conspiracy~~ Arrangement"). The Terrorist Funding ~~Conspiracy~~ Arrangement involved the transfer of funds running into the hundreds of millions of US Dollars to Al Nusra, by the means set out in these Brief Details of Claim. Al Nusra is responsible for terrorist acts in Syria perpetrated against the Claimants, including acts of torture, severe, cruel and inhuman and degrading treatment and arbitrary detention, threats of assault and execution, wanton destruction of property and other forms of religious and ethnic persecution.
>
> 2. ~~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 service. The mechanics of the Terrorist Funding Conspiracy are further detailed below, but include:~~ The Terrorist Funding Arrangement involved high-ranking members of the Qatari ruling elite, including certain Defendants in these proceedings, to actively support and facilitate the actions of Al Nusra.
>
> 3. On the Claimants' primary case, they invite the Court to draw an inference that the Terrorist Funding Arrangement and the diversion of funds to Al Nusra occurred with the direct or indirect authority or acquiescence of the Emir of Qatar, or an individual or entity officially or unofficially authorised to give consent on the Emir's behalf (the "Primary Case").
>
> 4. Alternatively, if the inference above is not established, the Claimants will proceed on the basis that the Defendants (save for the Fourth, Eighth and Ninth Defendants) participated in the Terrorist Funding Arrangement in their individual (or corporate) capacities, and that there was no authorisation, direction or

control of the participation in terrorist financing of the Defendants by the Emir of Qatar, any individual or entity authorised to act on the Emir's behalf or directed or controlled by the Emir, any organ of the State of Qatar or any other person exercising any element of governmental authority (the "Alternative Case").

5. The Terrorist Funding Conspiracy was carried out in conjunction with the Muslim Brotherhood and (on the Primary Case) with the involvement of the Qatari intelligence service. The mechanics of the Terrorist Funding Arrangement are further detailed below, but include:

5.1 ~~2.1~~ The co-ordination and funding of clandestine activities, together with the Muslim Brotherhood, through Turkey, from (at least) 2010 onwards.

5.2 ~~2.2~~ The laundering and channelling of funds to Al Nusra by way of transfers through and withdrawals from accounts of –held with - and in the knowledge ~~of~~ held with the First and Second Defendant Banks ("QNB" and "Doha Bank" respectively)…

5.3 Overpriced construction contracts awarded to the Twelfth and Thirteenth Defendants (the "Al Khayyat Brothers"), prominent businessmen and active supporters of terrorism (and/or to their construction companies) by the Private Engineering Office of the Amiri Diwan (the Eighth Defendant; the "Private Office"). The purpose of the Private Office is to provide commercial funding of engineering projects. Whilst the construction contracts were ostensibly legitimate, and in respect of real projects, they were in the event used as a structure by which to facilitate the channelling of funds to Al Nusra. Their overpriced component was laundered through banks including Doha Bank and QNB …

5.4 ~~2.4~~ The purchase at inflated values of property in Syria by the Al Khayyat Brothers, with the excess funds transferred through accounts at Doha Bank and/or QNB, either to Syria directly, or to Turkey where funds were withdrawn and carried over the border to Syria.

5.5 ~~2.5~~ Direct transfers to accounts held at Doha Bank and/or QNB in Turkey, to be withdrawn in Turkey on the pretext that they were payments for building materials, withdrawn in cash, and carried over the border to Syria …

…

5.7 ~~2.7~~ Direct payments made to Al Nusra by certain of the Defendants (including the Sixth, Fourteenth and Fifteenth

Defendants,), and/or on behalf of, or facilitated by, QNB and Doha Bank. …

…

8. ~~5.~~ The Defendants are the individuals or entities that participated in, and/or facilitated, the Terrorist Funding ~~Conspiracy~~ Arrangement. They include prominent individuals in Qatari society at the epicentre of the Terrorist Funding ~~Conspiracy~~ Arrangement, such as:

8.1 ~~5.1~~ The Fourth and Fifth Defendants (the "Al Thani Brothers"); respectively the former Prime Minister and Foreign Minister of Qatar and Head of the Qatar Investment Authority, or "QIA", until 2013 ("Sheikh Hamad"); and his brother, Mr Hashwah's business partner in Qatar ("Sheikh Nawaf"), who each had interests in the Charitable Foundation. Sheikh Nawaf was assisted by the Seventh Defendant ("Al Khatib") Sheikh Nawaf's property manager.

8.2 ~~5.2~~ The Ninth Defendant ("Sheikh Al Attiyah"), the powerful former head of Qatar state security and the head of the Private Office, who was assisted by the Tenth Defendant ("Timbakji"), Sheikh Al Attiyah's ~~lieutenant~~ associate, who had arranged for the Al Khayyat Brothers to relocate from Syria to Qatar and who (with Al Khatib) threatened and induced Mr Hashwah to participate in the Terrorist Funding ~~Conspiracy~~ Arrangement.

