

Case No: A3/2015/4115 & 4115(A)

Neutral Citation Number: [2016] EWCA Civ 556  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**Mr. Justice Peter Smith**  
**[2015] EWHC 3155 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/06/2016

**Before:**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE MOORE-BICK**  
and  
**LORD JUSTICE McFARLANE**

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**Between:**

**JANAN GEORGE HARB**

**Claimant/  
Respondent**

**- and -**

**HRH PRINCE ABDUL AZIZ BIN FAHD BIN ABDUL  
AZIZ**

**Defendant/  
Appellant**

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**Lord Grabiner Q.C., Mr. Ian Mill Q.C. and Miss Shaheed Fatima Q.C. (instructed by  
Howard Kennedy LLP) for the Appellant**  
**Mr. Charles Hollander Q.C. and Mr. Ian Clarke Q.C. (instructed by Hughmans) for the  
Respondent**

Hearing dates: 16<sup>th</sup> & 17<sup>th</sup> May 2016

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**Judgment**

## **The Master of the Rolls**

1. This is the judgment of the court.

### *Background*

2. This is an appeal against the judgment of Peter Smith J. in favour of Mrs. Janan Harb, against Prince Abdul Aziz bin Fahd, a member of the Saudi royal family and son of the late King Fahd, on her claim to enforce the performance of a contract to pay her the sum of £12 million and to procure the transfer to her of the title to two properties in Cheyne Walk, Chelsea (“the properties”).
3. Mrs. Harb was born in Palestine to Christian parents. In 1967 she moved to Jeddah where she met the man who was later to become King Fahd of Saudi Arabia and who at that time was Minister of the Interior. According to Mrs. Harb they were married in early 1968 after she had converted to Islam, but relations between her and other members of the royal family deteriorated and in 1970 she left Saudi Arabia and eventually moved to the United States. Prince Fahd became King in 1982. Despite two subsequent marriages, one of which was annulled and one terminated by divorce, Mrs. Harb continues to maintain that in the eyes of shari’a law she remained married to the King, who had never divorced her. In 1995 King Fahd suffered a stroke and became partially incapacitated.
4. By about 1999 Mrs. Harb’s finances were at a low ebb. She met the Prince in Marbella in the autumn of 1999 or the summer of 2000, explained her difficulties and told him that she was thinking of publishing her autobiography. Not surprisingly, the prospect of her disclosing details of her relationship with the King caused some concern in the royal household. It appears that on the King’s instructions the Prince arranged for one of his staff, Mr. Faez Martini, to negotiate terms. As a result, on 1<sup>st</sup> March 2001 Mrs. Harb entered into an agreement in the form of a deed with Mr. Faez Martini, acting as agent for an “Undisclosed Principal”, under which, in return for a banker’s draft for an undisclosed sum, she assigned to him the whole of her interest in the documents and information in her possession relating to her relationship with the King. She also agreed not to publish any biography or memoirs relating to such matters in the future. The agreement was expressed to be made in full and final settlement of all and any claims which Mrs. Harb had, or might in the future have against the King. The banker’s draft was for £5 million.
5. Despite the receipt of this substantial amount of money, by 2003 Mrs. Harb’s finances were again in a parlous condition. She insisted that the King had promised to maintain her in a comfortable and dignified style of life and that she continued to have a claim upon him. Accordingly, she approached him through her solicitors and sought to engage his sympathy and to persuade him to pay her £12 million in full and final settlement of her claims. Having failed by that means to persuade the King to provide further financial support, on 7<sup>th</sup> May 2003 Mrs. Harb made an affidavit for the purposes of an application to the High Court under section 27 of the Matrimonial Causes Act 1973. The affidavit contained a detailed description of her relationship with the King, including matters of an intensely personal nature relating to his use of drugs and her termination of several pregnancies. A copy of that affidavit was sent to the King by her solicitors under cover of a letter of the same date.

6. In June 2003 Mrs. Harb learnt through Mr. Martini that the Prince would be staying in London later that month. She said that she made an appointment with his secretary to see him on the morning of 19<sup>th</sup> June at the Dorchester Hotel where he was staying, but that when she arrived the Prince was unavailable and she was told to return in the evening. She said that she and a close friend, Mrs. Hama Mustafa-Hasan, had returned to the Dorchester that evening at about 6.00 pm, where they waited in the lobby for an opportunity to speak to the Prince. It was Mrs. Harb's case that when he entered the hotel in the early hours of 20<sup>th</sup> June she approached him and engaged him in conversation, in the course of which he agreed that, if she withdrew her allegations against the King, he would pay her £12 million and arrange for the properties to be transferred to her. The Prince, however, denied that any conversation of that kind had taken place. He said that Mrs. Harb had accosted him as he passed through the lobby on the way to his car, that he had not paused to speak to her and that the whole encounter had lasted no more than a minute. He said that he had told her that he would not speak to his father again on her behalf until she had withdrawn her lies about him. He then left the hotel.
7. What is not in dispute, however, is that on the morning of 20<sup>th</sup> June 2003 Mrs. Harb went to see her lawyers, Mr. Philip Marshall and Mrs. Sara Simon, accompanied by Mrs. Mustafa-Hasan. She told them that she had made an oral agreement with the Prince the night before by which she was to retract the comments in her affidavit about the King's drug-taking and in return she would receive £12 million and the properties. She said that it had also been agreed that the lawyers would provide independent confirmation that they would not divulge any information that she had given to them about her relationship with the King. At Mrs. Harb's request, Mr. Marshall prepared documents to give effect to the agreement. These comprised a formal contract for signature by Mrs. Harb and the Prince, a statutory declaration for execution by Mrs. Harb and confidentiality letters to be signed by Mrs. Simon and himself. In her statutory declaration Mrs. Harb said that upon reflection she had been wrong to make "certain allegations" against the King and in particular to suggest that he had become addicted to illegal drugs. She said that she wished to apologise unreservedly for the fact that she had falsely accused His Majesty of misconduct and misbehaviour that she now accepted was untrue.
8. Mrs. Harb said that later that day she and Mrs. Mustafa-Hasan went to the Dorchester Hotel again where she handed Mr. Martini an envelope containing copies of the documents. She also said that she had delivered a second set of copy documents to the Prince personally at the Dorchester Hotel during the afternoon of 22<sup>nd</sup> June and that he had promised to consider them and respond to her within a few days. On 26<sup>th</sup> June her solicitors wrote to the Prince enclosing yet further copies of the documents and seeking a response. They received no reply, but she said that about a week later Mr. Martini had telephoned her to say that the Prince wanted the original documents rather than just the copies. Chasing letters were sent by Mrs. Harb's solicitors to the Prince on 7<sup>th</sup> and 15<sup>th</sup> July 2003. They elicited no response, but Mrs. Harb said that two or three weeks later Mr. Martini had telephoned her asking again for the original documents. She said that with some reluctance she had asked Mrs. Mustafa-Hasan to deliver them to the Prince's London address.
9. Mrs. Harb said that she spoke to the Prince twice when he was next in London at the end of August 2003 staying at the Landmark Hotel. She said that on the second

occasion he had said he would look at the papers and arrange matters for her. Despite all that, however, he failed either to pay her the agreed sum of £12 million or make arrangements to transfer the properties into her name. This account of events which occurred between June and August 2003 was not accepted by the Prince or Mr. Martini. In particular, the Prince denied that he had asked for or received the original documents or that there had been any meeting between Mrs. Harb and himself at the Landmark Hotel. He said that he had never stayed there. The contract was never signed by the Prince.

