CA on appeal from Family Division (Mr Justice Singer) before Ward LJ; Mummery LJ; Wilson LJ. 15th November 2007

Lord Justice Ward:

1. This is a singularly unsatisfactory, unfortunate and embarrassing matter. On 1st August 2007 we allowed an appeal by Sheikh Khalid Ben Abdullah Rashid Alfawaz ("the Sheikh"), the third respondent in ancillary relief proceedings, against the order of Singer J. made on 10th July 2007 dismissing the Sheikh's application for the judge to recuse himself on the ground that comments made during the course of a pre-trial review betrayed apparent bias towards the appellant. We directed that the matter be heard by a different judge of the Family Division of the High Court, we set aside the order for costs made against the Sheikh and, by consent, made no order for costs here and below. These are our reasons for doing so.

The background

2. It will be difficult to capture in a few paragraphs the full flavour of this case, features of which are quite remarkable. It is a claim by Mrs Wendy Ann El Farargy for ancillary relief, bitterly contested by her husband Mr Nael Mahmoud El Farargy. She was born in South Africa 59 years ago. He is a 67 year old Egyptian. They married in 1974 after the wife had converted to Islam. They have an adult son estranged from his father.

3. Their financial affairs are extraordinarily complicated. Mr Cayford Q.C., who appears for the wife, has told us he has "*trawled through more than 50 lever arch files*", and that was before full discovery had been given. That gives some impression of the scale of the case.

4. The couple started married life in Qatar but subsequently moved to Egypt. In 1981 they returned to the United Kingdom and purchased a flat at 92 Gloucester Place. Later, in 1987 a Jersey company, Neon Investments Ltd, purchased 2 Pinehurst Close, Kingswood, which became their matrimonial home. Still later, in March 2003 their last matrimonial home in Cobham was purchased for £1.7 million in the name of McKellar Holdings Ltd ("McKellar"), a British Virgin Island registered company. Husband and wife still occupy the house in what must be the most trying circumstances. The Sheikh now claims to be the beneficial owner of McKellar. In that he is supported by the husband. This is strongly denied by the wife who asserts that the family home belongs beneficially to her and her husband. This is one of the key issues in the case and accounts for the Sheikh's involvement in the case.

5. Together husband and wife worked in the hotel industry, incorporating Wena Hotels Ltd ("Wena") in the United Kingdom in 1982, the name taking "We" from her name, Wendy, the "na" from his, Nael. Both are directors and they hold the shares in the approximate proportions of 70% to the husband and 30% to the wife. The way in which they operated Wena is central to the enquiry. At first the company was concerned with British hotels. Then in 1984 Wena Hotels International ("Wena International"), a British Virgin Island company was incorporated, managed by a Guernsey trust which so far as the wife is concerned was part of the El Farargy family trusts. In 1989 the business expanded to Egypt and Wena and an Egyptian state-owned hotels company entered into a lease for the Luxor Hotel and Wena and Wena International signed agreements for the management of that hotel. A year later they entered into arrangements for the management of the Nile Hotel.

6. Their problems began in 1991 when the Egyptian government seized the two hotels. They were returned to Wena's management in 1992. Problems with the government continued and in 1993 and 1994 Wena issued arbitration proceedings in Egypt relating to the two hotels and were successful. Success was short-lived and the Egyptian court overturned the arbitrator's awards in their favour. Cutting the story very short, Wena applied to the International Center for International Disputes (ICSID) in Washington for compensation for the government of Egypt's failure to protect Wena's investments in Egypt and this led to another long drawn-out struggle. In December 2000, the ICSID held the government of Egypt liable and awarded Wena $20.6 million in compensation. The Egyptian government appealed. The appeal was rejected in February 2002 and Wena received their compensation then worth about £14.5 million and this was placed with Investec.

7. The summer of 2004 saw some serious rifts in the relationship of husband and wife. She began to suspect him of transferring monies away from the Investec accounts. In November 2004 she launched these proceedings. Coleridge J. granted a freezing order which was returnable on 10th December 2004 and thus began Singer J.'s involvement in this case. He reserved it to himself. Of specific concern at the time of that injunction was the destination and beneficial entitlement to sums of £5 million and $5 million transferred from Investec to UBS in Switzerland.