…Those prominent individuals and entities put the Terrorist Funding ~~Conspiracy~~ Arrangement into action with the assistance of, and in the knowledge of:

…

9.2 ~~6.2~~ The Banks: QNB and Doha Bank, which each facilitated payments to and/or the financing of Al Nusra, as further developed in these Brief Details of Claim. In the case of Doha Bank, this included the transmission of funds to accounts in Turkey and/or Lebanon carried out at the behest of the Al Khayyat Brothers. In the case of QNB, its unlawful actions include permitting the unlawful call on the bond at the behest of the Foundation, freezing the bank account of American Titan on the orders of Sheikh Nawaf and making direct payments to Al Nusra, pursuant to and in furtherance of the Terrorist Funding ~~Conspiracy~~ Arrangement. Board members of each of the Banks further funded Al Nusra directly by way of payments through the hawala system.

9.3 ~~6.3~~ Christian Comair (the Eleventh Defendant): a prominent Lebanese Canadian businessman, who provided the performance bond of USD 3 million securing American Titan's obligations

> under the Contract in favour of the Charitable Foundation, and whose principal source of commercial funds was Sheikh Al-Attiyah.
>
> …
>
> 10. ~~7.~~ The Terrorist Funding ~~Conspiracy~~ Arrangement was also furthered by the following entities or individuals:
>
> …
>
> 10.3 ~~7.3~~ The ~~Eighteenth~~ Seventeenth Defendant ("Al Hajri"), a well-known Qatari businessman and the son of the Emir's father in law, who made several trips to Turkey to meet with armed Syrian groups, organised by the Muslim Brotherhood.
>
> …
>
> 11~~. 8.~~ The Defendants knew (or ought to have known) that the funds that passed from them and/or through their accounts or the transfers which were otherwise facilitated by each of them were intended for Al Nusra, pursuant to the Terrorist Funding ~~Conspiracy~~ Arrangement. In transferring the funds, allowing the funds to pass through their accounts and/or otherwise facilitating their transfer pursuant to the Terrorist Funding ~~Conspiracy~~ Arrangement, the Defendants breached international and/or national law, causing the Claimants loss and damage. In addition, or alternatively, QNB and Doha Bank acted unlawfully in failing to monitor their accounts.
>
> …"

10. The original sole case advanced by the claimants was at that stage characterised as a "*Conspiracy*" but is now characterised as an "*Arrangement*". This is a change that may have been driven by governing law considerations but in any event is not material to the applications before me so I say no more about it.

11. The claimants' original (and currently their only pleaded) case is that the arrangement was carried into effect " *... by high-ranking members of the Qatari ruling elite ... to actively support and facilitate the actions of Al Nusra in Syria on behalf of the State of Qatar* … " – see paragraph 2 of the Brief Details in the Claim Form. The wording "*in Syria on behalf of the State of* Qatar" has been deleted in the proposed amendment to the Claim Form and replaced with a paragraph that invites the Court to draw an inference that the arrangement came into existence and/or was carried into effect " … *with the direct or indirect authority or acquiescence of the Emir of Qatar, or an individual or entity officially or unofficially authorised to give consent on the Emir's behalf* …"

Applicable Principles

12. It is not necessary in this judgment that I set out the legal history leading to the State Immunity Act 1978 ("SIA") other than to note that prior to the coming into force of the SIA, the principle of state immunity took effect in England and Wales by the application of common law principles derived from a rule of customary international law that one state cannot be sued in the courts of another for sovereign or governmental acts, which in turn is derived from the basic principle of international law that all states are equal - a concept that has been carried through into Article 2 of the United Nations Charter, as to which see further below.

13. The SIA is a complete code and now the sole source of English law on state immunity, but it is common ground that it must be construed against the background of customary international law given the sources from which the doctrine is derived – see Alcom Limited v. Republic of Colombia [1984] AC 580 *per* Lord Diplock at 597-8 and Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62; [2019] AC 777 *per* Lord Sumption at [10].

14. The general rules are those set out in SIA, s.1, which provides:

> "(1) A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question."