### *The proceedings*

10. Mrs. Harb was declared bankrupt on 1<sup>st</sup> May 2008. The present proceedings were issued by her trustee in bankruptcy on 15<sup>th</sup> June 2009, shortly before the limitation period expired, but have since been taken over by Mrs. Harb, to whom the claim has been assigned. In these proceedings, Mrs. Harb seeks to enforce, or obtain damages for breach of, an agreement said to have been made between herself and the Prince at the Dorchester Hotel on 19<sup>th</sup> June 2003, by which, in consideration of her agreeing to withdraw, and then withdrawing, certain factual assertions she had made about King Fahd, he would pay her the sum of £12 million and procure the transfer to her of the properties. It is alleged that the Prince entered into the agreement in a personal capacity “in order to satisfy the promises and assurances given by King Fahd to Mrs. Harb to provide for her financially for the rest of her life.”
11. In the alternative, it is alleged that, following the exchange in the Dorchester Hotel and the delivery of the copy documents, by requesting and receiving the original documents, the Prince became contractually bound to pay the sum of £12 million to Mrs. Harb and to procure the transfer of the properties to her.
12. By his re-amended defence the Prince contests virtually the whole of Mrs. Harb’s claim. In particular, although he admits that Mrs. Harb accosted him in the Dorchester Hotel in June 2003, he says that their conversation lasted only about one minute. He says that he told her that he would not speak to her until she had withdrawn her allegations against the King. He denies having had any general authority to bind the King, but if the court were to find that he had entered into a contract with Mrs. Harb as alleged, she had at all times been aware that whatever he had said had been said in his capacity as the King’s representative, rather than in a personal capacity, and that any such agreement had been made by him as agent for the King. He also says that if any agreement of the kind alleged by Mrs. Harb was made, it was too vague to be enforceable.
13. The Prince specifically denies having met Mrs. Harb on 22<sup>nd</sup> June at the Dorchester Hotel, but he admits that she came to the hotel that evening and gave Mr. Martini an envelope containing copies of the documents mentioned earlier. Mr. Martini had translated them for him and the Prince told him that the statutory declaration did not constitute an adequate withdrawal of the allegations against the King. Mr. Martini spoke to Mrs. Harb by telephone on 23<sup>rd</sup> June and gave her that message. It is denied that Mr. Martini had told her that the Prince wanted the original documents or that they had been delivered to Mr. Martini.

### *The issues*

14. The principal questions for determination at trial, therefore, were, first, what was said by Mrs. Harb and the Prince to each other during their conversation at the Dorchester on 19<sup>th</sup> or 20<sup>th</sup> June 2003? Did they enter into an agreement, and if so, who were the parties to it and what were its terms? Was the agreement intended to be binding immediately, and if not, was it intended that a binding contract was to come into existence at a later date? If so, when and how was that to occur? Finally, were the requirements for a binding contract later satisfied? Mrs Harb's primary case was that a binding contract was made on 20<sup>th</sup> June. Her alternative case was that a binding contract was made when the Prince requested the originals of the copy documents and she handed them to Mr Martini in late July or early August.
15. These questions turned largely on the evidence of Mrs. Harb and her witnesses (principally Mrs. Mustafa-Hasan, Mr. Marshall and Mrs. Simon) and that of the Prince and his witnesses (Mr. Martini and Mr. Jrayed, the Prince's personal secretary). We have been provided with copies of their statements and transcripts of the evidence of those who were called for cross-examination. Although we have not had the advantage (as the judge did) of seeing and hearing those who gave evidence in person, it is apparent from reading the transcripts that the judge was faced with a difficult task. All the witnesses had difficulty to a greater or lesser degree in concentrating on the questions put to them and giving clear, concise answers to them. Moreover, the judge's task of getting at the truth was made more difficult by the fact that the Prince did not attend for cross-examination, despite the fact that the judge had ordered him to do so.

#### *Summary of the judgment*

16. The judge accepted the evidence of Mrs. Harb and found in accordance with her primary case that a binding contract was made on 20<sup>th</sup> June. In case he was wrong about that, he also found that a binding contract had been made on the basis of her alternative case. He also rejected the Prince's argument that he was not personally liable because, if he had entered into a contract with Mrs Harb, he had done so as agent for the King.

#### *The amended grounds of appeal*

17. The first two grounds of appeal are that the judge was wrong to find in favour of Mrs. Harb on either her primary case or her alternative case. He should have found that no contract was made. We deal with these grounds at paras 27 to 41 below. The third ground is that, if there was a contract on either basis, the judge should have found that the Prince was acting as agent for the King and had no personal liability. We deal with this ground at paras 42 to 47 below. The fourth ground is that the judge erred in rejecting the evidence explaining the Prince's failure to give oral evidence at the trial: this led him to give no weight to important aspects of the Prince's evidence and led to his erroneous conclusions. We deal with this ground at paras 18 to 26 below. The fifth ground is that the judge was apparently biased against the Prince. The judge should not have concluded that a binding agreement was made between Mrs. Harb and the Prince. We deal with this ground at paras 49 to 77 below.

#### *The Prince's failure to attend for cross-examination (Ground 4)*

18. It is convenient at this point to consider the judge's approach to the Prince's failure to attend for cross-examination, which as we have said forms a separate ground of appeal, although it is intimately connected with the main grounds. The Prince's first witness statement was served on 8<sup>th</sup> July 2015 under cover of a Civil Evidence Act notice which stated that he would not be called to give evidence in person because he did not believe that the present King, King Salman, would regard it as appropriate for him to expose himself to questioning about matters relating to King Fahd's personal life. On 9<sup>th</sup> July 2015 Mrs. Harb applied for an order that the Prince attend for cross-examination and on 12<sup>th</sup> July 2015 the Prince's solicitor, Mr. Steven Morris, made a statement explaining that the Prince had no intention of becoming involved in a media circus, although he realised that his failure to give oral evidence would affect the weight which the court attached to his statement. On 15<sup>th</sup> July 2015 the Prince produced a second statement to which he exhibited a letter from the Saudi embassy in London conveying a note from the Saudi Ministry of Foreign Affairs in the following terms:

“With reference to the litigation entitled Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz, which is due to be heard from 16 July 2015, the Government of the Kingdom of Saudi Arabia wishes to inform the Court that it is not permissible for a Member of the Royal Family of Saudi Arabia to provide oral evidence in foreign court proceeding [sic] concerning matters related to HM the late King Fahd. The Royal Court of Saudi Arabia forbids HRH Prince Abdul Aziz from doing so in this matter.”

19. The judge was not impressed by that letter. He seems to have understood it as saying that members of the Saudi royal family were prevented from giving evidence in foreign proceedings generally, which, from his own experience he knew not to be the case. On 16<sup>th</sup> July he made an order that the Prince attend for cross-examination on the following Monday, 20<sup>th</sup> July.
20. The Prince failed to attend, but on 21<sup>st</sup> July Mr. Morris made a further statement to which he exhibited a letter from the Saudi Minister of Foreign Affairs confirming that the letter of 15<sup>th</sup> July had been prepared on his instructions after he had been informed by the Royal Court that it had instructed the Prince not to give oral testimony in this case. He confirmed that the Royal Court (by which it appears he meant the King) had forbidden the Prince from doing so.
21. On 21<sup>st</sup> July 2015, at the conclusion of the hearing, counsel for the Prince applied for the order against him to be discharged. The application was not resolved on that occasion and came back before the judge on 21<sup>st</sup> August. On that occasion the judge said that, although the Prince was in breach of his order, he should not punish him for that and that he had given such weight as was appropriate to his statements.
22. The judge dealt with this aspect of the case in paras 55-63 of his judgment. He said that he did not consider the letter of 15<sup>th</sup> July from the embassy to be satisfactory because he had had experience in other cases of members of the Saudi royal family giving evidence. But he was not prepared to disregard the Prince's evidence completely. However, in para 60 he said that he was satisfied that that “this evidence was put forward so as to avoid giving live evidence and being cross-examined”. In

para 61 he said that “[t]he inexorable conclusion is that I should give little or no weight to the untested hearsay statements of the Defendant.” Similarly, in para 62 the judge said again that he inferred that the Prince’s failure to attend was to avoid being cross-examined. He did not, however, refer to the letter from the Minister of Foreign Affairs so that one cannot tell what he made of it. He concluded in para 63 by saying that he rejected the Prince’s evidence where it was at variance with that of Mrs. Harb and Mrs. Mustafa-Hasan.

