Neutral Citation Number: [2017] EWCA Civ 29

Case No: A2/2015/2708, 2795 and 2721

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
The Hon Mr Justice Dingemans
[2015] EWHC 1084 (QB)
[2015] EWHC 2021 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2017

Before:

LORD JUSTICE PATTEN
LADY JUSTICE KING
and
LORD JUSTICE SIMON

Between:

HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco	**Appellant**
and	
Elaph Publishing Limited	**Respondent**

And between:

Elaph Publishing Limited	**Appellant**
and	
HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco	**Respondent**

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Justin Rushbrooke QC and **Richard Munden** (instructed by **Lee & Thompson**) for the Appellant on the first appeal and Respondent on the second appeal
Heather Rogers QC and **David Glen** (instructed by **Payne Hicks Beach**) for the Respondent on the first appeal and the Appellant on the second appeal

Hearing date: 30 November 2016

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Approved Judgment

Lord Justice Simon:

Introduction

1. This appeal concerns a claim brought by Prince Moulay Hicham Ben Abdallah Al Alaoui of Morroco ('the Prince') against Elaph Publishing Limited ('Elaph'), a company incorporated in England and Wales, in respect of an article published in Arabic on Elaph's news website on 8 and 9 October 2014.

2. On 9 October the article was removed from the website following a complaint by solicitors acting for the Prince, and on the following day proceedings were begun. The Particulars of Claim, served on 8 December, annexed a certified translation of the article.

3. On 30 January 2015, Elaph applied under CPR Part 53 PD 4.1 for an order from the Court, (1) that the words relied on were not capable of bearing, (a) the meanings pleaded in §§6.1 to 6.3 of the Particulars of Claim, or (b) any other meaning which was defamatory of the Prince; and (2) that the claim be struck out and summary judgment entered in favour of Elaph.

4. The relevant parts of the article are set out below, with the paragraph numbers added by Dingemans J ('the Judge') in his first judgment. The article was headed with a photograph of the Prince.

> Using former boxer Zakaria Moumni in a premeditated plot:
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> Moulay Hicham schemes to entrap Mounir Al-Majidi
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> [1] Moulay Hicham does not pass up any chance to sabotage the image of Moroccan King Mohammed VI, and the latest ploy utilised former boxer Zakaria Momeni to bring down Mounir Majidi, assistant and adviser to the King.
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> [2] Beirut: Everything that harms Morocco always involves Moulay Hicham. This argument has become increasingly prevalent in the corridors of the royal family palace in light of the machinations that the cousin of King Mohammed VI never ceases to weave, the most recent of which, recently involved a take-down of Mounir Majidi, an aid very close to the Moroccan monarch's heart.
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> Premeditated plots
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> [3] Reports emerged stating that Moulay Hicham met with former Moroccan boxer Zakaria Moumni on 26th June this year in the Fouquet Hotel in Paris in order to urge him to raise a case against Majidi in French courts on charges of making death threats. Hicham requested that Moumni keep the case a secret, so that Majidi could be forcibly held when he came to France.
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> [4] Hicham launched a similar strike last February on Abdellatif Hamouchi, head of Morocco's anti-espionage

> agency, who was called by the French judiciary for investigation while staying at the home of the Moroccan ambassador in Paris. This issue had a negative impact on French-Moroccan relations.
>
> [5] Moumni insists that the alleged meeting happened only by coincidence - but this was the response that Hicham whispered into his ears. The latter is working very hard not to answer the fundamental question: what is the difference between a chance meeting that he claims took place and the meeting that lasted half an hour? Moumni admits, however, and without equivocation, that he met Moulay Hicham and his wife in the Fouquet hotel because he, himself, frequents the hotel and happened to see the Alaouite Prince, himself, visit that day.
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> Coincidence or conspiracy!
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> [6] Few believe the story of the accidental meeting, especially since Hicham visited the George V Four Seasons Hotel, owned by a relative of Saudi Prince Alwaleed bin Talal, when he was in Paris. The Fouquet Hotel, where the meeting took place, is situated on the same street.
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> [7] News reports list some of the finer details of this meeting, claiming that the Moroccan Prince spoke frequently while Moumni spent half an hour listening attentively. Hicham incited the former boxer to say, at every occasion and wherever he went, that Mounir Majidi, Secretary to the Moroccan King, threatened to kill him in France. He also urged him to submit a judicial complaint against Majidi, informing him of people that would help him do so and asking him to contact them.
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> [8] Moumni himself is the world champion of a type of Thai boxing called 'light contact.' He currently benefits from a decree issued by late Moroccan King Hassan II which appointed him Sports Advisor of Morocco, despite the fact that the sport that he practices is not included on the list of sports recognised by the Olympics. In 2006 Moumni received authorisation to operate two large fare-operated vehicles and take all the revenues. One would be placed under his name and the other under his father's name. Thus, the man set fire to the Kingdom's highest-ranking centres whose revenues he benefits from, just like a man who drinks from a well and then throws a stone inside it …