On its true construction applying the principles noted above, the immunity conferred by section 1(1) of the SIA extends only to acts by the state concerned that are "*jure imperii*" – that is a governmental, sovereign or public act, as opposed to an act of a private law character – see The I Congreso Del Partido [1983] 1 AC 244 *per* Lord Wilberforce at 262E-G and Kuwait Airways v Iraqi Airways [1995] 1 WLR 1147 *per* Lord Goff at 1160A. The immunity extends to servants or agents of foreign states who are sued in respect of matters where they were acting in discharge or purported discharge of their duties as such – see Jones v Ministry of the Interior of Saudi Arabia & another [2007] 1 AC 270 *per* Lord Bingham at [10] and Lord Hoffmann at [69], Belhaj v. Straw [2017] AC 964 *per* Lord Mance JSC at [17] and (most recently) Surkis and others v. Poroshenko and another [2021] EWHC 2512 *per* Calver J at [61] - [63] – because "*… to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state*" – see R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 3) [2000] 1 AC 147 *per* Lord Phillips at p.286A. Where officials are sued, the state immunity conferred by the SIA will be available to them whether or not they are in post at the date they are sued. State immunity can be waived only by the state concerned – see Surkis and others v. Poroshenko and another (ibid.) at [47]. It cannot be waived by officials or former officials if and when they are sued. In the absence of such a waiver the court is bound to give effect to the immunity – see s.1(2) of the SIA. In summary therefore, officials and agents of a state are entitled to the same protection that the state would be entitled to if the state itself had been sued for the acts in question. There is no dispute in this case that if otherwise state immunity applies it is available to the defendants.

15. The scheme of the SIA is to create a general immunity for the governmental acts of states and their officials, subject to any qualifications to the immunity derived from generally accepted customary international law norms and the express exceptions set out in later sections of the SIA. If the case concerns a governmental act that does not fall within one of these qualifications or exceptions, the state and its officials are immune from suit in respect of such acts – see Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) *per* Lord Sumption JSC at [39]. That is so whether or not the acts are illegal, unconstitutional or unauthorised under the internal law of the state concerned or otherwise - see The I Congreso Del Partido (ibid.) *per* Lord Wilberforce at 272, because the *rationale* of the state immunity principle is to prevent such issues being canvassed in the courts of one state in respect of the acts of another; and Jones v Ministry of the Interior of Saudi Arabia & another (ibid.) *per* Lord Bingham at paragraph 12, where it was held that Saudi officials allegedly responsible for torture could not be sued in the courts of England and Wales.

16. The statutory exception argued by the claimants to be relevant is that which applies to commercial transactions. It is set out in the SIA, s.3 in these terms:

> "(1) A State is not immune as respects proceedings relating to—
>
> (a) a commercial transaction entered into by the State; or
>
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.
>
> (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.
>
> (3) In this section "commercial transaction" means—
>
> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual."

Discussion

17. As I have explained by reference to the proposed draft amended Brief Details on the Claim Form, the claimants' primary case is an inferential case that the "*Terrorist*

Funding Arrangement" and the diversion of funds to Al-Nusra occurred with the direct or indirect authority or acquiescence of the Emir of Qatar, or an individual or entity officially or unofficially authorised to give consent on the Emir's behalf. That allegation is repeated word for word in paragraph 5 of the ADPC.

18. In paragraph 6 of the ADPC, the claimants set out the bases on which they allege such an inference is to be drawn. They include (i) " … *certain statements made by Hamad Bin Jassim*[1] *and Qatari foreign policy in favour of Al Nusra, ISIS and/or the Muslim Brotherhood* …" and (ii) " … *additionally, the conclusions of a 2016 US Defence Intelligence Agency Report that Al Nusra "probably receives logistical, financial and materiel assistance from elements of the Turkish and Qatari governments"; and various open-source reports detailing clandestine transfers to Al Nusra across the Turkish Border to Syria, including using Qatari aircraft …"*

19. I agree that the primary case advanced by the claimants as formulated in this way engages the question whether the claim is one that is subject to state immunity. In substance, the primary case is an allegation that Qatar provided state funding to Al Nusra using the mechanisms referred to in the draft amended Brief Details and the ADPC and the defendants were its agents for those purposes. I accept too that at least realistically arguably some of these mechanisms were or involved commercial transactions. For reasons that I explain below, that does not in my view entitle the claimants to rely on the commercial transactions exception.

20. That this claim engages state immunity principles has been recognised by the claimants, as is apparent from the fact that the state immunity issue is addressed by the claimants in paragraphs 8-10 of the ADPC. Whether in fact the claimants are precluded from bringing their primary claim on state immunity grounds depends on their draft pleaded case that state immunity is not available to the defendants.

21. The claimants' case in relation to the state immunity issue is set out at paragraph 8 of the ADPC in these terms:

> "For the purposes of the Primary Case, the Claimants contend that the actions of those involved in the Terrorist Funding Arrangement are incapable of protection by sections 1 and/or 14(2) of the State Immunity Act 1978 ("SIA 1978"), in that:
>
> 8.1 the funding of terrorism falls under the "commercial transaction" exception under section 3 SIA 1978, construed against relevant principles of English law and international law;
>
> 8.2 the funding or support of international terrorism cannot be characterised as "state conduct", a "public duty" or "the exercise of sovereign authority" such as to extend the immunity of the State to an agent under section 1 of the SIA1978 or to a separate entity under section 14(2) SIA 1978, both provisions construed

[1] The reference to "*Hamad Bin Jassim*" is to the fourth defendant who is the former Prime Minister and Foreign Minister of Qatar – see paragraph 4.2 of the ADPC.