23. Lord Gabor Q.C. submits that, in the light of the letters from the embassy and the Ministry of Foreign Affairs, the judge was simply wrong to infer that the Prince had refused to give evidence in person because he was unwilling to face cross-examination. The letters made it clear that the Prince had been forbidden by the present King to give evidence in these proceedings because they touched on the personal life of his brother, King Fahd. The judge had rejected them because he wrongly thought that they were making a wider point about members of the Saudi royal family, but that was not the case. As a result, the judge’s view of the Prince’s evidence had been coloured by the false assumption that he did not believe his own account and was himself aware that it would not withstand cross-examination. Mr. Hollander Q.C. points out, however, that the judge had not entirely disregarded the Prince’s evidence. As he said himself, he gave it such weight as it deserved. It was not surprising that, not having been tested in cross-examination, his evidence was not given same weight as that of Mrs. Harb and Mrs. Mustafa-Hasan.
24. It is almost inevitably the case that evidence on a disputed question of fact which has not been tested in cross-examination will be given less weight than that which has been tested. We do not, therefore, think the judge can be criticised for approaching the Prince’s evidence with some caution. On the other hand, we do not think that the mere fact that the Prince did not make himself available for cross-examination inevitably justified the judge in preferring the evidence of Mrs. Harb and Mrs. Mustafa-Hasan to that of the Prince whenever they were in conflict. It is not uncommon for a judge to conclude that in the light of the evidence as a whole a person’s evidence may seem to be reliable in some respects, although unreliable in most if not all others. In a case where the evidence on both sides is less than satisfactory (as it was in this case), it is the responsibility of the judge to assess the witnesses’ evidence on each issue and to test it by reference to any contemporaneous documents and the inherent probabilities before deciding where the truth lies. In this case it is entirely possible that, if the judge had approached the matter issue by issue, he would have preferred the evidence of Mrs. Harb and Mrs. Mustafa-Hasan whenever it was in conflict with that of the Prince, but that should have been the result of a careful consideration of the evidence rather than a blanket preference for one witness over another.
25. More importantly, however, we think there is some force in Lord Gabor’s submission that the judge wrongly concluded that the Prince had failed to attend the trial to avoid being cross-examined and that this conclusion is likely to have adversely affected his assessment of the Prince’s evidence. We accept that the judge was entitled to have regard to the fact that the reasons put forward for the Prince’s unwillingness to give evidence had altered over time and it is fair to say that parts of the note conveyed by the letter of 15<sup>th</sup> July 2015 from the embassy might on a cursory reading have given the misleading impression that the minister was relying on a

general rule of Saudi law. In fact, however, it is clear that it was limited to “oral evidence . . . concerning matters related to HM the late King Fahd” and the following sentence was quite unequivocal in stating that “The Royal Court of Saudi Arabia forbids HRH Prince Abdul Aziz from doing so [sc. giving oral evidence] in this matter.” Any uncertainty ought to have been dispelled by the subsequent letter from the Minister of Foreign Affairs, but the judge made no reference to that in his judgment, so it is impossible to tell what he made of it. It follows that in our view the judge’s findings in paras 60 and 62 do not reflect the evidence before him. If he was minded to reject the contents of the letters and treat them as merely providing a colourable excuse for the Prince’s failure to attend, he should have made that clear and given his reasons for doing so.

26. The significance of all this is not far to seek. If a judge has reason to think that a witness is unwilling to face cross-examination because he has no confidence that his evidence will stand up to scrutiny, it is only a matter of common sense that he should give very little, if any, weight to what that person has said in his statement. Since the judge appears to have come to the conclusion that the Prince failed to attend for that very reason, it seems highly likely that it adversely affected his view of his evidence. Taken on its own that might not be enough to justify setting aside his decision, but it has to be viewed in the context of the matters raised by the other grounds of appeal, to which we now turn.

*The existence of a binding agreement (Grounds 1 and 2)*

27. Although he did not directly address the issues identified in para 14 above, in para 83 of his judgment the judge held, on the basis of Mrs. Harb’s evidence, the evidence of her other witnesses and the documents before him, that she had made out her primary case. Nonetheless, he admitted to having had “considerable doubt” about the matter, though he did not explain why. He also made it clear in para 122 of his judgment that, if he were wrong about that, Mrs. Harb succeeded on her alternative case. Again, the reasoning behind that decision is not clear. On delivery of the draft judgment, counsel for Mrs. Harb invited the judge to make specific findings that (i) by asking for delivery of the original documents, the Prince had indicated his satisfaction with their terms and (ii) on acceptance of the originals he became bound to pay Mrs. Harb the sum of £12 million and to procure the transfer to her of the properties. But the judge declined to do so. It is not clear, therefore, on what basis he found the alternative agreement proved, since Mrs. Harb’s case as set out in the amended particulars of claim was that it was only by requesting and receiving the original documents that the Prince had become bound.
28. Lord Grabiner submits that in the light of Mrs. Harb’s evidence the doubt expressed by the judge was fully justified, but despite that he had failed to explain what had given rise to the doubt or what had enabled him to overcome it. Lord Grabiner has identified several aspects of both her evidence and that of Mrs. Mustafa-Hasan which he submits called for careful consideration but which had not been identified or discussed in the judgment. In his submission, the judge had failed to analyse the evidence properly. He had accepted the evidence of Mrs. Harb and Mrs. Mustafa-Hasan uncritically and as a result had reached conclusions which were unsustainable on the totality of the evidence before him. It is necessary, therefore, to examine more closely the criticisms made of their evidence.

29. It is, of course, important not to lose sight of the fact that the judge had the benefit of seeing Mrs. Harb and Mrs. Mustafa-Hasan in the witness box, but we have been provided with transcripts of their evidence and are able to make a reasonably reliable assessment of it. In para 35 of the judgment the judge noted that Mrs. Harb had been unsure on some points of detail and that in some respects her evidence had been “bizarre”. Some would think that a charitable description. Despite that, he expressed the view that she had “performed well” and had “maintained her position in relation to the key points of the agreement despite firm cross-examination.”
30. The judge returned to deal with criticisms of Mrs. Harb’s evidence in para 80. He said:
80. The Defendant in his closing criticises extensively the evidence she gave which was said to be inconsistent with her witness statement. I would have been surprised if someone had given consistently the same detail of evidence in respect of the relevant meetings. Where a person sat, where a person joined in a meeting or where they went or who else was in the lobby seemed to me to be items which it is unrealistic to expect the Claimant to have a clear recollection of 13 years after the events.
81. More significant are the Letters of her solicitor and Counsel (and the contemporaneous note referred to earlier in this judgment) and the correspondence which support her primary contention that the Defendant entered in to a binding agreement as she contends.
82. This is not a complicated case factually; it turns entirely on one short discussion between the Claimant and the Defendant which took place in the presence of Mrs Mustafa-Hasan.
83. I have therefore come to the conclusion (I accept after considerable doubt) based on the evidence of the Claimant, the supporting evidence of her other witnesses and the Documents referred to above that there was the Agreement as she alleges.
31. About Mrs. Mustafa-Hasan’s evidence the judge said this:
39. . . . Mrs Mustafa-Hasan is a long standing friend of the Claimant. It was not suggested that she was lying in her evidence. Her recollection was clear and she maintained it confidently throughout the cross examination. I found her to be a most compelling witness before me in the case and I accept her evidence.”

We have also been provided with a transcript of her evidence and can therefore to a considerable degree assess it for ourselves.

32. Lord Grabiner has identified nine examples of what he says was Mrs. Harb's evasiveness or lack of credibility and in view of her importance as a witness we think it appropriate to set them out at some length.
- (i) On 3<sup>rd</sup> January 2003 Mrs. Harb's solicitors wrote to the Prince on her behalf seeking to reach a settlement with his father, King Fahd. Having not received a reply to that letter or to "chasing" letters sent in January and February, on 4<sup>th</sup> March 2003 her solicitors wrote to the Prince threatening legal proceedings in which she would set out the full history of her relationship with the King. Those proceedings were to be issued against the Prince personally acting as his father's representative. The letter concluded with a veiled threat in the form of a reminder that the proceedings would be open to the public. Her response to the judge's questions when asked to describe the proceedings to which she referred suggests that she was either being evasive or was wholly unable to grasp the distinction between the proceedings threatened in that letter and the proceedings currently before the court.
  - (ii) In January 2004, some six months after the events surrounding the meeting at the Dorchester Hotel, Mrs. Harb swore an affidavit in support of proceedings against the King under the Matrimonial Causes Act 1973. In it she described handing the Prince an envelope on 22<sup>nd</sup> June 2003 containing copies of the statutory declaration, the letters from the lawyers and the draft contract together with a letter in Arabic setting out precisely what she wanted. Since there had been no mention of that letter in her witness statement it is not surprising that she was cross-examined about it. Her replies to questions, both from counsel and the judge, were rambling and confused. She could not remember what she had said in what she described as a "pleading letter", nor could she explain why it had been necessary to write it if she had already reached a firm agreement with the Prince only two days earlier.
  - (iii) On 6<sup>th</sup> February 2008, when she was facing bankruptcy, Mrs. Harb wrote to Mr. Martini asking him to convey her apologies to the Saudi royal family for the trouble she had caused them and seeking their financial assistance. That was followed on 12<sup>th</sup> February 2008 by a letter to the Prince requesting him to pay her debts of £2 million and give her a further £12 million to enable her to live in dignity. Although in the letter to the Prince she referred to promises made by his late father (the satisfaction of which she considered to be her right) in neither of those letters did she mention that she had made an agreement with him in June 2003. When she was questioned about that her replies were again rambling and confused and appear to betray an unwillingness to deal with the question.
  - (iv) In the event, despite the agreement she made with the King in March 2001, Mrs. Harb produced two editions of her autobiography in 2011 and 2013 respectively neither of which mentioned an agreement with the Prince in June 2003. When asked by the judge why she had chosen to omit that matter or any reference to the present proceedings (but little else), she could provide no satisfactory explanation and resorted to little more than bluster.