8. It is unnecessary to deal in detail with the progress of the wife's claims for ancillary relief. Significant events include the joinder of McKellar as second respondent on 19th May 2005, the hearing of the first appointment. In July 2005 Singer J. in effect converted into an order an agreement which had earlier been made with the wife to release part of the frozen funds to her because her husband was not paying her as he had been ordered to do. The husband appealed but received short shrift in the Court of Appeal where Thorpe L.J. described his manoeuvre as "deeply unattractive" and "the judge's instinct to hold the husband to his agreement rest[ing] on the surest of foundations".

9. In September 2005 McKellar issued a summons to determine the beneficial ownership of the company, serving in support of their application an affidavit sworn by the Sheikh. He asserted that he owned the shares in that company and he was supported by the husband in that case. It may be significant to note that he did not intervene. These contentions seem to have come as a surprise to the wife who asserts she had not even heard his

name mentioned until about mid-2004. The Sheikh was later joined as the Third Respondent on the wife's application.

10. Several days were set aside in October for a preliminary fact-finding hearing which, in Singer J's unavoidable absence, was conducted by Mr Andrew Moylan Q.C., as he then was. The Sheikh was required to give evidence. He was called late in the afternoon of 4th October and the court adjourned before Mr Cayford had completed his cross-examination on inconsistencies in the documents said seriously to undermine his case. The next day was the first day of Ramadan. It is now accepted that the Sheikh had indicated he would not return the following day. The hearing broke up somewhat inconclusively and was resumed in November with no greater progress made. The deputy judge made a series of orders which the husband sought unsuccessfully to appeal.

11. In the course of the adjourned hearing Mr Moylan described the case which had been put to him about McKellar as having been "blown out of the water ", saying:

"He [the husband] has not got a case left. He is the beneficial owner of McKellar. He might say, how I do not know, that he is holding it on behalf of someone else … on that issue his case has gone and everybody is running around struggling to reconstitute a case. … That is not a good way of doing litigation is it? Most judges would say, "Why are you doing this? Why having advanced one case, no mention of Sheikh Khalid to Investec, until the middle of this year?""

Singer J. would have been aware of those remarks because he had a transcript of the hearing before him.

12. On 3rd January 2006 Wena intervened seeking a declaration that the Isle of Man bond frozen by the injunction was beneficially owned by the company. At about the same time the Sheikh's solicitors came off the record and he remained unrepresented until June.

13. The trial had been fixed for November 2006, but in July 2006 the husband was granted an adjournment on the grounds of his ill health. The earliest date available for the resumed hearing then thought to be likely to last 3 weeks was a year later in November 2007. A pre-trial review was also fixed to be heard in September.

14. That directions hearing took place on Monday 18th September and resumed on Friday 22nd September 2006, the transcripts of those hearings running to 82 and 108 pages respectively. It was during these hearings that Singer J. made the comments which lead to this application that he recuse himself. That application was, however, not made until 22nd March 2007. As already set out, Singer J. refused to recuse himself on 10th July, and as five weeks had been set aside for the hearing to commence on 22nd October 2007, we expedited the hearing of the appeal and dealt with it in the long vacation.

15. That may be the bare bones of the chronology but I have given no impression at all as yet about the extraordinary way this litigation has been conducted, especially by the husband. He had shown himself to be contemptuous of his wife and equally contemptuous of the court, as, on a number of occasions, the court has found. Mr Cayford has placed before us a schedule of breaches of no less than twelve orders of the court despite in some cases penal notices having been attached to them. He has flagrantly ignored orders for the payment of maintenance pending suit to the wife and even when the order, upheld by the Court of Appeal, required him to pay her out of the frozen funds he did not do so. He has given incomplete discovery of documents. In the judgment under appeal Singer J. adverted to "*some abbreviated account of background events*" saying:

"16. W's case is that there were no outside investment participants in their hotel business: it was purely and simply their family business. H says she knows quite well that there were outside participants and that she knows who they are: but he for his part refuses to identify them for reasons which he says justify his refusal.