> against relevant principles of English law and international law; and
>
> 8.3 for an English Court to extend the protection of state immunity by an English Court to those involved in the Terrorist Funding Arrangement in such circumstances would be contrary to the United Kingdom's obligations under Resolution 1373 (2001) of the United Nations Security Council and Article 6 of the European Convention on Human Rights (the "ECHR") and the Human Rights Act 1998 (the "HRA")."

In relation to their case under the Human Rights Act 1998, The claimants' case is expanded upon in paragraphs 9 and 10 of the ADPC in these terms:

> "9. As to paragraph 8.3 above, by section 3 of the HRA, the SIA 1978 is to be read and given effect in a manner that conforms with the United Kingdom's obligations under the ECHR (insofar as it is possible to do so). Article 6 of the ECHR provides for the right of fair trial and access to court. Whilst the European Court of Human Rights has recognised that Article 6 must be interpreted in harmony with general international law (including international law on state immunity), it has also subsequently ruled that resolutions of the UN Security Council under Chapter VII of the UN Charter are mandatory in all circumstances, and take precedence over any other rule of national or international law. This includes customary international law. Accordingly, such resolutions take precedence over the rules on state immunity, insofar as they expressly limit a state's sovereignty.
>
> 10. In the alternative, the Claimants are entitled to a declaration of incompatibility under section 4 of the HRA, on grounds that the SIA 1978 is incompatible with the Claimants' Convention rights."

I refer to the issues identified by the claimants respectively below as (i) the Commercial Transaction Issue (paragraph 8.1); (ii) the Governmental Action Issue (paragraph 8.2); (iii) the UN Resolution Issue (paragraph 8.3) and (iv) the Article 6 Issue (paragraphs 8.3, 9 and 10). It will be necessary to consider each of these points in turn. Although the claimants refer to the Commercial Transactions Issue first in the ADPC, in my judgment it is the Governmental Action Issue that should be considered first since if the claimants are correct on that issue then state immunity cannot arise and the remaining issues become academic. Logically I should next consider the UN Resolution and Article 6 Issues since it is only if these are resolved against the claimants that the Commercial Transaction Issue becomes relevant.

The Governmental Action Issue

22. The defendants submit that this issue has been resolved at first instance in Heiser v. Islamic Republic of Iran and another [2019] EWHC 2074 (QB). I turn to that authority first in those circumstances since if that submission is correct, I should follow it on

comity grounds, unless I am convinced that it is plainly wrong, even though technically it is not binding on me.

23. The applications being determined in that case were applications to set aside a default judgment and an order permitting proceedings to be served out of the jurisdiction by which the claimants sought to enforce judgments obtained in the United States of America in respect of losses caused by terrorist incidents occurring in a number of countries in the Middle East and one in New York – see paragraph 10 of and the Appendix to the judgment. The defendants maintained that they were immune from suit under s.31 of the Civil Jurisdiction and Judgments Act 1982. Various preliminary issues had been directed to be determined including whether the defendants were immune from jurisdiction by operation of the SIA.

24. S.31(1) of the 1982 Act contains two requirements (contained in sub paragraphs (a) and (b)) that must be satisfied before enforcement can be ordered, the second of which requires that an overseas judgment against a state can be enforced by the English court only if " … *that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978*" – see s.31(1)(b). Stewart J concluded that if the claimants were to succeed they had to satisfy both s.31(1)(a) and (b). Stewart J concluded that the Claimants had not satisfied s.31(1)(a) of the 1982 Act – see paragraph 91 of the judgment. It follows that what he said thereafter concerning s.31(1)(b) strictly is *obiter*.

25. That said, Stewart J came to some firm conclusions concerning that issue. He referred to the statements of principle in The I Congreso Del Partido *per* Lord Wilberforce at 262E-G referred to above – see paragraph 127 of the judgment – and paragraph 53 of Lord Sumption's judgment in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.), where he had said that if *"(a)s a matter of customary international law, … an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune* …" and see paragraph 129 of Stewart J's judgment, where he substituted for the phrase " *… an employment claim* …" the phrase "*[state sponsored terrorism]"*. He then turned to the availability of the commercial transaction exceptions in paragraph 176 and following. I return to Stewart J's analysis of this exception below. For present purposes it is necessary only to refer to paragraph 183, where Stewart J set out again the relevant part of The I Congreso Del Partido (ibid.) set out earlier, and to paragraphs 184 -185 where he held as follows:

> "184. Following this authority, the act of state sponsored terrorism is of its own character a governmental act as opposed to an act which any private citizen can perform.
>
> 185. On that basis, the state financial sponsorship of terrorism found by the US courts (i) did not amount to a commercial transaction i.e. Iran was exercising its sovereign power *de iure imperii*; in any event, (ii) the proceedings leading to the Judgments did not relate to a commercial transaction. Section 3 is not therefore applicable."