5. Paragraph 6 of the Particulars of Claim pleaded that the natural and ordinary meaning of these words was:

> (1) that the Claimant had orchestrated a plot to sabotage the image of King Mohammed VI of Morocco whereby, in the course of a pre-arranged meeting at the Fouquet Hotel in Paris

> on 26 June 2014, he had induced [ ] Moumni: (a) to make false allegations against the King's close aide [ ] Majidi that he, Majidi, had threatened to kill Moumni, and (b) to bring a criminal complaint against Majidi on the basis of such false allegations so that Majidi would be arrested in France;
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> (2) that the Claimant had instructed Moumni to lie to cover up the plot by claiming, falsely, that his meeting with the Claimant at the Fouquet Hotel had been coincidental;
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> (3) that the Claimant had orchestrated a similar plot against [ ] Hamouchi, the head of Morocco's anti-espionage agency, in the February before this, which had resulted in Hamouchi's being called in for questioning by the French judicial authorities, and the Claimant was therefore responsible for the resultant negative impact on French-Moroccan relations.

The Judge's first judgment

6. In a judgment dated 24 April 2015, the Judge noted that there had been an alternative application for a preliminary determination of the meaning of the words complained of. This application had not been pursued because it raised issues about whether the statement had 'caused or is likely to cause serious harm' to the reputation of the Prince, within the meaning of s.1 of the Defamation Act 2013, and because it was common ground that there was relevant evidence about the extent of the publication on the internet.

7. The Judge directed himself that a decision on an application as to whether words were capable of bearing a defamatory meaning was to pre-empt perversity, and recorded the arguments as to meaning advanced on behalf of each side.

8. He set out the principles that applied when determining meaning; and it will be necessary to return to these later in this judgment. For present purposes it is sufficient to note a passage in the judgment in [14]:

> It follows that it is not enough that the words should damage the claimant in the eyes of a section of the public only, see *Modi v Clarke* [2011] EWCA Civ 937. It does not defame someone to say that he wishes to destroy the structure of world cricket, because that depends on the views of that section of the public interested in the sport on the current structure, see paragraph 30. This mirrors Strasbourg jurisprudence which emphasises the latitude given to statements about public figures and political matters where reasonable persons may have very different views about actions and systems of government, see *Lingens v Austria* (1986) 8 EHRR 407 at paragraph 41 and the analysis in *Curran v Scottish Daily Record and Sunday Mail Ltd* (2011) CSIH 86 at paragraphs 51 and 53.

9. The Judge referred to the evidence which had been lodged on each side, and found that it did not assist him. He proceeded on the basis that the hypothetical intelligent

reader would have the general knowledge that Morocco was a monarchy and that the King was its ruler. However, in his view the application had to be determined solely on the basis of the article and its translation.

10. The Judge decided that the words complained of did not sustain a meaning that the Prince had induced Moumni or anyone else to make 'false' allegations against Majidi so that he might be arrested. The use of the words 'premeditated plot' or 'ploy' showed only that it was planned and not that it was fabricated. The mere fact that matters are kept secret does not suggest that they are false.

11. So far as §6.1 and §6.3 of the Particulars of Claim were concerned, the Judge concluded, at [22], that the article could be understood to mean that the Prince urged Moumni to raise a case against an aide close to the King of Morocco on charges of making a death threat, and had launched a similar strike against Hamouchi, the head of the anti-espionage agency; and that this was part of a campaign to harm the image of the King. The article appeared to take the line that any such approach was wrong. However, that would depend on the views of that section of the public interested in the politics of Morocco. It was not capable of being defamatory of someone to say that they were working against the interests of a ruler for the reasons given in *Modi v. Clarke*. The Judge went on to record that he recognised the Prince's concerns about an article which he contended was inaccurate, adding that an inaccurate article was not necessarily defamatory.

12. For reasons set out at [23], the Judge also concluded that the position was different in relation to §6.2 of the Particulars of Claim. A reasonable reader might conclude that the article meant that the Prince had instructed Moumni to lie about the meeting happening by coincidence; and this meaning was capable of being defamatory of the Prince because it suggested he had lied. It is unnecessary to say anything further about the Judge's view of §6.2 since it is not the subject of any appeal by Elaph.