17. As for W, she (and H) continue to live in the home she says she regarded as belonging to the family, and ultimately intended to pass to the spouses' adult son from whom H is now estranged. She claims that the wealth of the family is to be counted in millions of pounds sterling, rather than the far more modest sum maintained by H.

18. If W is correct in her case that McKellar is not beneficially owned by SK [the Sheikh], it must necessarily follow that H and SK will have conspired to present a false case to disadvantage W and to deceive the court.

19. … Meanwhile W has not received financial support during the lengthy period of this case to date in accordance with what H offered and agreed at an early stage, not withstanding my attempt to turn his agreement into an order. That order was the subject of an unsuccessful appeal permission application, refused by Thorpe and Scott Baker LJJ and Sir Martin Nourse on 6th December 2005 see [2005] EWCA Civ 1770. …

20. Since that ruling H has not honoured his obligations precedent or subsequent nor has he complied with later orders made by me that he should contribute towards W's costs of this litigation. I have had to consider a ***Hadkinson*** *application based on a number of breaches of court orders, some of them admitted. On 1st December 2006 I made an order the effect of which is that any funds towards or on account of costs liabilities received by Messrs Withers, his current solicitors, should be split with half being paid over on account of her costs to W's solicitors. This was to meet the situation, which I said I found repugnant, that H should be able with the assistance of relatives and friends (including SK and/or entities with which he is apparently associated) to fund this litigation to the tune of over £1 million so far, whereas W in part as a result of H's non-compliance with orders has been able to pay only £56,000 on account to her own solicitors.*

21. Many issues remain unresolved, therefore, but that H has not behaved with total integrity over the time I have spent attempting to case manage the applications and to make appropriate interim orders is, I believe, a conclusion at which a judge can legitimately arrive as a preliminary inference in the course of extensive

interlocutory dealings with an application such as I have had. I estimate that I alone have spent at least 15 (mainly full but some partial) court days so far engaged in this case over the period since December 2004.

22. Unsurprisingly there is medical evidence that these proceedings are taking their toll on W's health. So far as H is concerned, his physical and psychological health has undoubtedly been affected by his illness, its treatment, and the side-effects. I say no more about that as his state of health is the subject of a forthcoming application before Baron J to vacate the autumn hearing."

[I interpolate that Baron J refused that application.]

The application for recusal

16. By summons issued on 22nd March 2007 the Sheikh applied for an order that the judge recuse himself and that the application be released to another judge of the Family Division. Complaint was made about seventeen comments made by the judge, six on 18th September and the remainder on 22nd September. In this appeal the Sheikh relies on only six of those remarks, four of which it is alleged, to quote from the grounds of appeal,

"… would cause a fair-minded and informed observer to conclude that there is a real possibility that the learned judge was (whether or not consciously) mocking the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his Arab ethnic origins and/or his Muslim faith."

The other two remarks would cause the fair-minded and informed observer to conclude that:

"There is a real possibility that the learned judge had formed a strong view that the first and third respondents were party to an improper combination/campaign not only to put up what the applicant wife says is a false case re: McKellar (the second respondent), but also to defer and in some instances disrupt the proceedings and to subject the applicant wife to maximum delay and expense."

17. I shall now set those remarks out adopting in this judgment the request made by Mr John Randall Q.C., who appeared in this Court, though not below, that we highlight the words to which objection is taken and place them in parenthesis. So, with highlight and brackets added the six comments are these:

(1) This appears on page 72 of the transcript for 18th September. The others were made on the 22nd.

"MR Le GRICE [Q.C., counsel then appearing for the Sheikh]: Surely, the right approach to this issue in the event, and it is purely a hypothesis, that the principal argument in support of the wide-ranging effect of the ICSID award was being presented by my client, and he had lost on that issue, it would then be open to the court to give a summary assessment of the costs of that issue, and order payment within 28 days.