- (v) There were occasions when Mrs. Harb professed to being unable to remember matters set out in her witness statement, giving rise to doubt whether the statement contained her true recollection of events.
  - (vi) There was a discrepancy between Mrs. Harb's witness statement, in which she said that she had first discussed the King's drug abuse with the Prince in 1999 or 2000, and her oral evidence in which she said that she had first mentioned it to the Prince when she met him at the Dorchester in June 2003. Once again, her answer was confused and confusing.
  - (vii) On 26<sup>th</sup> June 2003 Mrs. Harb's solicitors wrote to the Prince confirming their understanding that they met at the Dorchester on 22<sup>nd</sup> June when she had given him an envelope containing unsigned drafts of the contract, the confidentiality letters written by Mr. Marshall and Mrs. Simon and a copy of the statutory declaration. Although in her statement she had said that the statutory declaration and the letters from the two lawyers she had given to him were copies of the signed originals, that was inconsistent with her solicitors' understanding. In the end she had to accept that she could not remember whether at that stage the originals had been signed or not. Since the solicitors' letter refers to statements *to be signed* by Mr. Marshall and Mrs. Simon, we infer that, apart possibly from the statutory declaration, the documents were all unsigned.
  - (viii) In cross-examination Mrs. Harb said that it had not occurred to her to write directly to the King in late 2002 when she began to need more money because she thought he was no longer able to manage his affairs. When she was shown a letter which she had written to him in January 2003 she again resorted to bluster.
  - (ix) In her witness statement and also in her oral evidence Mrs. Harb referred to two conversations which she said had taken place with the Prince at the Landmark Hotel towards the end of August 2003. In her statement she said that on the first occasion she had gone with her mother to the hotel where they had waited for the Prince to appear. In cross-examination, however, she said that her sister had gone with them as well, but that she had not mentioned that in her statement because her sister was in Egypt and could not come to give evidence. In her statement Mrs. Harb said that on the second occasion her daughter Rania had gone to the Landmark Hotel with her, but had left before she had her conversation with the Prince. In cross-examination, however, she initially said that Rania had been present during the conversation, but later changed her mind. She said that on that occasion she had asked him about transferring the money and he said he would look at the papers and arrange matters for her. It is a striking fact, however, that there is no reference in any of the subsequent correspondence to a meeting between Mrs. Harb and the Prince at the Landmark Hotel.
33. It is clear from these parts of her evidence, as well as from other passages in the transcripts to which it is unnecessary to refer in detail, that Mrs. Harb's general reliability as a witness was open to serious question. In their closing submissions counsel for the Prince drew these and other criticisms of her evidence to the judge's attention in support of a submission that he should not accept her evidence of the

meeting at the Dorchester Hotel on 19<sup>th</sup> or 20<sup>th</sup> June. In a case where so much turned on the evidence of the witnesses, the judge should have dealt with this aspect of the matter in some detail. As it was, in para 37 of his judgment he said no more than that she had performed well under cross-examination and had maintained the same position in relation to the key parts of her case. Later, when reviewing criticisms of the claimant's evidence, he merely referred to the two confidentiality letters and Mr. Marshall's note before coming to the conclusion in one short paragraph (para 83) that "there was the Agreement as she alleges."

34. In our view the judge's approach to the evidence was unsatisfactory in a number of significant respects. First, he failed to identify in sufficient detail the questions that needed to be answered if he were to decide whether an agreement of the kind alleged by Mrs. Harb had been made. In addition, he failed to carry out a proper evaluation of all the evidence in order to test its strengths and weaknesses. Having referred in para 80 to the fact that counsel for the Prince had made extensive criticisms of Mr. Harb's evidence on the grounds that it was inconsistent with her witness statement, he failed to deal with any of those criticisms and brushed them aside by saying that it was unrealistic to expect Mrs. Harb to have a clear recollection of events 13 years after the event. That fails to recognise that her statement itself had been made very shortly before the hearing, when her recollection, whether good or bad, should have been much the same as it was at trial. It also fails to deal with the criticisms of the quality of her evidence and the way in which she responded to questions.
35. Similar criticisms can be levelled at the way in which the judge dealt with the evidence of Mrs. Mustafa-Hasan. He did not subject it to any serious degree of scrutiny; in particular, he did not deal with the submission that she had collaborated with Mrs. Harb and was not truly independent. He merely said at para 39 that her recollection was clear and that she had maintained it confidently throughout her cross examination. The transcript of her evidence suggests, however, that on many occasions she was anything but clear and that she too was unable or unwilling to deal in a simple and straightforward way with some of the questions put to her.
36. Secondly, the judge failed to advert to a number of aspects of the evidence that were potentially relevant to important areas of the case. For example, there was a significant body of evidence, both before and after the events of 20<sup>th</sup> June 2003, which suggested that Mrs. Harb regarded the Prince and others with whom she dealt as the representatives of the King. Thus, correspondence between Mrs. Harb's solicitors and various members of the royal household, including the Prince, was clearly intended to bring about concessions from the King himself. The agreement reached in March 2001 was undoubtedly made between her and the King as undisclosed principal of Mr. Martini. This evidence was not necessarily fatal to the case that the Prince had been acting in a personal capacity, but it was relevant to that question and ought to have been, but was not, considered and taken into account.
37. Thirdly, the judge failed to draw together the evidence from the various different sources and analyse it in order to make his findings in relation to individual issues. The evidence, not just of the witnesses but also of the documents, pointed in different directions. Whether the judge was right in his conclusions or not, in a case of this kind he owed it to the parties to identify the relevant evidence, discuss its significance and explain why he had reached the particular conclusion. That required him to analyse the various possible implications of different strands of evidence, as well as the

inherent probabilities. He failed to do this. For example, the fact that on the morning of 20<sup>th</sup> June Mrs. Harb asked Mr. Marshall and Mrs. Simon to prepare a draft contract and other documents could be taken as supporting her account that she had, as she said, made an agreement with the Prince, or, by contrast, as suggesting that, if anything had been agreed, it was “subject to contract”. Nor did he overtly consider the inherent probabilities and, if necessary, explain how they had been taken into account. The fact that (as now seems to be common ground) the Prince had been unaware of the existence of the properties tended to detract from the likelihood of his having made an explicit promise to transfer them to Mrs. Harb, but the judge did not deal with that point. The fact that she took no steps herself to pursue a claim against the Prince (these proceedings were issued by her trustee in bankruptcy) was another piece of evidence that should have been taken into account.