13. The Judge ordered that §6.1 and §6.3 of the Particulars of Claim be struck out and directed that the parties should have time to consider the judgment, with a view to the Prince's advisors considering whether the Claim Form and Particulars of Claim should be amended, see [27].

The Judge's second judgment

14. In the light of the Judge's observations at [22] and [27], the Prince's solicitors issued an application notice dated 29 June 2015, seeking permission to amend §6 of the Particulars of Claim and to add a new claim under the Data Protection Act 1998 ('the DPA').

15. The main change to the pleaded meaning was to add a new §6(1):

> … that the Claimant was endlessly plotting, scheming and weaving machinations in order to damage his country Morocco and its monarch Mohammed VI, who was his own cousin, thereby showing himself to be devious, underhand and disloyal.

16. There was a consequential amendment to what had previously been §6(1), which now became §6(2), setting out that, 'the most recent example of this was a secret plot which was orchestrated' to sabotage the image of the King.

17. The claim under the DPA identified the personal data relating to the Prince that was stored and processed by Elaph (§7A), contended that Elaph was the data controller in respect of such personal data (§7B) and claimed that the processing was a breach of s.4(4) of the DPA, in that Elaph retained and published inaccurate personal data in breach of the first and fourth Data Protection Principles (§7C).

18. Elaph resisted both applications; and the second judgment (dated 24 July 2015) dealt with both parts of the application.

19. So far as the Prince's application to amend §6 was concerned, the Judge repeated his reference to *Modi v. Clarke*, and reiterated his previously expressed view:

> 4. … The article does suggest that [the Prince], a cousin of the King, was plotting, scheming and weaving machinations against the King of Morocco, and suggests that such conduct was wrongful. However, whether such conduct is wrongful depends on the views of that section of the public interested in the politics of Morocco. It is not, in my judgment, capable of being defamatory of someone to say that they are plotting, scheming or weaving machinations against the King for the reasons given in *Modi v Clarke*.
>
> 5. In my judgment both the original suggested meanings in paragraphs 6.1 and 6.3 and the new meaning have the appearance of contrived meanings, fashioned so that an action in defamation can be pursued when (as appears from paragraph 22 of the original judgment) [the Prince's] real complaint is that the article was inaccurate.

20. For these reasons he refused the Prince's application to amend §6 of Particulars of Claim.

21. So far as the DPA claim was concerned, the Judge recorded Elaph's objections to the amendment, namely: that the claim was not legally sustainable because it was an attempt to fashion a remedy for damage to reputation where the law of defamation did not provide one, that the amendment was late, that there was no real and substantial tort, and that the litigation would 'not be worth the candle.'

22. Having considered the authorities, the Judge decided that there was nothing contrary to principle in allowing a DPA claim to proceed in combination with a defamation claim, see [8]; that the application was made before any defence had been served and was 'not very late', see [9]; that it was arguable that the Prince had a principled interest in ensuring an accurate record of his political activities and that such an interest might justify pursuing proceedings at proportionate cost in circumstances where there did not appear to be any voluntary body which could provide a binding adjudication on the accuracy of the article, see [10].

23. For these reasons he allowed the Prince's application to add the DPA claim to the Claim Form and to the Particulars of Claim.

The Prince's appeal

24. In summary Mr Rushbrooke QC's submission was that, although the Judge referred to the principles which applied to 'capability' applications, his exclusion of the original and amended pleaded meanings involved an over-literal approach to the article. There was nothing perverse about the meanings relied on. The article alleged that the Prince had incited Moumni to make false allegations against Majdi and Hamouchi; and the pleading extended only slightly beyond the actual words used in alleging that this meant that the Prince thereby showed himself in the words of the new §6(1) to be 'devious, underhand and disloyal.'

25. For Elaph, Ms Rogers QC, submitted that the Judge was right for the reasons he gave. The Prince's case founded on falsity was a contrivance that went beyond the words that were used. Stripped of a gloss that the Prince knew that (or was reckless as to whether) Moumni's complaints were false, there was nothing about what the Prince was said to have done, or what he was alleged to have encouraged Moumni to do, that was either discreditable or defamatory. Although the article implied that the Prince was pursuing a particular agenda and was disloyal, this was not defamatory in the light of the wider limits of acceptable political criticism as explained by Laws LJ in *Waterson v. Lloyd* [2013] EWCA Civ at [66] and [67], and the authoritative statements that imputations of disloyalty are not defamatory, referred to in the judgment of Warby J in *Rufus v. Elliott* [2015] EWHC 807 (QB) at [42]-[45].