26. For present purposes the defendants rely on the conclusions expressed in paragraph 184 as an orthodox application of the principles identified by Lord Wilberforce in The I Congreso Del Partido (ibid.) and the authorities that have followed it, that they submit I should follow. The claimants submit that I should not follow this authority because (i) it is the only case in which it has been held that state funded terrorism is a governmental act that engages state immunity; (ii) the facts in that case were different from the facts alleged in this case; and (iii) it is wrongly decided because it is possible for private individuals to fund terrorism.

27. Given the terms in which Stewart J expressed his conclusions, in reality it is only the third of these points that might lead to the conclusion that I should not follow his conclusion. The first point is immaterial if Stewart J's analysis is correct and the second is immaterial too given the basis on which the claimants advance their primary case in these proceedings.

28. As to the suggestion that Heiser v. Islamic Republic of Iran and another (ibid.) is wrongly decided on this point, I am not convinced that Stewart J was wrong. To the contrary with respect I consider he was correct. The key point is that by definition a private citizen cannot provide support for terrorist activity that is "*state sponsored*". By definition such support can be provided only by a state. As Stewart J held, such activity by a state is by its very nature " … *an inherently sovereign or governmental act* …" – see Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) per Lord Sumption at [53].

29. In this case that reasoning applies because it is alleged by the claimants as their primary case that the alleged scheme to fund the Al-Nusra Front was " … *with the direct or indirect authority or acquiescence of the Emir of Qatar, or an individual or entity officially or unofficially authorised to give consent on the Emir's behalf* …" That is by its nature a sovereign or governmental act or, in other words, the carrying into effect of the scheme was on the claimants' primary case a series of " … *acts done in the exercise of sovereign authority*."- see Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) *per* Lord Sumption at [37].

30. Thus in principle the defendants are immune from suit unless either (i) the immunity is not available in respect of the allegations the claimants make, by reason of what they submit is the effect of (a) the UN Resolution on which they rely or (b) ECHR Article 6, or (ii) if what is alleged comes within the scope of the commercial transactions exception set out in the SIA.

The United Nations Issue

31. The claimants allege that for an English Court to extend the protection of state immunity to those involved in the Terrorist Funding Arrangement would be contrary to the United Kingdom's obligations under Resolution 1373 (2001) of the United Nations Security Council ("Resolution 1373"). The underlying basis for this submission is that the effect of Resolution 1373 is to ensure that any person who participates in the financing of terrorist acts "*… is brought to justice …"* - see paragraph 2(e) - and that the UK would breach this requirement if the court was to permit the defendants to assert sovereign immunity in relation to the claimants' primary case.

32. Resolution 1373 was passed by the Security Council exercising the powers contained in Chapter VII of the United Nations Charter. Article 39 within Chapter VII, provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

and by Article 41 provides:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

33. Other provisions within the Charter that are relevant to the issue that arises include: (a) Article 2, which provides that:

> "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members. …";

(b) Article 25 (within Chapter V, which is concerned with the Security Council) which provides:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter";

(c) Article 92 (within Chapter XIV, which is concerned with the International Court of Justice), which provides that "(*t)he International Court of Justice shall be the principal judicial organ of the United Nations*" and (d) Article 94 within the same chapter, which provides:

> "1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

34. Although this judgment is not the place for a detailed analysis of the effect of the UN Charter, in my judgment it is clear that the Charter is concerned with regulating the relationship between sovereign states and those entities treated as such, that nothing within the Charter derogates from the sovereignty of states – see Article 2 – and ultimately any alleged failure to comply with obligations arising under the Charter or resolutions of the Security Council is for the International Court of Justice to adjudicate upon and for the Security Council to remedy. The extent to which resolutions of the Security Council become part of English law is something I return to below.

35. Resolution 1373 provides in so far as is material:

> "… The Security Council …
>
> 1. *Decides* that all States shall:
>
> (a) Prevent and suppress the financing of terrorist acts;
>
> (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
>
> (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
>
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
>
> 2. *Decides* also that all States shall:
>
> (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

…

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

…

> 8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;
>
> 9. *Decides* to remain seized of this matter."