38. In the light of these matters, it seems clear to us that the judge, in effect, took a short cut. Having decided that Mrs. Harb was a reliable witness, he accepted that she had made out her case in all respects. He did not, for example, ask himself whether her recollection may have been unreliable in any important respect, and if so, what the implications of that were. Nor did he ask himself whether any agreement that Mrs. Harb had made with the Prince at the Dorchester Hotel was informal and not intended at that stage to create legal relations. That was a serious question since, as she herself accepted, the terms of any retraction would have to be acceptable to the Prince if she were to be entitled to obtain what she wanted from him. Yet the judge found that the parties had entered into an unconditional binding agreement, despite the fact that the terms of the retraction had not been discussed, let alone agreed.
39. Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases.
40. Mr. Hollander quite rightly has reminded us that the accounts given by Mrs. Harb and the Prince were diametrically opposed. The judge had to decide which he accepted. Mr. Hollander submits that there were two good reasons for preferring that of Mrs. Harb: first, her evidence about the critical meeting was supported by that of Mrs. Mustafa-Hasan and the documents drawn up later that day; and secondly the Prince failed to attend for cross-examination. Those are, of course, powerful points, reinforced by Mrs. Harb’s evidence, and that of Mrs. Mustafa-Hasan, that the Prince swore a solemn oath that Mrs. Harb would be granted her rights. However, for the reasons mentioned earlier we do not think that entitled the judge to dispense with a proper analysis of the evidence. Mr. Hollander really had no answer to this criticism of the judgment other than to say that the corroborative evidence justified the judge in taking what we earlier described as a “short cut”, but that in our view is no answer.

41. The first question we have to consider in the light of all this is whether the shortcomings in dealing with the evidential issues to which we have referred are sufficiently serious to require us to allow the appeal on grounds 1 and/or 2. That depends in part on our assessment of the quality of the evidence adduced in support of Mrs. Harb's case, since, if the evidence supporting her case clearly bore out the judge's decision, it would be wrong to put the parties to the inconvenience and expense of a re-trial despite the shortcomings to which we have referred. In our view, however, far from that being the case, the evidence supporting her case was open to different interpretations. Mrs. Harb was in many respects an unsatisfactory witness, as is clear from the matters to which we have referred. The judge himself described parts of her evidence as "bizarre" and it is clear from the transcript that in many instances she was prepared to say whatever came into her head in order to deal with a difficult question. Despite the judge's finding that Mrs. Mustafa-Hasan was a compelling witness, the transcript of her evidence suggests that she also had her shortcomings and that in some respects she was not truly independent. Mrs. Harb's failure after January 2004 to assert the existence of the agreement on which her claim is based at any time before she lost control of her affairs as a result of bankruptcy is very striking and difficult to reconcile with her evidence at the trial. In the absence of any satisfactory explanation, it strongly suggests that, whatever took place at the Dorchester Hotel on 19<sup>th</sup> or 20<sup>th</sup> June 2003, she did not believe that she had made a binding agreement with the Prince. It should be remembered that at the time in question and for some time thereafter she had solicitors advising her, and yet rather than issuing proceedings against the Prince, she started proceedings against the King under the Matrimonial Causes Act 1973. As we have already said, a party in a case of this kind is entitled to expect that the judge will engage with the arguments advanced on his behalf and, insofar as the case turns on the facts, deal fully with the evidence and explain how he has come to his conclusions. For the reasons that we have given, the judge failed to do this adequately in this case and the appeal must be allowed on grounds 1 and 2.

*Agency (Ground 3)*

42. The question of the capacity in which the Prince was acting when he spoke to Mrs. Harb on 19<sup>th</sup> or 20<sup>th</sup> June at the Dorchester Hotel forms a separate ground of appeal. It was the Prince's case that throughout the period between 1999 or 2000 when she first approached him in Marbella and in the course of the meetings in June 2003 she had used him as a means of making contact with the King. She had done so in order to obtain concessions from the King and had never acted in such a way as to suggest that she expected the Prince himself to undertake any personal obligation to her. At the close of the evidence the judge referred to this as an issue which troubled him and on which he was particularly concerned to receive the assistance of counsel in closing submissions.
43. Mrs. Harb's evidence on this point was far from satisfactory. Both before, during and after her meetings with the Prince in June 2003 she claimed that she had certain rights against the King based on (i) her position as his wife, (ii) a particular introduction she claimed to have made to him from which he derived significant financial benefits, and (iii) his promises that he would ensure that she had the means to live in a style befitting her position as his wife. When asked by the judge about the capacity in which she thought the Prince had been acting, she appeared unable to grasp the distinction between acting as a representative of his father and acting in a personal

capacity. In her account of the conversation with the Prince she also said that she had referred to the King's promise and to the financial benefits she had brought him. She said that the Prince had sworn an oath to give her her rights.

44. The judge dealt with this question in paras 102 to 109 of his judgment. He held that the Prince bore the burden of proving that he had acted on behalf of the King. He then referred to passages in the Prince's statements in which he described his relationship with his father and said that counsel had failed to put to Mrs. Harb the Prince's case that she had been fully aware of the capacity in which responses were being sought from him during the meeting at the Dorchester. He rightly described her evidence about the capacity in which the Prince had been acting as "confused". Having referred to a passage in the Prince's second statement that he had authority equivalent to a power of attorney from the King in relation to certain matters, the judge noted that the Prince had given no disclosure that would support the existence of an agency and that his statements were so vague that they called for investigation, which had not been possible because he had not attended for cross-examination. The judge said that he could give little or no weight to those generalised untested assertions of agency. He therefore held that the Prince had failed to establish that he had been acting as agent for the King when he entered into the negotiations and concluded the agreement with Mrs. Harb.
45. Having referred to the transcript, we can see that the judge was mistaken in thinking that the Prince's case on this point had not been put to Mrs. Harb. It clearly had been put. The judge must have forgotten that he had himself intervened in the cross-examination in an attempt to focus her mind on the distinction between acting in a representative or personal capacity. More importantly, perhaps, the judge seems to have approached the matter as if the issue were whether the Prince had been acting under some general authority to act on behalf of the King. That was not, however, how the argument was being put. The Prince's case, as appears from the re-amended defence, to which the judge referred, was that Mrs. Harb had approached him as representative of the King and that she had been fully aware of the capacity in which he had participated in the conversation. Whether the Prince was or was not the King's agent in the usual sense for any or all purposes was nothing to the point. The question was whether Mrs. Harb approached him in a representative capacity and, if so, whether he said or did anything which led her to understand that he was giving her a personal undertaking of some kind.
46. In our view, therefore, the judge addressed the wrong question. If he had asked himself the right question it is open to doubt whether he would have held that the Prince had given Mrs. Harb a personal undertaking. There was a good deal of evidence, to which we have already referred, to suggest that she regarded the Prince simply as the person through whom she could gain access to the King. There was other evidence tending to support the conclusion that the Prince had undertaken a personal obligation of some kind to Mrs. Harb. Examples were the fact that he had sworn an oath that, if she retracted the allegations in her affidavit, he was ready to give her rights; her confirmation to her daughter Rania that she had reached an agreement with the Prince; and the fact that the draft contract prepared by Mr. Marshall on the morning of 20<sup>th</sup> June 2003 was expressed to be made with the Prince personally. However, the judge did not make any clear finding about what the Prince had said or in what context. The draft contract, Mrs. Harb's instructions to her lawyers and her

statement to Rania therefore provide almost the only evidence that she believed the Prince had been willing to contract in a personal capacity. What is not explained is why he should have been willing to do so and why Mrs. Harb did not subsequently refer to the agreement or take any steps to enforce it, even when her claim against the King collapsed on his death in 2005.

47. Unfortunately, the judge approached the question of agency as if it were separate from the question whether a binding agreement had been made. In fact, however, it was bound up with the question of exactly what was said, whether it amounted to a binding agreement and whether the Prince was undertaking a personal obligation. This was an aspect of the case that called for careful and detailed analysis. For example, it was important to identify as far as possible exactly what the Prince had said. The evidence of Mrs. Harb and Mrs. Mustafa-Hasan was not quite the same. It is interesting to note that in her witness statement Mrs Mustafa-Hassan said that she had understood the Prince to say that he would ensure that Mrs. Harb received her money if she retracted her allegations, not that he would pay her personally. Viewing the evidence as a whole, we think it open to question whether Mrs. Harb asked the Prince to agree in a personal capacity to pay her £12 million and transfer to her the title to the properties of whose existence he was apparently unaware (or procure that that be done). But if the judge was minded to reach that conclusion, it was necessary for him to deal in greater detail with the evidence and arguments. This shortcoming went to the heart of the agency issue. The appeal must, therefore, also be allowed on ground 3 too.

