Neutral Citation Number: [2025] EWHC 379 (KB)

Case No: QB-2019-002712

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2025

Before :

MR JUSTICE SOOLE

- -

Between :

Claimants

(1) BB
(2) CC
(3) DD
(4) EE
(5) FF
(6) GG
(7) HH
(8) II

- and -

(1) MR MOUTAZ AL KHAYYAT
(2) MR RAMEZ AL KHAYYAT
(3) DOHA BANK LIMITED

Defendants

Sir Max Hill KC and Mr Christopher Hare (instructed by **McCue Jury LLP & Partners**) for the **Claimants EE, FF, GG, HH**
Ms Hannah Brown KC and Mr Sandy Phipps (instructed by **Eversheds Sutherland (International) LLP**) for the **Third Defendant**

Hearing dates: 28-29 November 2024, 3 February 2025

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JUDGMENT

Mr Justice Soole :

1. By this application dated 25 September 2023, the 4 Claimants identified as EE, FF, GG, and HH and collectively referred to as 'the Discontinuing Claimants', ask for the presumptive rule in respect of costs upon discontinuance of an action to be displaced pursuant to CPR 38.6. The respondent to the application is the Third Defendant ('the Bank').

2. CPR 38.6 provides, as material: '(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.'

3. The detailed background to this complex and long-running litigation may be found in the judgment of Swift J ([2022] EWHC 904 (QB)) and is summarised in the subsequent judgment of the Court of Appeal ([2023] EWCA Civ 253) at [2]-[22], handed down on 8 March 2023.

4. Since those judgments and pursuant to applications and consequent Orders of the Court, the 8 Claimants in this action split into two groups, known respectively as the 'Discontinuing Claimants' and the 'Continuing Claimants'. The Discontinuing Claimants were acting by solicitors McCue Jury & Partners LLP (McCue Jury). The Continuing Claimants became litigants in person, but were advised and assisted by law firm Jenner & Block LLP (J&B) pursuant to a retainer which J&B ultimately terminated in November 2024.

5. By my Order dated 16 November 2023 made pursuant to the Discontinuing Claimants' same application dated 25 September 2023, the Court granted permission for them to discontinue their action and ordered that all issues related to the costs consequences thereof to be determined at a later hearing.

6. By my Orders dated 23 February 2024 and 1 July 2024, the Court granted the Bank's successive applications to stay and then to strike out and dismiss the claims of the Continuing Claimants. The procedural history which led to the Order of 1 July 2024 is set out in my judgment under neutral citation number [2024] EWHC 2951 (KB).

7. Leaving aside that division and by way of background, the Claimants are Syrian citizens who allege that they were forced to flee their homes in Syria in consequence of the actions of a jihadist terrorist group known as the Al-Nusra Front, which is said to be affiliated to al-Qaida and has been proscribed by the UN Security Council, the EU, the UK, the USA and other States. From the outset of these proceedings the 8 Claimants have been granted anonymity on the basis of a genuine fear that they and/or their families would be at grave risk of serious harm, including death, if the fact of their involvement in the proceedings becomes public.

8. The First and Second Defendants are Syrian/Qatari businessmen who are alleged by the Claimants to have a history of providing financial and other support to terrorist groups operating in civil conflicts in the Middle East. They have not been served with the proceedings and therefore have taken no part in the action.

9. The Bank is incorporated in Qatar and has branches and representative offices internationally, including in London.

10. By Claim Form dated 30 July 2019 the Claimants issued these proceedings claiming damages for 'severe physical and psychiatric injuries, destruction of property, loss of profits and forcible displacement from their homes in Syria', on the basis that the Defendants are liable under Syrian law for the damage caused by the unlawful acts of the al-Nusra Front, because (in the case of the First and Second Defendants) they allegedly financed or (in the case of the Bank) it allegedly facilitated the making of payments to that organisation.

11. Following issue and service of the proceedings, the Bank applied for the action to be stayed on the grounds of *forum non conveniens.* That application has had a long and complex history and, in view of the discontinuance and strike-out, will not now be determined.