MR JUSTICE SINGER: And what good would that do her if it turns out that he is not the owner, and/or that I do not think it appropriate to treat him as the beneficial owner, and therefore cast aside for Family Division purposes the cloak of incorporation, and if he chose to depart ***[on his flying carpet]*** *never to be seen again –* ***[it should be Ramadan quite soon?]*** *the whole point about security for costs … is that the money is up front."*

(2) This appears on page 62 of the transcript:

"MR Le GRICE: … Mr Pointer (counsel for the husband) seeks one form of order with regard to the ICSID award and Mr Cayford seeks another sort of order, but both are seeking an order with regard to the ICSID awards, not like a classic plaintiff and defendant …

MR JUSTICE SINGER: But you want to come into this, or you might want to come into this, and you reserve your position, in certain circumstances you might come in to it if Mr Pointer does not ahead and I suppose it is possible if Mr Pointer does not want to go ahead the Sheikh would be here to see that no stone is unturned, ***[every grain of sand is sifted.]"***

(3) Taken from page 73:

"MR CAYFORD: That is what the position would have been with effect from his oral evidence as given in court, but he is now resiling from that.

JUSTICE MR SINGER: And say what in relation to ICSID in his affidavit?

MR CAYFORD: It is not entirely clear. He does not, as I recall …

MR JUSTICE SINGER: ***[A bit gelatinous, is it?]***

MR CAYFORD: I am sorry?

MR JUSTICE SINGER: ***[A bit like Turkish Delight?]"***

(4) During the course of this hearing there were some references to Ramadan. On the first day there was some dispute between counsel as to whether or not they expected the Sheikh to attend to be further cross-examined by Mr Cayford, it now being accepted that he had informed the court that he would not return. There was another reference to Ramadan in the passage I have cited at (1) above. Exception is, however, taken to this passage at page 80:

"MR JUSTICE SINGER: I do not know what the lines of communication are to Saudi Arabia, or wherever the Sheikh may be ***[at this I think relatively fast-free time of the year]****, do you want five minutes to consider your position?"*

(5) The first of the remarks said to throw doubt on the judge's ability to try the issues with an objective judicial mind was this:

"MR JUSTICE SINGER: He (the husband) is running a campaign. It is perfectly clear to me, *prima facie, I keep having to say that* because, of course, **I may be persuaded out of the near conviction**, that the campaign

here is to make sure that she is put at the maximum disadvantage by the non-compliance with orders, even when he is able to deal with every one of his requirements, and it is not fair." (I have added the emphasis to the words in italics.)

(6) The final comment is one made on page 47 where the judge was discussing the imaginative order he eventually made on 1st December 2006 to deal with the husband's contempt through his failures as found by the judge to pay costs and satisfactorily to explain his expenditure of monies drawn from the frozen accounts. For each £1 that he paid to his solicitors for preparation, representation or advice, he had to pay £1 into a joint account in the name of the parties' solicitors to be held to the order of the court but to be paid to the solicitors for the wife at the conclusion of the hearing unless the court then ordered otherwise. This was to ensure that the wife had some cover for future costs. He said:

"MR JUSTICE SINGER: Mr Pointer, it is going to be obvious whenever this case is before another court that **I have formed a view about this case**, not dissimilar from that which Lord Justice Thorpe formed, and maybe I should not ultimately take the final hearing. I do not know. The view I have taken *at this stage* is that it looks awfully like it is a war of attrition and if there is a way of evening it up then I will do so and if it is necessary to be inventive in order to achieve it I hope I will be able to, because I find it repugnant for reasons I outlined on Friday. Now I have come out in the open about it. My intention is to try and level the playing field and I will try and find a way to deal with it …" (The words in italics are emphasised by me.)