#### *Conclusion on grounds 1 to 4*

48. This was not an easy case to try, given that the principal witness on one side declined to attend for cross-examination and the principal witness on the other gave evidence that was far from satisfactory and inconsistent with many of the important documents in the case. We are not able to go so far as to hold that the judge's findings of fact were contrary to the evidence, but we do consider that he failed to examine the evidence and the arguments with the care that the parties were entitled to expect and which a proper resolution of the issues demanded. We regret to say that in our view the deficiencies in the judgment are so serious that it cannot be allowed to stand and that the matter must be remitted to the High Court for re-trial.

#### *Apparent bias*

49. This makes it unnecessary for us to determine the final ground of appeal which is that there was an appearance of bias on the part of the judge against the Prince's counsel and thereby against the Prince himself. However, in view of the importance of the allegation we think it right to express our conclusions on it.
50. The trial took place on 16<sup>th</sup>, 17<sup>th</sup> and 20<sup>th</sup>-24<sup>th</sup> July 2015. The judgment was sent to the parties in draft on 21<sup>st</sup> October and handed down in final form on 3<sup>rd</sup> November.
51. On 22<sup>nd</sup> July 2015, the judge recused himself from hearing *Emerald Supplies Ltd v British Airways* [2015] EWHC 2201 (Ch). This is a commercial case in which British Airways is the defendant. The circumstances in which he came to do this are described in his judgment in that case dated 22<sup>nd</sup> July 2015 as follows:

#### “The Problem

6 On 30 April, I booked a return ticket to Florence with the first defendant. On 6 July, I flew to Florence, together with my wife, due to return on 10 July. ...

8 We arrived at Gatwick, hung around in the baggage claim, as people do at Gatwick, for 45 minutes and then we were told to go to Global Recoveries, where we were told for the first time that the entire flight's luggage had been left behind. No explanation, no representative, nothing. Nothing from BA. Nothing from Vueling who provided the flight.

9 I saw the distress that lots of people suffered as a result of that; and I contacted BA customer relations, who simply said: it was a Vueling flight, you will have to take it up with Vueling. That is all they said.

10 Vueling were no better. In fact, they were worse, for the reasons I have said in argument. Vueling refused to acknowledge my communicating with them until a computerised individual number went onto their system. As I said earlier, it never did. The luggage arrived spontaneously and without warning on Wednesday last week.

11 I signed my emails as my judicial capacity to alert the Chairman to the fact that this was not merely an issue of a disgruntled consumer. For reasons which I set out below it was essential that his office knew about the proceedings and those conducting the proceedings knew about the complaint. I also advised him to contact the lawyers conducting this litigation on BA's behalf.

#### True Issue

12 This is not an issue over luggage, however. It never has been. I was concerned about as Mr Turner QC rightly says, BA's conduct in dealing with that flight — or Vueling's conduct, [for] which as far as I can see BA take responsibility. They are in the same group of companies, my contract was with BA, BA charged me and I got a BA flight number — if it was not explained, it might be something that is strikingly similar to some of the allegations in this case.

13 The reason I was concerned really ought to have been blindingly obvious, although some of the submissions by Mr Turner QC today would suggest otherwise. The situation is that I do not know how a plane departs with all of the passengers' luggage left behind, unless that is a deliberate decision. It is an easy enough question to pose and it ought to be an easy enough question to answer. We are now 12 days from the flight and I have no explanation, and Mr Turner QC and the team who instruct him have deliberately refused to enquire, to provide me with an answer, praying in aid a desire to separate what they call a private dispute from this judicial dispute. This is not possible but could have been easily resolved had BA and its advisors wished it. This if correct was similar to some of the allegations in this case. If correct I would have had to recuse myself as I made clear in argument.

...

#### Consequences

19 When this problem arose, I immediately realised there would be a conflict, potentially, depending on why the luggage did not go the way it should have done. So I sent an email to the chairman, having been rebuffed by customer relations. I did so in the knowledge that the chairman, Mr Williams, has repeatedly said in public that he wants to introduce a new openness policy in BA and put behind him all the disputes that have taken place in the past. ...

21 What could I do? I do not accept Mr Turner's fundamental proposition that as soon as I had complained with [sic] the chairman and drawn to his attention the litigation, that meant there would be immediately a perception of bias. I fundamentally disagree with that, for the following reasons. ...

25 So, at the earliest opportunity (on the following Monday), I called in the lawyers into my room and explained the position to them.

#### A Reasonable Observer

26 I do not believe for one minute that the reasonably minded observer, which is the test, as Mr Turner has reminded me of, would think that merely because I have raised issues over the non-delivery of my luggage of itself should lead to the possibility of bias. ...

31 ...Almost within a matter of hours of the meeting, [BA and its solicitors] decided that I should recuse myself.

32 Now, I do not accept that the correspondence justifies that application. And I am afraid to say that it is, in my view, an opportunistic application, made by a party that has wanted to get me off this case before. ...

41 I however cannot allow my presence in the case and its difficulties to distract the parties from this case. And therefore, regretfully, I feel that I have no choice, whatever my feelings about it, but to recuse myself from the case, and that is what my decision is; not for the reasons put forward by BA, but for the reasons that I have said.

42 So I will recuse myself. ...”.

52. On 3<sup>rd</sup> September 2015, an article (“the Article”) appeared in *The Times* newspaper with the headline “A case about luggage that carries a great deal of judicial baggage”. It was written by Lord Pannick QC (a member of Blackstone Chambers) who had, at an earlier stage of Mrs. Harb’s claim, represented the Prince on his CPR Part 11 (sovereign immunity) application. The Article stated:

“On July 22, 2015, Mr Justice Peter Smith stood down from hearing a complex commercial case in which British Airways is a defendant. The airline asked the judge to recuse himself after a dispute about what happened to the judicial luggage on a trip home from Florence. How we laughed. But the case raises serious issues about judicial conduct that need urgent consideration by the Lord Chief Justice. ...

The judge sent a number of emails to the chairman of BA complaining about the incident. He said there was “plainly a deliberate decision to leave a whole flight’s luggage behind”. He suggested that lucrative commercial freight may have been loaded “at the expense of passengers who could go to hell at the expense of profits.” BA applied to the judge to recuse himself because the case against the airline that he was hearing raises allegations similar to those he was making, and conclusions similar to those he was asserting, in the correspondence.

The transcript of the recusal application is extraordinary. Jon Turner, QC, for the airline, began by politely stating his client’s concern. The judge intervened: “Right, Mr Turner, here is a question for you. What happened to the luggage?” Mr Turner responded that his clients would deal with such a personal complaint in the ordinary course of business and not in these proceedings. The judge was not satisfied: “In that case, do you want me to order your chief executive to appear before me today?”

Mr Turner patiently replied (his submissions were a model of courtesy and focus in very difficult circumstances) that if the judge would permit him to develop his argument he would contend “that that would be an inappropriate mixture of a personal dispute...”. The judge interrupted: “What is inappropriate is the continued failure of your clients to explain a simple question, namely what happened to the luggage?” After a lot more of this, the judge reluctantly agreed to stand down from the case. He said that there were no grounds for BA’s application but its “attitude” left him with no alternative.

There are a number of troubling features about this unhappy episode. First, the transcript repeatedly confirms what the judge refused to acknowledge: that his personal irritation (perhaps justified) was affecting his judicial responsibilities and made it impossible for him fairly to hear the BA proceedings. The judge said in his judgment that he wanted answers from BA simply because if there were an innocent explanation for the delayed luggage, then he could put the incident to one side and hear the case. But BA’s concern was the strong allegations and concluded views expressed by the judge on personal issues similar to those raised in the litigation. In any event, if BA had offered an explanation for his treatment, was the judge to rule on its adequacy?

Second, there is the inexcusably bullying manner and threats: “What has happened to the luggage? ... I will rise until 12.45 and you can find out... Do I have to order you to do it, then?... I shouldn’t make any preparations for lunch because you are going to be sitting through.”

Third, there are the judge’s arrogant comments concerning the decision of the Court of Appeal in 2007 to remove him from an earlier case in which he had been unable to recognise that his personal interests made it inappropriate for him to sit in judgment. Mr Turner, QC, referred to the case for the legal principles. Mr Justice Peter Smith responded that he had “no regret” about his decision, but “plenty of regrets about the way in which the Court of Appeal went about their decision”, but he was “no longer surprised by what happens in the Court of Appeal”. That was a case where Sir Anthony Clarke, MR,

described Mr Justice Peter Smith's conduct of the proceedings as "somewhat extraordinary" and "intemperate". Sir Igor Judge added that Mr Justice Peter Smith's conduct of the hearing demonstrated that he "had become too personally involved in the decision he was being asked to make to guarantee the necessary judicial objectivity." Mr Justice Peter Smith was not listening.