12. As the judgment of the Court of Appeal explains at [12], the original Particulars of Claim contained no clear allegation that the Defendants or any of them were acting on behalf of the Qatari State. However that was put in question by the terms of the Claimants' subsequent application to amend; and by the Bank's consequent contention that the proposed amendments must fail on the grounds of state immunity. That the Claimants were not alleging that the Qatari State was involved was finally clarified in the submissions of their Leading Counsel before Swift J and the Court of Appeal. As Andrews LJ stated at [49]: *'Mr Emmerson has now made the Claimants' position crystal clear in open court both before Swift J and on this appeal. The Bank can be in no doubt that the Claimants do not wish to contend that the Qatari State was involved, because they do not wish to enable the Defendants to raise the issue of state immunity. They do not need to make the allegation that the State was involved, even if some of or all of them believe that to be true. There is a viable and coherent claim without it.'* The Court of Appeal in consequence struck out various paragraphs of the proposed amendment which referred to the State of Qatar: see at [58].

13. As set out in the supporting (and 8th) witness statement dated 26 September 2023 of the Discontinuing Claimants' solicitor Mr Matthew Jury, the contention is that their discontinuance of the action is 'because of criminal actions by individuals associated with the State of Qatar to pervert the course of justice in these proceedings' (para.8). In other passages, the statement refers to 'the actions of the individuals connected with the Defendants and the State of Qatar' (para.126) and 'the actions of those associated with the Defendants' (para.127(g)). They ask the Court to disapply the presumptive rule on costs and to order the Bank to pay the costs of the action on the indemnity, alternatively standard, basis.

14. In his following (9th) witness statement dated 21 August 2024, Mr Jury states that his firm has throughout the proceedings 'repeatedly requested information from [the Bank] and its legal representatives on what steps they have taken to ensure that criminal activity to pervert the course of justice is not being carried out directly or indirectly for its benefit', to which they have received 'no satisfactory response… despite the escalating nature of the harassment, threats and interference that has characterised these Proceedings'. Further that 'while the [Bank] and the State of Qatar are not the same entity, it is also evident that they enjoy extremely close links.' For that purpose they in particular point to a number of members of the ruling Al-Thani

family who sit on its board; and to substantial shareholdings in the Bank by State entities. The statement continues that 'the only reason that they were seeking to discontinue was because of fears for their safety and security as a consequence of the actions of those associated with the Defendants and/or the State of Qatar'. This statement followed a meeting on 24-25 July 2024 in Rotterdam between Mr Jury, some of the Claimants and others, from which further evidence is said to have emerged. In August and September 2024 the Continuing Claimants CC, DD and II and Discontinuing Claimant EE made witness statements. The material submitted in support of this application includes these and other witness statements and expert reports, together with voluminous exhibited documents.

15. The skeleton argument of the Discontinuing Claimants' Counsel (Sir Max Hill KC and Mr Christopher Hare) dated 26 November 2024 in turn submits 'that the Proceedings have been derailed and irreparably compromised as a result of a criminal conspiracy by agents acting on behalf of the State of Qatar and/or the Defendants'; and refers to actions of 'associates of the State of Qatar and/or the Defendants'. In the alternative, they submit that 'Even if the State of Qatar is solely responsible for the Conspiracy…the [Bank] should not be permitted to disavow those acts of interference. The [Bank] should not be allowed to shield behind a convenient legal fiction, given the very real connections between the State of Qatar and the [Bank].' Further the Court 'should draw the adverse inference that the [Bank] was aware of and/or acquiesced in and/or was associated with the Conspiracy by virtue of its connections with the State of Qatar and/or benefitted directly from that unlawful conduct.'

16. Those connections are identified as (i) the Chairman, Managing Director and two other present board members being members of the ruling al-Thani family, including one with the high-status title of His Excellency and (ii) the two largest shareholders in the Bank, namely the Qatari Investment Authority (17.15%) and the General Retirement and Social Insurance Authority (6.671%), a State-owned enterprise responsible for managing civil and military pension funds. It is submitted that this concentration of shareholdings enabled these two Qatari State authorities 'to exercise a degree of control that cannot be matched by the dispersed shareholding of the general public.'