36. The claimants submit that the obligations set out in the resolution are mandatory and binding on all UN member states including both Qatar and the United Kingdom. They submit that Qatar cannot invoke state sovereignty in contradiction of Resolution 1373, that the acts constituting the claimants' primary case are acts that breach Resolution 1373 and on this basis state immunity is not available to it or its officials as a matter of English law applying Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) *per* Lord Sumption at [37]. In my judgment this is unarguable for the following reasons.

37. Firstly, international treaties and conventions which have not been incorporated into domestic law by the legislature cannot be a source of domestic rights or obligations – see J H Rayner (Mincing Lane) v Department of Trade and Industry [1990] 2 AC 418 and Belhaj v. Straw (ibid.) *per* Lord Mance at [123]. That is as much so in respect of resolutions of the Security Council as any other treaty or convention. Whether and if so how and to what extent such resolutions are to be carried into effect as a matter of domestic law is a matter for Parliament. This issue has been legislated for by s.1 of the United Nations Act 1946, which provides:

> " (1) If, under Article forty-one of the Charter of the United Nations … the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order."

Various such Orders in Council have been made pursuant to the 1946 Act in respect of Resolution 1373. None of them modify either the jurisdiction of the Courts of England and Wales over civil claims or any of the provisions of the SIA.

38. This is unsurprising since there is nothing within Resolution 1373 that addresses either the question of civil jurisdiction by one UN member state over another concerning the alleged state funding of terrorism, nor does it address any issue concerning sovereign immunity, much less requires or entitles states not to afford immunity to a state facing a claim such as that advanced by the claimants as their primary case. The claimants rely specifically on paragraph 2(e) of the Resolution. That provision does not concern the assertion of civil jurisdiction by one state over another. It is concerned exclusively with a requirement that states introduce legislative measures to criminalise the financing of terrorism by that state's citizens or within its borders. More generally, that is the effect of the resolution as a whole – see Ahmed v HM Treasury [2010] 2 AC 534 *per* Lord Philips PSC at [133] to [138].

39. If and to the extent that a state's domestic law does not give sufficient effect to Resolution 1373 that is a matter ultimately for the Security Council.

40. Secondly, as I explained earlier, state immunity is a fundamental norm of international law derived from the sovereign equality of states. As I have said already, given the source of the sovereign immunity concept, the SIA is to be construed applying principles of customary international law. In that context, well- established international legal rules should be upheld unless they are required to yield to another rule of international law – see Reyes v Al-Malki [2016] 1 WLR 1785 per Lord Dyson at [64]. It is not in dispute that international law may develop qualifications to norms such as that on which sovereign immunity depends and thus that a rule of customary international law might develop that " … *entitles or perhaps requires states to assume civil jurisdiction over other states* …" in limited circumstances – see Jones v Ministry of the Interior of Saudi Arabia & another (ibid.) *per* Lord Hoffmann at [45]. Whether such a rule has developed however is to be ascertained " … *in the normal way from treaties, judicial decisions and the writings of reputed publicists* …" [46] and judicial decisions - see [48] and [59] - but the search is ultimately for the common consent of nations to such an emerging qualifying norm. As Lord Hoffmann said at [63]:

> "It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

The level of consensus required to be demonstrated was summarised by Lord Sumption in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) at [31] in these terms:

> "To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (opinio juris): see conclusions 8 and 9 of the International Law Commission's *Draft Conclusions on Identification of Customary International Law* (2016). There has never been any clearly defined rule about what degree of consensus is required. The editors of *Brownlie's Principles of Public International Law*, 8th ed (2012), p 24, suggest that "Complete uniformity of practice is not required, but substantial uniformity is". This accords with all the authorities."

As he added at the end of that paragraph:

> "What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law."

41. There is no evidence that there is an international consensus that satisfies these requirements, which qualifies the fundamental norm of international law on which sovereign immunity is founded so as to enable the SIA to be construed in the way contended for by the claimants. That two states, the United States of America and

Canada, have introduced terrorism exceptions into their domestic state immunity legislation is not to the point. Parliament has not introduced such an exception here and that those states have done so does not demonstrate that a consensus has emerged amongst nations to the effect that state immunity should not apply to civil claims in respect of alleged terrorist financing by states. Indeed, it is worth noting that in Canada it has been held at state provincial appellate level that the Canadian provision ignores rather than gives effect to international law:

> "[42] The presumption of compliance with international law presumes that domestic legislation will be interpreted in a manner that is consistent with or minimizes contravention of international law: *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. State immunity is recognized as a general rule of customary international law: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at para. 38.
>
> [43] These presumptions are important tools in statutory interpretation, but they are subject to rebuttal by Parliament through the use of clear statutory language. In short, Parliament has the power to make legislation retroactive and it has the power to ignore international law. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates such an unequivocal legislative intention, absent constitutional concerns, which are not raised here.
>
> …
>
> [45] Similarly, the presumption of compliance with international law is rebutted where Parliament expresses a clear intention to default on an international obligation: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53.
>
> [46] A plain reading of the *JVTA*, together with the contemporaneous amendments to the *SIA*, establishes that Iran's immunity from civil proceedings related to terrorism was lifted in September 2012, exposing them to liability for acts of terrorism they supported that occurred on or after January 1, 1985. Thus, the presumption of compliance with international law and against retroactivity has been rebutted, to this extent, by the clear wording of the statutes."