Singer J.'s disposal of the application

18. The judge was very alive to and concerned by the time this case was taking to get to trial. It will be recalled that the hearing fixed for the Michaelmas term 2006 was adjourned just before the long vacation and the earliest available date was a year later. The judge was aware that a further application was listed before Baron J. to break that fixture. Singer J. said:

"6. … The listing position is such that, as things currently stand, no judge of the Division can be made available to hear this case over the five weeks for which it has with very considerable difficulty been fixed if I am not to do so. I mention this simply as a fact which I must bear in mind, but make it plain that it does not and cannot impact on the merits of SK's recusal application.

7. The first aspiration expressed in SK's summons, that this autumn's listing be released to another Family Division judge, cannot therefore be met by the Clerk of the Rules as matters now stand."

19. When this appeal came into my list I was aghast at the prospect that allowing the appeal would have the effect of putting the hearing back another year to 2008. When I spoke at the beginning of this judgment about unsatisfactory features of the case, one of them to my mind is the length of delay the Family Division is having to endure in cases of this kind. That is no fault of the Clerk of the Rules nor of the judges assigned to the task of deciding these "big money" cases where millions of pounds are frequently involved. The trouble is that there are simply not enough judges to do this complicated work which takes second place to the children's cases. The first step is for the parties to exchange their Form Es, which give complete financial disclosure and an up-to-date picture of their means. The first appointment may take six months to fix. Then there is a wait for another six months for the financial dispute resolution hearing. If no compromise is reached, they have to wait up to and even more than a year for a date for the final hearing, sometimes, perhaps, through excessive indulgence to counsel's convenience. By then the valuations are out of date and the whole process begins again. No wonder the costs are sometimes enormous. Because I was so appalled by this prospect, I spoke to the President very shortly before he departed on holiday. I have his permission to disclose what happened. Singer J. was rightly concerned about the application and the effect it would have on the fixture. Very properly he consulted the Head of his Division to discuss the predicament and see whether anything could be done about the listing of the final hearing before another judge of the Division but the emphatic information given by the then Clerk of the Rules was that no other judge could be found to replace him. If he could not hear it, the hearing would have to be vacated and further delay would ensue. I mention this in fairness to the judge because, if the inference could not have been drawn from paragraphs 6 and 7 of his judgment which I have already cited, it surely now can be drawn that he would (and, this is my guess, would willingly) have released the case to another judge of the Division if that could have been arranged. That not being possible, he had to get on with deciding the application and making up his own mind on the merits as he saw them. He was right to make it plain that listing difficulties could have no impact on the outcome.

20. Lord Justice Wilson was equally concerned about delay and he made independent approach to the new Clerk of the Rules and, great advocate that he is, persuaded her to re-organise the sitting of the High Court judges of the Division so that someone would be available to deal with this matter on the dates listed and we were able to hear the appeal relieved by that news. The hearing is under way before Baron J. as we prepare these judgments.

Singer J.'s judgment

21. He recorded that there was effective unanimity about the applicable law and he recited at length paragraphs [99] - [105] inclusive of Lord Hope's speech in ***Porter v McGill*** [2001] UK HL 67, [2002] A.C. 357 and from paragraph 25 of the judgment of the Court of Appeal in ***Locabail (UK) Ltd v Bayfield Properties*** [1999] EWCA Civ 3004, [2000] Q.B. 451 at 480. He correctly summarised the test to be *"whether a fair-minded and informed informer would conclude that there is a real possibility of potential bias (actual bias not being asserted) on the part of the tribunal".*

22. Of the allegations that he had apparently made his mind up, he said:

"23. … I postulated (upon what is indeed W's case) that H and SK might be in combination not only to put up what W says is a false case re: McKellar, but also to seek to defer and in some instances to disrupt the proceedings and to subject W to maximum delay and expense. As I have already remarked, if she is correct that SK has no interest in McKellar then the assertion that H and SK are in combination would be made out, and from there to the balance of her contentions about their tactics would be but a small step.

24. I believe that an objective fair-minded and informed bystander would not regard it as unrealistic, pre-judgmental or as a sign of apparent bias for a judge to treat such a scenario as one possible feature of the case. To contemplate that possibility and to take such steps as are available to protect the party who would thereby be disadvantaged do not in my judgment legitimately give rise to any reasonable inference of potential bias on the part of the tribunal against either H or SK.