17. The potential significance of this point arises from the sixth of the principles in respect of an application to disapply the presumptive costs rule pursuant to CPR 38.6, as approved by the Court of Appeal in Brookes v HSBC Bank plc [2011] EWCA Civ 354. These principles are:

'*(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;*

(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule.'

18. In these circumstances, at an early point in the hearing I asked Sir Max to clarify his clients' position as to whether or not they were alleging that the Bank was party to a conspiracy with the State of Qatar to pervert the course of justice and thereby bring these claims to an end; and if so the full evidential basis for such an allegation. His response was that the application was not being pursued on the basis that the Bank was party to a conspiracy with the State, nor otherwise that the decision to discontinue had been brought about by conduct of the Bank. He further accepted that the description of the distinction between the State and the Bank as a 'legal fiction' could not be maintained. However, in the very particular circumstances of the evidence upon which they relied as to the criminal conduct of agents of the State in their successful frustration of this action, this was a case where the presumptive rule should be displaced notwithstanding the absence of evidence of causative unreasonable conduct by the Bank. Further the Bank was a beneficiary of the conduct of the State. The sixth principle in Brookes was expressed in qualified terms ('no change in circumstances is likely to succeed unless…'); and the case law showed examples where the presumptive rule was disapplied without causative conduct of the defendant: see in particular Arcadia Group Ltd & ors v. Telegraph Media Group Ltd [2019] EWHC 223 (QB). This was a classic case where it was appropriate to do so.

19. Whilst not resiling from the application that the Bank should be ordered to pay his clients' costs of the action and on the indemnity basis, Sir Max suggested that, in the circumstances of the case as now advanced, a disposal on terms of 'no order as to costs' might be more attractive to the Court.

20. In these circumstances the next preliminary question for the Court was whether it was appropriate to undertake a detailed investigation of the voluminous material which was said to support the allegation that the claim had been discontinued because of criminal conduct by agents of the Qatari State. Factors which might militate against such investigation included (i) the State of Qatar being neither a party to this action or application; and therefore in no position to respond to the allegations; (ii) the potential difficulties of assessing evidence in circumstances where no witnesses were being called; and (iii) the general desirability of avoiding complex satellite litigation, and/or of conducting mini-trials, on costs issues.

21. For these and other reasons Ms Hannah Brown KC for the Bank submitted that it was unnecessary and inappropriate to take this course. In circumstances where the allegation of involvement by the Bank in the alleged misconduct was no longer being advanced, and having regard to the Brookes principles, there was no good reason to take this course. Against these powerful arguments, but having regard to the gravity of the allegations and the quantity of material (including detailed analysis prepared by

each party; in the Bank's case, in the alternative), I was persuaded to undertake this exercise. This was without prejudice to my ultimate conclusion as to whether it was appropriate to attempt to reach any conclusion on the conspiracy allegations.

22. The substance of those allegations is helpfully summarised, with cross-references to allegedly supporting material, in paragraph 8 of the skeleton argument for the Discontinuing Claimants.

23. This alleges that a conspiracy involving agents of the State of Qatar to 'derail and irreparably compromise[d]' the Proceedings has been enduring, grave and unrelenting. The allegations had been reported by McCue Jury to SO-15 Counter Terrorism Command on 8 November 2020 and on four subsequent occasions in 2023-4. By its response dated 18 February 2021 SO-15 stated that it had completed a thorough and careful scoping exercise which had concluded that there was 'information and evidence to support' the allegation of a conspiracy to pervert the course of justice; that further evidence may be made available or identified by further investigation and that a crime report should be recorded. However it concluded that 'a full investigation would represent a disproportionate and unreasonable use of finite police resources, given the limited prospect of conducting an effective investigation and of obtaining sufficient evidence to prosecute any suspect in connection with this offence.' In this respect it was also noted that the alleged activity occurred entirely outside this jurisdiction. SO-15's response to McCue Jury's subsequent reports was in similar terms.