- see Tracy v. Iran (Information and Security) [2017] ONCA 549.

42. In summary the SIA is a complete code of domestic sovereign immunity law. There is nothing within Resolution 1373 that concerns civil claims for losses alleged to have been caused by terrorism, much less such claims against sovereign states alleged to have financed activity alleged to be terrorist activity (however that might be defined) nor is there any established rule of customary international law that qualifies the international law norm that is the foundation of state immunity in the UK, by reference to which the scope of sovereign immunity conferred by s.1(1) of the SIA might be qualified. Thus whilst I accept that such a norm (if it existed) might have the effect of

qualifying what constitutes governmental acts, no such norm has been proved. Absent such a norm, it would require an Order in Council or, possibly, primary legislation creating a qualification to the SIA, before Resolution 1373 could have direct effect in the UK to qualify when state immunity is available (assuming, contrary to the case, that to be the effect of one or more of the provisions of Resolution 1373).

The Article 6 Issue

43. The claimants contend that for an English Court to extend the protection of state immunity to those involved in the Terrorist Funding Arrangement would be contrary to Article 6 of ECHR and the Human Rights Act 1998 (the "HRA").

44. Article 6(1) provides that "*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*." It is not in dispute that Article 6(1) implicitly confers a qualified right of access to a civil court to determine a dispute – see Golder v the United Kingdom (1975) 1 EHRR 524 and Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) *per* Lord Sumption at [14] – or, on the assumption that a claim to state immunity is a procedural bar that has the effect of denying a claimant access to a court and therefore engages Article 6(1), that denial of access to a court can be justified where the denial of access is a proportionate means of delivering a legitimate aim following Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.) and the European Court of Human Rights ("ECtHR") jurisprudence there referred to. That said, as Lord Lloyd-Jones noted in General Dynamics v State of Libya [2021] 3 WLR 231 at paragraph 83, this approach is different from that usually taken in this jurisdiction, which is that " … *article 6 is concerned with access to the court in the sense of access to the jurisdiction which the court enjoys in accordance with principles of international law. If international law requires the grant of immunity, the court lacks jurisdiction in this sense so article 6 is simply not engaged …*". I return to this debate at the end of this section of the judgment to the extent it is necessary to do so.

45. The degree to which if at all Article 6 can impact the right of a state to rely on state immunity was determined in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.), where the lead judgment was given by Lord Sumption, with whom all the other members of the court agreed. He summarised the effect of the ECtHR jurisprudence at paragraph 20:

> "… it has always held that the proper application of the rule of state immunity was justifiable because it was derived from a fundamental principle of international law. The only cases in which it has ever held article 6 to have been violated are those in which it has found that a claim to state immunity was unfounded in international law."

He added at [34]:

> "What justifies the denial of access to a court is the international law obligation of the forum state to give effect to a justified assertion of immunity. A mere liberty to treat the foreign state as immune could not have that effect, because in that case the denial

> of access would be a discretionary choice on the part of the forum state. … To put the same point another way, if the legitimate purpose said to justify denying access to a court is compliance with international law, anything that goes further in that direction than international law requires is necessarily disproportionate. I conclude that unless international law requires the United Kingdom to treat Libya and Sudan as immune as regards the claims of Ms Janah and Ms Benkharbouche, the denial to them of access to the courts to adjudicate on their claim violates article 6 of the Human Rights Convention."

46. The claimants submit that if as a matter of international law, Qatar has no right to claim immunity in respect of a claim based on allegations that it has financed or facilitated terrorism then the grant of immunity would be discretionary and is necessarily disproportionate applying the principles identified by Lord Sumption in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs (ibid.). On the premise identified that would no doubt be correct. However, in my judgment, the premise is not correct and the Article 6 point is unarguable in light of the conclusions I have reached concerning the United Nations Issue. In those circumstances no question of reading down or granting a declaration of incompatibility can arise.

47. In those circumstances it is not necessary for me to resolve which of the different approaches to the relationship between Article 6 and state immunity principles identified by Lord Lloyd-Jones in General Dynamics v State of Libya (ibid.) is to be preferred because applying either approach the ultimate question is the same – whether the immunity conferred by the SIA exceeds what is mandated by customary international law. It does not for the reasons set out above and the claimants' challenge fails therefore on whichever basis is adopted.