…

27. In a situation where the escalation of costs is of such critical concern to W and her advisers it is not in my judgment objectively reasonable to conclude that there is a real possibility of bias from the fact that the tribunal is astute to protect and indeed enhance W's ability to recover costs SK might be ordered to pay her.

28. Extracts [6] above are remarks made in relation to H rather than SK. It must however be the case, as Mr Pointer submitted, that SK could rely on bias if established against H, not least because SK's factual case will depend in part on judicial assessment of H's evidence. But, for the reasons already given, I do not accept that the comments made about what appears to be H's "campaign" and, if established, its repugnance, would be regarded by the informed observer as demonstrating judicial bias, given the circumstances of this case as they stood last September.

29. The reference to "near conviction" does not in my judgment affect that proposition. A person may at an intermediate stage legitimately reach a prima facie view of greater or less strength, which in either event can be dispelled at the final hearing on dispassionate assessment of the evidence then produced.

30. In extract [6] I said: "Maybe I should not ultimately take the final hearing" in the light of the view I had formed about H's forensic tactics. In [another extract no longer relied on] I acknowledged that expressing that view "may have consequences for the future conduct of the case". I have given careful thought to the effect of these expressions, on both SK and H, not least because it is submitted that once a judge has doubted his suitability to conduct the final hearing of the case it is important for all parties to feel confident that he approaches the task with sufficient impartiality. What I have been critical of has been H's litigation tactics, and the same criticism would be deserved by SK if it proves to be the case that he and H have combined to disadvantage W. But it is entirely possible that a litigant husband, outraged beyond measure, attempts to thwart by tactical means the false and exaggerated case brought by his wife, and that the husband's case on the facts proves to be accurate. I would expect an informed observer to understand that distinction, and to have confidence in the tribunal's ability to conduct an impartial inquiry and to arrive at an unbiased conclusion at trial, while meanwhile attempting to maintain between the parties as level a playing field as possible in the circumstances."

23. Dealing with the other complaints, the judge said:

"31. Complaint is raised about certain references to Ramadan, when its onset is fixed in different parts of the Muslim world, and when it might fall in 2007. I certainly intended no disrespect or disregard for the tenets of Islam …

32. References to flying carpets, grains of sand and Turkish Delight cannot in my judgment, whether in isolation or in combination with any of the other passages relied upon, give rise in the fair-minded and informed observer to a real possibility of bias. Mr Cayford in his submissions referred to these examples of "colourful language", which I accept. I do not accept that they demonstrate disrespect or disregard for SK's Saudi nationality and Arab ethnicity.

…

35. I arrive therefore at the conclusion that there is no real as opposed to fanciful doubt about my impartiality which should be resolved by recusing myself. This summons therefore fails, and I will not rule myself out from further participation in this case, including at the final hearing (whether or not this autumn) if I am available to take it."

Discussion

24. There is no dispute about the law. In Lord Hope's words in paragraph 103 in ***Porter v McGill***: "*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*". Mr Randall also directs our attention to paragraph 63 in Lord Hope's speech in ***Millar v Dickson*** [2001] UK PC D4, [2002] 1 W.L.R. 1615 where he referred to:

"… the fundamental importance of the convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done."

Mr Cayford emphasises paragraph 14 in the speech of Lord Steyn in ***Lawal v Northern Spirit Ltd*** [2003] UK HL 35, [2003] I.C.R. 856:

"Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v

Johnson (2000) 200 CLR 488, 509, at para 53, by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"."

Finally I draw attention to the endorsement by this Court in paragraph 21 of *Locabail* of the observations of the constitutional court of South Africa in ***President of the Republic of South Africa v South African Rugby Football Union*** (1999) 4 S.A. 147, 177:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

25. With those last words ringing in my ears, I consider first the submission advanced by Mr Randall that there is a real possibility that the learned judge had formed so strong a view manifested by his reference *to "near conviction"* and "*obvious[ly] … formed a view"* that the husband and the Sheikh were party to an improper combination or campaign so as to throw doubt on the judge's ability to try the issues with an objective, open judicial mind.