24. The summary in the skeleton argument alleges unlawful conduct under five heads.

25. First, that from August 2019, numerous attempts were made by identified Qatari officials to circumvent the anonymity orders by putting pressure on a key witness, Majed Saleh, to provide information regarding the Claimants' identities and/or by bugging his apartment.

26. Secondly, that from the same time, numerous attempts were made by the same individuals and others to uncover through Mr Saleh information about a man called Lourans Issa who was acting as a translator for the Claimants and was the liaison with their legal team, so that they could bribe Mr Issa to derail the proceedings. It is alleged that Mr Issa had been continuously offered bribes and that shots were fired at his restaurant. Whilst resilient at first he had succumbed at a later date. In consequence he had been instrumental in the Continuing Claimants' disinstruction of McCue Jury and provision of funds for a retainer with J&B. The Continuing Claimants did not speak English and were entirely dependent upon Mr Issa as their translator and sole point of contact. This resulted in letters being sent on without their knowledge and their signing untranslated documents, in particular Notices of Change of Legal Representative, without understanding their nature. They were left without effective legal advice or representation. Once their claims had been stayed pursuant to my Order of 23 February 2024, Mr Issa cut links with them. This culminated in the striking-out of their claims by my Order dated 1 July 2024. I interpose that in its correspondence with McCue Jury, J&B emphatically rejects these and any criticisms of its conduct of the retainer.

27. Thus the gist of the allegation is that Mr Issa, at the behest of and funded by agents of the State, tricked all the Claimants into abandoning these proceedings on the

fraudulent promise that he would procure a direct and substantial settlement of their claims by the State.

28. Thirdly, that from October 2019, numerous attempts were made by the same individuals and others to infiltrate the Claimants' legal team to put forward 'fake' claimants in order to access confidential information about the Claimants in breach of the anonymity order and to destabilise the proceedings by subsequently resiling from their evidence.

29. Fourthly, that from August 2019, numerous attempts were made by the same individuals and others to interfere with and intimidate a number of the Claimants' witnesses whose statements corroborate one another, namely:

(i) Mr Saleh, a former agent of the Syrian Ministry of Defence who could give a first-hand account of the Defendants' involvement with terrorist financing, threats of prosecution, attempted bribery, threats to members of his tribe, threats to kill or kidnap him, intrusions at his home; and being followed when driving. This intimidation was successful in that he eventually succumbed by attempting to withdraw the evidence set out in his witness statement and indicating that he was going to cooperate with the State and/or the Defendants in relation to the proceedings;

(ii) Wael Elkhaldy, a dissident and activist who received death threats, had his car and home broken into, confidential papers stolen and received warning notes and messages with the result that he has had to give up his career and home to safeguard his family;

(iii) Anas Idress, a Syrian freelance journalist, who had received death threats and was forced to sign papers declaring that he would not give evidence against the Defendants.

30. Fifthly, that throughout the proceedings there were numerous attempts to bring them to an early conclusion by seeking to settle the proceedings otherwise than through the Claimants' legal representatives and/or trying to reach agreement with witnesses such as Mr Saleh.

31. There were numerous aspects of the proceedings that remained largely unexplained and 'potentially inexplicable', including (a) the source of Mr Issa's funds to pay J&B on behalf of the Continuing Claimants; (b) the extent and nature of J&B's role in representing the Continuing Claimants; and (c) the precise role of three other lawyers who had been involved in the matter. These included Mr Luis Moreno Ocampo, a former Chief Prosecutor of the International Criminal Court, who appears to have been instructed by the law firm Pillsbury Winthrop Shaw Pittman (Pillsbury), on behalf of an unidentified client, in return for a very substantial success fee.

32. Sir Max developed these allegations through detailed reference to the witness statements and documents. He submitted that the motive for the alleged conduct of the State of Qatar was two-fold. Until the end of 2022, to avoid the litigation being disposed of before the World Cup was staged in Qatar late that year; and thereafter to benefit both the Bank, in which it had a substantial holding, and the State itself.