The Commercial Transaction Issue

48. The claimants submit that the funding of terrorism falls under the "*commercial transaction*" exception set out in s.3 of the SIA, construed against relevant principles of English law and international law.

49. For s.3 to apply it must be shown that the claim is one "*... relating to ... a commercial transaction entered into by the State ...*". In my judgment the submission that any part of what is alleged as part of the primary case is a or part of a claim "*... relating to ...*" a commercial transaction as defined elsewhere in s.3 is unarguable for the following reasons.

50. The Courts in England and Wales have consistently held that the effect of the words quoted apply the commercial transactions exception to claims arising out of the relevant transaction itself and not to " … *tortious claims arising independently of the transaction but in the course of its performance* … " or " … *some subsequent act, albeit that that act itself might loosely 'relate to' the contract or transaction* …" – see Holland v. Lampen-Wolfe [2000] 1 WLR 1573 *per* Lord Millett at 1587F-H and Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2005]

EWHC 2437 (Comm); [2006] 1 All ER (Comm) 731, *per* Gloster J (as she then was) at [50].

51. It is true to say that Lord Millett's conclusions were *obiter* since the House concluded that the SIA did not apply on the facts of that case and the sovereign immunity issues that arose were to be resolved applying common law principles. However Lord Millett's conclusions followed full argument and were agreed with by the other members of the House. Lord Millett's conclusions have been followed in the authorities decided subsequently – see AIC Ltd v Federal Govt of Nigeria [2003] EWHC 1357 (QB) *per* Stanley Burnton J (as he then was) at [24] to [28]; Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) (ibid.) *per* Gloster J at [50] and Heiser v. Islamic Republic of Iran and another (ibid.) *per* Stewart J at [181] to [182] and [185(ii)]. In those circumstances, it would be wrong for me not to follow these earlier decisions unless I was convinced that they are wrong. I am not convinced that they are. On the contrary with respect I am satisfied that they are correct, not least because (i) that is the literal effect of the statutory language used; (ii) if the construction for which the claimants contend was correct it would be difficult to define with any precision where the line should be drawn; and (iii) in any event there is no provision of customary international law to which I was taken that would support such a wide construction.

52. In those circumstances I am satisfied that what is currently the claimants' only claim and its proposed primary claim is one over which the court has no jurisdiction or is one over which it should not assert jurisdiction on state immunity grounds.

The Proposed Amendment

53. The issue that remains is whether I should grant the claimants' application for permission to amend on the basis of the claimants' contention that there is no plausible basis for suggesting that the alternative claim would be barred by the SIA. The defendants all contend that I should dismiss that application, at any rate as it is currently formulated.

54. The alternative claim is set out in paragraphs 71-73 of the ADPC. In summary it is that :

> "If and to the extent that the inference pleaded at paragraphs 5-6 above is not accepted by the Court, the Claimants will ~~elect to maintain~~ advance their claims against all Defendants save for Hamad Bin Jassim, the Private Office, Sheikh Al Attiyah (the "**Excluded Defendants**")."

This formulation assumes that at trial, the court will hear all evidence and submissions relevant to the primary case that I have held is subject to state immunity but the court in its judgment following completion of the trial would refuse to draw the inferences that the alleged Terrorist Funding Arrangement had occurred but not with " … *the direct or indirect authority or acquiescence of the Emir of Qatar, or an individual or entity officially or unofficially authorised to give consent on the Emir's behalf* …". This is consistent with paragraph 7 of the ADPC, where it is pleaded that " … *should the inference set out at paragraphs 5-6 above not be accepted by the Court and/or established at trial, the Claimants advance their claims against certain of the*

Defendants on the footing that they participated in the Terrorist Funding Arrangement in their individual or private capacities, as pleaded at paragraph 71 below."

55. The alternative case as pleaded is premised " … *on the absence of any authorisation, direction or control of the participation in terrorist financing of those Defendants by the Excluded Defendants or the Emir* …". In order to decide whether that is so, there would have to be a full trial and judicial determination of all the issues that constitute the primary claim. As I have explained in the earlier part of this judgment, the court is precluded by s.1(1) of the SIA from hearing or determining the claimants' Primary Claim. It follows therefore that the current draft Brief Details and ADPC assume that what will happen is what in law cannot be permitted to happen. In consequence, the application for permission to amend in its current form must fail.

56. In those circumstances, it is not necessary or desirable that I reach any conclusions concerning the claimants' case as to the availability of state immunity to the defendants if a claim is advanced against them exclusively " … *on the footing that they participated in the Terrorist Funding Arrangement in their individual or private capacities …*". That issue will have to be determined (if it arises) as and when such a claim is brought.