On hearing about this latest episode, no one at the bar or on the bench would have said, "What, Mr Justice Peter Smith? Surely not?" Litigants are entitled to a better service than this. The reputation of our legal system is damaged by such behaviour. The Lord Chief Justice should consider whether action to address Mr Justice Peter Smith's injudicious conduct has, like his luggage, been delayed for too long."

53. Neither of the parties to this appeal has contested the accuracy of any of the facts stated by Lord Pannick in the Article. By a letter dated 1<sup>st</sup> December 2015 ("the Letter"), the judge wrote to one of the two joint Heads of Blackstone Chambers, Mr. Antony Peto QC, in these terms:

"I refer to our conversation a couple of weeks ago. I am disappointed not to have heard from you.

The quite outrageous article of Pannick caused me a lot of grief and a lot of trouble. I will be taking that up with the requisite authorities in due course.

You said that you would get back to me and you have not. This has meant even more trouble for me because his article has been used as the basis for several lay people to make complaints about me. Fortunately he has never appeared in front of me so his opinion is not worth the paper it is printed on. It has caused me great difficulties in challenging it but fortunately again I have letters of support from no less than 24 Silks, 4 High Court Judges and 1 Court of Appeal Judge all of whom appeared in front of me and do not share his views of my abilities and the way I perform in Court. Some of the letters have been extremely critical of Pannick's article. Others have commented adversely in terms I would not wish to print.

The article has been extremely damaging to Blackstone Chambers within the Chancery Division.

I am extremely disappointed about it because I have strongly supported your Chambers over the years especially in Silk Applications. Your own application was supported by me and was strongly supported by me to overcome doubts expressed to me by brother Judges concerning you. I have supported other people. It is obvious that Blackstone takes but does not give.

I will no longer support your Chambers please make that clear to members of your Chambers. I do not wish to be associated with Chambers that have people like Pannick in it."

54. There is no dispute as to the test for appearance of bias. In *Porter v Magill* [2002] 2 AC 357, Lord Hope said at para 103:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

55. The Letter has assumed significance in this appeal because the Prince was represented at the trial by Mr. Ian Mill QC and Ms. Shaheed Fatima QC, both of whom were (and still are) members of Blackstone Chambers. It led to the Prince amending his grounds of appeal to add a fifth ground alleging apparent bias.
56. The following particulars of alleged apparent bias are relied on. First, a fair-minded and informed observer would conclude that there was a real possibility that the judge became biased against the Prince after the publication of the Article because it was critical of him and he knew that the Prince had been represented by Lord Pannick and was continuing to be represented by Mr. Mill and Ms. Fatima. Secondly, the content of the Letter would cause such an observer to conclude that there was a real possibility that the judge harboured a personal animus against all members of Blackstone Chambers. Thirdly, the observer would conclude that there was a real possibility that the judge’s apparent bias against Blackstone Chambers might have affected his decisions in relation to this claim because, as a matter of timing, the Article preceded (a) the date on which the draft judgment was sent to the parties (21<sup>st</sup> October 2015), (b) the date on which the judgment was handed down in its final form (3<sup>rd</sup> November), and (c) the date on which the judge determined costs (9<sup>th</sup> December). Fourthly, the observer would conclude that there was a real possibility that the judge was biased because he refused to correct a material inaccuracy in the draft judgment even after it had been drawn to his attention. The particular inaccuracy relied on is the judge’s failure to correct the statement at para 106 of the judgment that “it was not put to the claimant” that she had been aware of the Prince’s capacity as the agent of his father, King Fahd. Fifthly, the observer would conclude that there was a real possibility that the judge had been biased against the Prince because his judgment is in key respects inconsistent with the evidence, the inherent probabilities and, in particular, his questions and observations during the trial. There was a change of stance by the judge after the hearing which it is impossible to explain except by attributing bias to the judge. This submission is founded on a detailed analysis of the judge’s interventions during Mrs. Harb’s evidence. These are said to demonstrate hostility by the judge towards her and incredulity about her evidence at that time. Sixthly, the observer would conclude that there was a real possibility that the judge became biased against the Prince in view of his change of mind regarding the explanation given by the Prince during the trial for not attending to give oral evidence. This is the subject of the fourth ground of appeal.
57. It is necessary to have in mind some key aspects of the chronology. The starting point is that on 23<sup>rd</sup> July, after the conclusion of the evidence, the judge asked the parties whether they wished him to give an indication of his provisional views. In response to their request that he should do so, he said:

“on the evidence at the moment I am of the provisional view that there was an agreement as the claimant alleges. However, the question of the capacity of the agent I find very troubling at the moment, the capacity of the agreement. I suspect, I have not looked into it, there is some law about whether or not an

agent, [where there] is an undisclosed principal, can assume personal liability under the contract.”

58. The parties then made their closing submissions and the judge reserved judgment. He dictated his judgment during the last week of July and first week of August. On 5<sup>th</sup> August, a written note was submitted on behalf of the Prince commenting on the authorities relied on by Mrs. Harb in relation to the agency issue. The judge says that he dictated a short addendum to the relevant section of the draft judgment relating to the agency issue, but that the draft was not otherwise materially altered.
59. He handed the tapes to his clerk for typing later in August. On 21<sup>st</sup> August, there was a further hearing before the judge to purge the Prince’s contempt for failing to attend the hearing. The judge said that he had hoped to release his judgment in draft form that day. He was on leave between 2<sup>nd</sup> and 16<sup>th</sup> September. As we have already stated, the Article was published on 3<sup>rd</sup> September. The judge’s clerk started typing the judgment on 6<sup>th</sup> October. She believes that she completed transcribing the tapes on 14<sup>th</sup> October. She says that she printed off a hard copy of the judgment for the judge to check and approve and that she made the amendments required by him on 19<sup>th</sup> October. The draft judgment was circulated to the parties on 21<sup>st</sup> October. It was handed down on 3<sup>rd</sup> November.
60. The judge spoke to Mr. Peto QC in about mid-November and complained about the Article. Having not received an answer from him, he wrote the Letter on 1<sup>st</sup> December.
61. To meet the point that the judge had indicated a provisional view in favour of the claimant before the parties made their closing submissions and before he drafted his judgment, Lord Grabiner says that the judge made some amendments to his draft judgment after reading the Article and before handing down the judgment. We do not know the nature of the amendments. We do not know what the judge’s thinking was in relation to this case after the publication of the Article. In short, he submits, the fair-minded observer would consider that there was a real possibility that the final judgment was influenced by the Article, if only by the judge’s refraining from making changes that he might otherwise have made.
62. More broadly, in his oral submissions Lord Grabiner illustrated his case in this way:

“If I were a client and I was using a Blackstone Chambers barrister to argue a case for me and these facts were drawn to my attention, I would be very concerned indeed about who the trial judge was going to be. If I were told the whole of this story, my reaction to that—and I am simply saying that as a reasonable client, given the knowledge of all the facts—the question for this court is: what would be the reaction of that reasonable client?

In my submission that is susceptible of only one answer. He would say—particularly if he were a foreign client who the reason that he comes here in the first place is because he holds the English court system in such high regard. To be given this story, he would be astonished and he would say ‘Well I must

say I hope there's some other judge who can hear my case', and he would be right" (Transcript 1/107-108).