33. This topic of settlement negotiations with the State of Qatar is then elaborated in the witness statement dated 27 September 2024 of Mr Jonathan Ivinson, a partner in the law firm King & Spalding LLP (K&S), based in its offices in Geneva and Dubai. I interpose that Sir Max Hill KC is Senior Counsel and Policy Advisor at K&S, but is instructed in this matter by McCue Jury. Mr Ivinson's statement includes that he was approached in 2018 by a client in Switzerland who wished to establish a litigation fund to pursue human-rights based claims on behalf of victims of terrorism, genocide, torture or displacement. He used his expertise to establish the fund; which in due course sponsored two cases in London on behalf of Syrian victims of the Al Nusra Front. In 2022 he was made aware by McCue Jury that Mr Saleh wished to withdraw his testimony; and later that they had received communications from Mr Issa to the effect that the Claimants wished to withdraw their claims.

34. At a similar time he had received a telephone call from Mr Ocampo, who was a personal friend and who knew that he was involved in these proceedings. He explained that he had been introduced to lawyers in Doha including Pillsbury. In 2023 he understood that Mr Ocampo had entered a contract with Pillsbury for consultancy services towards an intended settlement of these and other related claims in other jurisdictions in return for a very substantial success fee. He understood the ultimate client to be the State of Qatar.

35. The witness statement then details discussions and meetings with Mr Ocampo in 2023 and 2024 over 'potential settlement structures and amounts'. Frustrated by the lack of progress, the fund, on Mr Ivinson's advice, withdrew from the matter. However Mr Ocampo and he continued his settlement attempts through another lawyer in Doha. This culminated in Mr Ocampo coming back 'with a figure of $40m for the London cases only (including the present Proceedings)'. His statement concludes that in about June 2024 he learned from Mr Ocampo that he and the lawyer had been removed from the negotiations and that 'a new intermediary from the royal family had taken charge of the negotiations'.

36. The witness statement of Mr Ocampo, dated 21 November 2024, in turn sets out his involvement in the matter, including his first contacts in 2018 with Mr Ivinson, Mr Saleh and Mr Issa; his subsequent engagement by Pillsbury which included a 'reward clause'; and settlement discussions in London in May 2023 and January 2024. These were unsuccessful and his contract was not renewed. He states that it is *'plausible to conclude that Qatar Security personnel had the means and the interest to be involved'*; that in respect of Saleh and Issa *'There are strong reasons to believe that they reach*[ed] *an agreement with individuals in the Qatar Security apparatus, aiming to derail these Proceedings and the various other claims in multiple jurisdictions';* and that there is *'reasonable basis to believe that Qatar authorities developed a multipronged strategy to confront the claims presented in this case, hiring the best law firms, while engaging in negotiations outside courtrooms and allowing its secret security forces to obstruct the proceedings and negotiate with a key witness and with the person liaising with the claimants.*'

37. Through her critique of the case theory advanced on behalf of the Discontinuing Claimants and by reference to close analysis of the witness statements and documentary evidence, Ms Brown KC submitted inter alia that:

(i) the whole conspiracy theory was based on manifestly unreliable witness evidence;

(ii) the theory was not supported by J&B, who had advised and assisted the Continuing Claimants until terminating their limited retainer on 18 November 2024. On the contrary their letters to McCue Jury (including 22 September 2023 and 11 September 2024) had made clear that, having carefully reviewed and considered the evidence supplied, they did not consider it to support the concerns raised in respect of Mr Issa;

(iii) the contention that the Claimants did not speak English was in some cases contradicted by references in the documents;

(iv) the evidence provided no adequate explanation for the divisions which had occurred within the Claimants' group, namely between the Continuing and Discontinuing Claimants;

(v) the evidence of those Continuing Claimants and the one Discontinuing Claimant (EE) who had provided witness statements did not suggest that they had feared for their safety. The evidence of continuing negotiations with the State by other lawyers and intermediaries on their behalf was to the contrary effect;

(vi) there was no satisfactory or coherent account of the role played by the many and various law firms and individuals apparently acting on behalf of some or all of the Claimants both sequentially and concurrently;

(vii) the evidence of continuing settlement negotiations with the State by lawyers and intermediaries was inconsistent with the theory of deceit by Mr Issa;

(viii) even now, the Court had not been given anything like a full picture of the course of events and in particular as to the state of negotiations and the apparently continuing involvement of K&S;

(ix) the alleged causative effect of the supposed conspiracy was at odds with the Discontinuing Claimants' letter to McCue Jury dated 3 November 2020 which confirmed their intention to withdraw from the proceedings. There was no evidence to suggest that any misconduct on the part of the State had affected that decision. EE's evidence of their understanding was that McCue Jury would withdraw them from the proceedings 'at an opportune moment' rather than immediately. That decision to discontinue having been made, no subsequent events can have had any causal effect.

