

## SAUDI PRINCE'S APPEAL SUCCEEDS BUT ENGLISH JUDGE NOT BIASED

*Harb v Aziz* [2016] EWCA Civ 556

### Introduction

By a judgment handed down on 16 June 2016 in *Harb v Aziz* [2016] EWCA Civ 556, the English Court of Appeal allowed the appeal of a Saudi prince against a decision that he was bound by an oral contract. However, whilst the Court of Appeal agreed that the first instance judge's approach to the evidence had been unsatisfactory, an appeal on the grounds that the judge had been biased against the prince's counsel was dismissed.

### Factual Background and First Instance Decision

Mrs Harb alleged that, from early 1968, she had been a wife of the late King Fahd who ruled Saudi Arabia from 1982 to 2005 (although, following a debilitating stroke in 1995, he was unable to continue to perform his full official duties for the last 10 years of his reign). King Fahd's youngest son was HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz Al Saud ("the Prince"). According to her evidence, Mrs Harb's relations with other members of the Saudi royal family deteriorated significantly and she left Saudi Arabia in 1970.

Mrs Harb alleged that there had been a promise by King Fahd to maintain her in a comfortable and dignified style for the rest of her life. Apparently on the instructions of King Fahd, Mrs Harb was paid £5 million in 1999. However, by 2003, Mrs Harb required more money. She sought to persuade the King to pay her a further £12 million. Mrs Harb was declared bankrupt in May 2008.

Mrs Harb sought to get the Prince to honour the promises allegedly made by King Fahd, and in June 2009 a claim was brought seeking to enforce, or obtain damages for breach of, an oral agreement concluded at the Dorchester Hotel on 19 June 2003 by which the Prince had himself promised to uphold King Fahd's promises. Specifically, Mrs Harb claimed that the oral agreement was for the Prince to pay her £12 million and procure the transfer of two London properties to her.

The Prince, having unsuccessfully relied on state immunity at an earlier stage of the proceedings, denied that any such agreement had been made and further denied that he had acted in his personal capacity rather than as an agent of King Fahd.

The Prince declined to give oral evidence before the English courts and submitted a letter from the Saudi Embassy in London which appeared to state that members of the Saudi royal family were not permitted to give oral evidence relating to King Fahd. Peter Smith J ("the Judge") noted, drawing on his own previous experiences as a judge, that Saudi royals had given evidence in other cases that he had tried. The Judge considered the letter unsatisfactory and went on to treat the Prince's evidence as hearsay evidence. On that basis, the Judge expressly found that he preferred the evidence of Mrs Harb and her friend who claimed to have witnessed the making of the alleged oral contract. The Judge found that an oral agreement had been made and that the Prince had been acting in his personal capacity.

Following the hearing but before judgment had been handed down, the Judge had taken objection to a letter written by a barrister criticising the Judge's conduct of separate and wholly unrelated litigation. The Judge had himself written to the head of the chambers from which that barrister practised in order to complain about the article in very strong terms. That barrister had acted for the Prince at an earlier stage of the instant litigation, and other barristers from that chambers continued to be a part of the Prince's legal team. In addition to comments made about the barrister who authored the article, the Judge's letter also made adverse comments about the chambers as a whole.

On appeal against the Judge's decision, the Prince argued:

(1) that the Judge had been wrong to accept without proper scrutiny Mrs Harb's evidence and this had caused the Judge to form conclusions on the issue of contract formation which, on the evidence, were not open;

(2) that the conclusions formed by the Judge relating to the issue of agency were not sustainable; and

(3) that there was an appearance of bias against the Prince on the basis that the Judge had written a letter to counsel for the Prince's head of chambers to complain in very strong terms about an article which had been written by another member of that chambers concerning the Judge's handling of a separate matter in which allegations of bias had been made.

### **Decision in the Court of Appeal**

The Court of Appeal (Lord Dyson MR giving judgment) dismissed the allegations of apparent bias but allowed the appeal and remitted the case to be re-tried by a different High Court judge.

#### *The Judge's approach to the evidence*

In light of the fact that the Prince had not made himself available for cross-examination, the Judge had been entitled to approach any evidence put forward on behalf of the Prince with some caution. However, that fact did not inevitably lead to the conclusion that Mrs Harb's evidence was to be preferred. In fact, the evidence of both sides had not been satisfactory or coherent, and thus it was the responsibility of the Judge to assess each witness's evidence on each issue.

Furthermore, the Judge had misinterpreted the letter from the Saudi Embassy which had caused him to wrongly conclude that the Prince failed to attend trial in order to avoid cross-examination. In fact, the letter had not stated that there was a general rule of Saudi law prohibiting the royal family from giving evidence, but rather a specific rule limited to oral evidence concerning King Fahd. The letter itself was conveying a note from the Saudi Ministry of Foreign Affairs stating, inter alia, that the Royal Court of Saudi Arabia had forbidden the Prince from giving oral evidence concerning King Fahd. The Prince's first witness statement had given an express notice under the Civil Evidence Act 1995 that he did not believe King Salman (the present King of Saudi Arabia) would regard it as appropriate for the Prince to expose himself to questions concerning the personal life of King Fahd. The Judge's conclusion on that point was incorrect and was likely to have adversely affected his

judgement of the Prince's evidence.

The Court of Appeal found that the Judge's overall approach to the evidence had been unsatisfactory. Rather than setting out which questions needed to be answered on contract formation and properly evaluating all the evidence, the Judge, it seemed, had taken a "short cut" in simply deciding that Mrs Harb was a reliable witness and then accepting that her case had been established in all respects. In the interests of the fairness of the trial, judgments needed to show that all essential issues had been addressed and how they were resolved. Having identified material shortcomings in the Judge's dealing with the evidence, the Court of Appeal allowed the appeal and ordered a retrial.

#### *The agency issue*

As to agency, the Judge had wrongly thought that the Prince's case on agency had not been put to Mrs Harb. The Judge had considered whether the Prince had been King Fahd's agent in a general sense, rather than whether Mrs Harb had approached the Prince in a representative capacity and, if so, whether the Prince had done anything to cause her to understand that a personal undertaking was being given. The Judge had approached the agency question separately from the issue of whether a binding agreement had been made. In fact, those questions were bound up together.

#### *The apparent bias issue*

On the issue of apparent bias, the Court of Appeal strongly denounced the Judge's conduct in writing the letter. However, such "deplorable" conduct did not properly lead to the conclusion that the allegation of apparent bias succeeded. The correct test was whether the fair-minded observer would perceive a real possibility of bias, not whether a litigant would do so. A litigant lacked the objectivity required for that test.

In any event, judicial hostility towards an advocate did not automatically lead to the conclusion that that hostility would affect the judicial approach to the actual parties. Whilst it was possible that a fair-minded observer, having read the letter, would conclude that the Judge was biased against all members of the chambers in question, he would not conclude without more that such bias would affect his determination of the case.

Furthermore, in the instant case the Judge had given the parties an indication of his conclusions before he had read the article which caused his letter of complaint. It was fanciful to think that the Judge had made major substantive changes to his assessment of the case purely in reaction to the article.

#### **Concluding Remarks**

The Master of the Rolls' judgment confirms the principle that the appearance of bias is subject to an objective test, rather than the subjective perception of bias by a litigant in front of the judge. However, whilst the Judge was not found to have been biased in the circumstances, the Court of Appeal's strong criticisms of the Judge's actions provide an important discourse on proper judicial behaviour and functions both inside and outside of court.

26<sup>th</sup> July 2016