26. For my part I do not accept that submission. This judge had already had to deal with this matter on many occasions for many days and, in the light of the husband's appalling forensic behaviour, no observer sitting at the back of his court could have been surprised that he had formed a *"prima facie"* view nor even that it was "*a near conviction*". A fair-minded observer would know, however, that judges are trained to have an open mind and that judges frequently do change their minds during the course of any hearing. The business of this court would not be done if we were to recuse ourselves for entering the court having formed a preliminary view of the prospects of success of the appeal before us. Singer J. did express himself in strong terms and he would have been wiser to have kept his thoughts to himself. But there are times in any trial and in any pre-trial review where a judge is entitled to express a preliminary view and I do not see that Singer J. has over-stepped the mark in the particular circumstances of this case. The husband has behaved disgracefully yet he, noticeably, has not joined in the application for the judge to recuse himself. The Sheikh, who allies himself with the husband, cannot complain too vociferously if some of the judge's wholly justifiable ire rubs off on him.

27. In my judgment the judge was right not to recuse himself on the basis that he had apparently already closed his mind.

28. The other attack upon him is of a quite different character. It will be recalled that Mr Randall invited us to read extracts 1-4 with brackets inserted around the offending words. This was an utterly compelling piece of advocacy. There is a world of difference between saying: "*If he chose to depart never to be seen again*" and gratuitously adding "*if he chose to depart* ***on his flying carpet*** *never to be seen again*". Likewise it would have been unexceptional to say that the Sheikh would be present "*to see that no stone is unturned",* without glibly adding ***"every grain of sand is sifted***". The judge could well make the point that he did not know what lines of communication were available to Saudi Arabia or wherever the Sheikh may be yet once again there was no need for the uncalled-for addition of "***at this I think relatively fast-free time of the year***". Without the additional words, the judge was making fair points but the incidental injections of sarcasm were quite unwarranted.

29. The third example is the worst. Mr Cayford quite clearly did not understand why the judge had interrupted his submission that the Sheikh's case was not entirely clear by commenting that the affidavit was "***a bit gelatinous***". He did not understand the interruption because he would not have appreciated that, as Mr Randall correctly submits, the judge was setting himself up to deliver the punch line to his joke, ***"a bit like Turkish Delight"***.

30. When I said at the beginning of the judgment that I found this case embarrassing, no little part of my embarrassment comes from my belief that the injection of a little humour lightens the load of high emotion that so often attends litigation and I am the very last judge to criticise laughter in court. I fully appreciate the conventional view that jokes are a bad thing. Of course they are when they are bad jokes - and I am sure I have myself often erred and committed that heinous judicial sin. Singer J. certainly erred in this case. These, I regret to say, were not just bad jokes: they were thoroughly bad jokes. Moreover, and importantly, they will inevitably be perceived to be racially offensive jokes. For my part I am totally convinced that they were not meant to be racist and I unreservedly acquit the judge of any suggestion that they were so intended. Unfortunately, every one of the four remarks can be seen to be not simply "*colourful language*" as the judge sought to excuse them but, to adopt Mr Randall's submission, to be mocking and disparaging of the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith.

31. I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity. Making every

allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey. Singer J. may talk too much; yet he is a good judge. Unfortunately for him and for all of us, on this occasion he crossed the line between the tolerable and the impermissible. For that reason, allowing the appeal is inevitable.

A postscript

32. It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so frequently coming to this Court in ways that do none of us any good. It is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Whilst judges must heed the exhortation in *Locabail* not to yield to a tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour.

Lord Justice Mummery:

33. I agree.

Lord Justice Wilson:

34. I also agree.

John Randall QC and Huw Jones (instructed by Wragge & Co LLP) for the Sheikh Khalid Ben Abdullah Rashid Al Fawaz
Philip Cayford QC and Victoria Domenge (instructed by CKFT Solicitors) for Wendy Ann El-Farargy