38. In his reply Sir Max contended inter alia that:

(i) the Claimants had all been destabilised and put in fear by conduct of the State before November 2020, hence McCue Jury's first report to SO-15 on 8 November 2020;

(ii) J&B's rejection of a conspiracy followed a review in 2023 which thus pre-dated the critical meeting in Rotterdam in July 2024 between Mr Jury and the Claimants which had led to the evidence contained in their various witness statements;

(iii) whatever negotiations had taken place, they had brought no benefit to any Claimant. This was consistent with the case that they had abandoned these proceedings as a result of the deceit.

39. Upon my enquiry as to the current state of negotiations, Sir Max took instructions from McCue Jury and said that there may be discussions taking place in respect of other proceedings. As to K&S, I was told that the firm was still involved in the matter.

40. In the face of all this evidence and argument, the first question is the correct approach to the application in the light of the Brookes principles and subsequent authority.

41. Both parties accept that on such applications the Court is not entitled to conduct a trial as to whether or not the claim would have succeeded: see Brookes principle (2); also Nelson's Yard Management Company & ors v. Eziefula [2013] EWCA Civ 235 at [32].

42. The position as to whether and/or the extent to which the Court may enter a factual enquiry as to conduct unrelated to the merits of the claim is less clear: see the discussion in Nelson's Yard at [34]-[37]. My provisional view is that it would be a very rare case indeed where the Court might be justified in embarking on a full-blown factual enquiry as to the conduct of the defendant (let alone of a third party not before the Court) on the issue of costs. However the Discontinuing Claimants' case makes it unnecessary to determine the point.

43. This is because Sir Max made clear that it is not contended, on the evidence in this case, that the Court is in a position to conclude, on the civil standard of proof, that the State of Qatar has carried out the conspiracy and had thereby achieved the discontinuance of these claims. The realism in that acknowledgment is apparent. Rather, by reference to observations in Brookes, he submits that it is not necessary for the Court to be satisfied of the alleged third party conduct on the civil standard. It is sufficient if the discontinuing party, seeking to displace the presumptive rule on costs, presents evidence which is prima facie 'cogent'. This is because Brookes at [10] states: *'It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances.'* Sir Max then submits that 'cogency' may be established by evidence which satisfies the Court that the allegation is 'not fanciful'. He added that a party seeking to displace the presumptive rule should not be disadvantaged by the factual complexity of the case which it was advancing.

44. In all, he submits that the Court has been presented with cogent, not fanciful, evidence of the alleged conspiracy and its consequences. Further, the Bank had adduced no evidence in response. Its evidence was confined to denial, through the witness statement of its Group CEO Abdulrahman bin Fahad bin Faisal bin Thani Al Thani, that the Bank had had any involvement in the alleged acts of interference with the proceedings.

45. Sir Max then turns to the balance of paragraph [10] in Brookes. This continues: *'The reason was well expressed by Proudman J in* Maini v Maini*: a claimant who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment…There may be cases in which it can be said that the defendant has brought the litigation on himself, but even that is unlikely to*

justify a departure from the rule if the claimant discontinues in circumstances which amount to a failure of the claim.' Sir Max submits that these observations have no application in the present case where the cause of discontinuance stands quite outside anything that could be regarded as the 'ordinary' risks of litigation.