63. In response to Lord Grabiner's submissions, Mr. Hollander makes a number of points. First, although he accepts that it is possible for a bias for or against an *advocate* to be sufficient to give rise to a case of apparent bias against the *client*, of its nature this is likely to be exceptional. It should be borne in mind that the judge has sworn a judicial oath.
64. Secondly, the Letter was a complaint in relation to an article by Lord Pannick, and not against Mr. Mill or Ms. Fatima. These are two of 100 self-employed barristers practising at Blackstone Chambers. They are not in partnership. Nor is there any suggestion that Mr. Mill or Ms. Fatima had any involvement in the writing of the Article. If the appellant's argument were accepted, it would follow that in *any* case at *any* time in which *any* of the 100 barristers of Blackstone Chambers appeared before Peter Smith J, the fair-minded and informed observer would take the view that the *client* could not expect a fair trial because of the prejudice of the judge through the advocate's membership of Blackstone Chambers. That would be the case irrespective of the advocate's lack of involvement in the Article or the date of his or her joining those Chambers. The fair-minded observer would not take such an extreme view.
65. Thirdly, what irked the judge and provoked him into writing the Letter was the failure of Mr. Peto to provide a considered response to his oral complaint some two weeks earlier rather than the Article itself.
66. Fourthly, there was no change of mind by the judge in his assessment of Mrs. Harb's evidence. The informal indication at the close of the evidence that, subject to the agency issue, he was minded to accept that there was an agreement "as the claimant alleges" is a complete answer to the allegation of change of mind.
67. In summary, Mr. Hollander submits that it is fanciful to suppose that, in these circumstances, the fair-minded observer would consider that there was a real possibility that the judgment that was handed down on 3<sup>rd</sup> November was infected by bias as a result of the Article.
68. In his letter to the claimant's solicitors dated 12<sup>th</sup> February 2016, the judge accepted that he should not have written the Letter. It is difficult to believe that any judge, still less a High Court Judge, could have done so. It was a shocking and, we regret to say, disgraceful letter to write. It shows a deeply worrying and fundamental lack of understanding of the proper role of a judge. What makes it worse is that it comes on the heels of the BAA baggage affair. In our view, the comments of Lord Pannick, far from being "outrageous" as the judge said in the Letter, were justified. We greatly regret having to criticise a judge in these strong terms, but our duty requires us to do so. But it does not follow from the fact that he acted in this deplorable way that the allegation of apparent bias must succeed. It is to that question that we now turn.
69. As we have said, the legal test is not in doubt: see para 54 above. We would, however, emphasise two important points. First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant. The "real possibility" test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias: see *Helow*

*v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416 at para 2 per Lord Hope. As Lord Hope also said in *Porter v Magill* at para 103, the “real possibility of bias” test “is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a *reasonable* apprehension of bias” (emphasis added). We mention this because it demonstrates that the approach urged on the court by Lord Grabiner is incorrect. The court does not ask whether a litigant who is being represented by a member of Blackstone Chambers and knows of the Article would be content to have his case heard by Peter Smith J. We have little doubt that most, if not all, litigants represented by a member of Blackstone Chambers, knowing of the Article, would prefer to have their case heard by another judge. We are prepared to accept that some, indeed many, might have very strong feelings on the subject. But the litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded.

70. The facts of *Helow* illustrate the point well. The petitioner was a Palestinian refugee living in Lebanon. She claimed asylum in the UK on the ground that she feared that, if she were returned to Lebanon, she would be attacked by Lebanese and Israeli agents on account of her Palestinian ethnicity and political opinions. Her claim was refused by the Secretary of State, whose decision was upheld by an adjudicator sitting in Glasgow. Her petition to the Court of Session was dismissed by the Lord Ordinary, who was a member of the International Association of Jewish Lawyers and Jurists, whose magazine had carried a number of extreme pro-Israeli articles. The petitioner sought to set aside the Lord Ordinary’s decision on the ground that a fair-minded and informed observer would have concluded that there was a real possibility that she was biased by reason of her membership of an association which was actively antipathetic to the interests with which the petitioner was identified. The House of Lords dismissed the appeal. In doing so, it conducted a detailed examination of the facts to ascertain the nature and significance of the Lord Ordinary’s membership of the association and its published aims and objectives. The House also said that it could be assumed (and took into account) that the judge was able to discount material that she had read and reach an impartial decision according to the law. We expect that the petitioner would have been very unhappy that her petition had been determined by the Lord Ordinary. No doubt she would have preferred a judge who had no involvement with a body like the association. From her subjective point of view, it might have appeared that there was a real possibility that the judge had been biased. But the test is an objective one and the focus is on the *fair-minded* informed observer. The approach advocated by Lord Grabiner fails to draw that critical distinction.
71. It also fails to take account of the important point that, even if a judge is irritated by or shows hostility towards an *advocate*, it does not follow that there is a real possibility that it will affect his approach to the *parties* and jeopardise the fairness of the proceedings. From time to time, the patience of judges can be sorely tested by the behaviour of advocates. Sometimes, a judge will overreact and unwisely make an intemperate comment. But judges are expected to be true to their judicial oaths and not allow their feelings about an advocate to affect their determination of the case

they are hearing. The informed and fair-minded observer is to be assumed to know this.

72. Secondly, the informed and fair-minded observer is to be treated as knowing all the relevant circumstances and it is for the court to make an assessment of these: see *Competition Commission v BAA Ltd and Ryanair Ltd* [2010] EWCA Civ 1097 per Maurice Kay LJ at paras 11 to 13 and the authorities cited there. It is common ground before us that the relevant circumstances in this case include all the facts set out at paras 57 to 59 above, although some of these were not in the public domain. It was held in *Viridi v Law Society* [2010] EWCA Civ 100 that the hypothetical fair-minded observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available. Stanley Burnton LJ gave a number of reasons for this conclusion at paras 43 to 48 of his judgment. This reasoning is binding on this court. In any event, we are satisfied that it is correct.
73. With these introductory comments in mind, we can now deal with the allegation of apparent bias in this case quite shortly. We start by saying that we do not accept the submission of Mr. Hollander that the Letter was merely a complaint about Mr. Peto's failure to respond to the judge's earlier oral complaint. It is true that the third paragraph complains that Mr. Peto "said that you would get back to me and you have not". But the rest of the letter is about the "outrageous" Article and his reaction to that. It is impossible to describe the Letter as confined to a complaint about Mr. Peto's failure to respond.
74. We are prepared to assume that the informed and fair-minded observer, knowing of the Article, would conclude that there was a real possibility that the judge was biased against all members of Blackstone Chambers, at least for a short period after the publication of the Article. But for the reasons we have given, the observer would not conclude *without more* that there was a real possibility that this bias would affect the judge's determination of the issues in a case in which a party was represented by a member of Blackstone Chambers.
75. But there is a further reason why this ground of appeal must fail. The assessment of whether an informed and fair-minded observer, having considered the facts, would conclude that there was a real possibility of bias depends on an examination of all the relevant facts. It is fact sensitive. In our view, the facts in the present case show that the possibility that Peter Smith J was actuated by bias against the Prince is unrealistic. We accept the submission of Mr. Hollander that the chronology of events is very powerful. The judge indicated in open court immediately after the conclusion of the evidence that he was of the provisional view that "there was an agreement as the claimant alleges". This was despite his (at times) aggressive questioning of Mrs. Harb. The only caveat he entered was in relation to the agency issue. But his concern in relation to that issue seems to have had nothing to do with the credibility of the witnesses. Rather, at that stage it concerned a question of law as to whether an agent may be liable where there is an undisclosed principal. That may be an elementary question (as Lord Gribner suggested), but that is neither here nor there.
76. The critical point is that the question whether a binding agreement was concluded at the meeting on 20 June 2003 was at the heart of the case. It turned to a large extent on the credibility of the oral evidence of Mrs. Harb and Mrs. Mustafa-Hasan and the witness statement of the Prince. We are not persuaded that there is a real possibility

that the judge changed his mind about their evidence after reading the Article. It is true that the judge *could* have amended his draft judgment after reading the Article so as to make findings favourable to Mrs. Harb which were not contained in the original draft. But the judge said that the only amendments that he made were to deal with the note on the agency authorities and otherwise the amendments were not material. We see no reason to disbelieve this and we did not understand Lord Grabiner to submit that we should do so. More fundamentally, we think it fanciful to suppose that the judge made major changes to his assessment of the evidence simply as a reaction to the Article or that his decision on the agency issue owed anything to a bias against the Prince. There is no evidence to suggest that he did so. In our view, the informed and fair-minded observer would not conclude that there was a real possibility that the judge behaved in this way.

77. For all these reasons, regrettable though the judge's conduct was in writing the Letter, we reject the allegation of apparent bias.

*Overall conclusion*

78. For the reasons that we have set out above, this appeal must be allowed. The claim will have to be retried before a different judge.