46. Sir Max also points to the observations in Zuckerman on Civil Procedure: Principles of Practice (4th ed.) where at para. 14.25 the author criticises the Brookes principles/guidelines in a range of respects and states that *'…they must not be taken as conclusive. Discontinuance may take place in an infinite variety of circumstances and the court should be able to decide what is just in the particular case without striving to fit its conclusion into one of the six categories. It would be unhelpful if case law were to develop on questions such as what is or is not a material change, whether such a change resulted from the defendant's own conduct,…etc'.* At 14.26 Professor Zuckerman continues: *'Decisions of the Court of Appeal, such as* [Brookes] *have invested the presumption that the discontinuing claimant must pay costs with far too much force. Bringing proceedings is risky enough as it is. There is no reason why claimants should be put to even greater risk by holding that discontinuance will be attended with costs* "save in unusual circumstances". *The better approach, it is suggested, would be to take the words of CPR 38.6(1)…at face value. They suggest that the court has a wide discretion as to who should bear the costs in the event of discontinuance.'*

Conclusions

47. The opinions and criticisms of Professor Zuckerman of course deserve very great respect. However in my judgment the Court is bound by precedent to apply the six principles which are reaffirmed in Brookes.

48. As to the sixth of those principles, its language makes clear that there is no universal rule that a discontinuing claimant must show that the change of circumstances was brought about by some form of unreasonable conduct on the part of the defendant. Further, and as Ms Brown ultimately accepted, Arcadia does provide an example of a case where the presumptive rule was disapplied, albeit to a limited extent.

49. However, I do not accept that the reference in Brookes to 'cogent reasons' provides any support for the proposition that it is sufficient for a claimant to demonstrate that its case for the alleged third party conduct and its effect is 'more than fanciful'. That submission confuses the stated reason(s) with the supporting evidence. In my judgment the Discontinuing Claimants would have to establish their case on the civil standard of the balance of probabilities. I see no basis for any lesser standard to be appropriate.

50. It being rightly acknowledged that the evidence does not permit the Court to make such a finding on the civil standard, it must follow that the factual basis of the application fails. I add that the application gains no support from the fact that the Bank has not adduced evidence in refutation or rebuttal of the alleged conspiracy. As is now accepted, the distinction between the Bank and the State is not a 'legal fiction'; nor is a case now advanced that the Bank was party to a conspiracy. It is not for the Bank to respond to the case against the State; nor therefore is it legitimate to draw any adverse inference from the course taken by the Bank in its response to the application.

51. In any event, in my judgment it would be wrong for the Court to reach even a provisional conclusion in respect of allegations of this gravity and complexity about the conduct of a party not before the Court. This includes not only the State of Qatar but also a number of the individuals whose conduct is impugned. This is so whether the standard of proof is the conventional civil standard or some lesser standard. There may be cases where the Court is able to proceed on the basis of incontrovertible evidence as to third party conduct, e.g. Lord Hain's identification of the anonymised party in Arcadia, or to resolve some short point of fact without injustice to the third party; but that is not this case.

52. In any event, even if it were appropriate to reach a provisional view on some lesser standard of proof, the evidence on a central part of the Discontinuing Claimants' case is particularly unsatisfactory. Against the allegation that the State used Mr Issa to deceive the Claimants (Continuing and Discontinuing) into abandoning their claims on the faith of negotiations which would take place with the State for settlement of their claims, the statements of Mr Ocampo and Mr Ivinson provide detailed evidence of settlement negotiations with a party believed to be the State of Qatar. True it is that Mr Ocampo concludes with opinions supportive of the conspiracy theory. However, the final paragraph of Mr Ivinson's statement suggests that those negotiations may be continuing. Further it is a striking feature of the case that the Court has been provided with no updating evidence from Mr Ivinson or otherwise as to the state of those negotiations. At the very least, this all puts in serious question a central pillar of the case theory.

53. In any event, I am not persuaded that it would be appropriate to disapply the presumptive rule in the absence of a case or supportive evidence that the discontinuance of the claims has been brought about by any conduct of the Bank. I do not accept that the general principles in Brookes only apply where the cause of a discontinuance is one of the 'ordinary' risks of litigation; but in any event the point is academic.

54. For all these reasons, and in the overall exercise of my discretion under CPR 38.6, the application is refused and the presumptive rule will apply.