26. CPR 53 PD 3.1 provides:

> Ruling on Meaning
>
> 4.1 At any time the court may decide –
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> (1) whether a statement complained of is capable of having any meaning attributed to it in a statement of case.

27. As the editors of the White Book observe, since the coming into effect of s.11 of the Defamation Act 2013, there will rarely be any purpose in seeking a ruling as to what meaning the words are capable of bearing. Instead the Court will be asked at an early stage to determine the actual meaning of the words either as a preliminary issue or by way of a summary disposal under Part 24.

28. This is because on a 'capability application' the threshold for exclusion is a high one, see for example Neill LJ in *Berkoff v. Burchill* [1997] EMLR 139 at 143:

> The court should exercise great caution before concluding that words are incapable of a defamatory meaning.

29. In *Rufus v. Elliott* [2015] EWCA Civ 121, [2015] EMLR 17, Sharp LJ expressed the appropriate approach for the Court at [8].

> The Judge's task under CPR PD 53 para 4.1 is no more and no less than to 'pre-empt perversity': see *Jameel v The Wall Street*

> *Journal Europe Sprl* [2004] EMRL 6. Though this issue normally arises in the context of rulings made about the meanings pleaded by the parties, it seems to me a similarly high threshold applies to the question whether words are capable of being defamatory of the claimant.

30. Sedley LJ's observations in *Berezovsky v. Forbes Inc* [2001] EWCA Civ 1251, [2001] EMLR at [16], are to similar effect. The approach is 'an exercise in generosity, not parsimony'; and if it appears that a judge has erred on the side of an unnecessary restriction of meaning this Court may be readier to adopt its own view of the legitimate ambit of meaning, while having proper regard to the judge's opinion.

31. The Judge's conclusion that (apart from §6.2 of the un-amended pleading) the article was incapable of bearing a defamatory meaning was based on his view, expressed at [22] of the first judgment:

> It is not, in my judgment, capable of being defamatory of someone to say that they are working against the interests of a ruler for the reasons given in *Modi v Clarke*.

32. That is plainly right as far as it goes. However, in my judgment, the decision in *Modi v. Clarke* does not provide as much support for his conclusion as the Judge thought. *Modi v. Clarke* concerned a capability argument in relation to an email sent by the defendant to the President of the Board of Control for Cricket in India which was highly critical of the claimants (Mr Modi and IMG (UK) Ltd), see [5] of the judgment of the Court of Appeal. The Judge at first instance (Tugendhat J) had concluded at [68] of his judgment, reported under neutral citation reference [2011] EWHC 1324 (QB):

> Right thinking members of society have, by definition, a view of what is right or wrong in personal conduct. But the court cannot attribute to members of society generally any view on what might be the proper structures for the governance of cricket or the rules they should apply to any sport. That is not a matter of right or wrong in the sense of what is required by the legal definition of what is defamatory.

33. This point was picked by the Court of Appeal in the judgment of Thomas LJ (as he then was) with which the other members of the Court agreed.

> 30. Actions designed to destroy cricket's structure or which could be viewed by the cricketing authorities as requiring banning a person from cricket because of the desire to destroy its structure would only be considered defamatory by that section of the cricketing public which has faith in the current structure. It is difficult to see how saying of someone that he wishes to destroy the structure of world cricket would be considered by society at large as being disparaging; there may be all sorts of reasons why someone would wish to change the structure of cricket, but it would be only to that section that believed in the present structure that making such a statement

> would be disparaging. If, by way of example in another world sport, a person was seeking to undermine the existing structure and that person had meetings without telling the establishment, the view of that person's conduct would depend entirely upon the views of that section of the public interested in that sport on the current structure.

34. Thomas LJ went on to consider various other pleaded meanings which he did not consider to be defamatory (or capable of being defamatory), see [31-32] before returning to this point:

> 33. … A person seeking to bring about change cannot always abide by the rules of activity he is seeking to change. An accusation that he is breaking the rules is therefore only disparaging in the eyes of that section of the cricketing public that believes in the current structure.

35. It was on these passages that the Judge primarily based his view that it was not defamatory to say of someone that he was working against the interests of a ruler. The judgment of Thomas LJ then considered the position of Mr Modi.

> 34. The position in respect of Mr Modi is, however, different to other people who might be engaged in the conduct which I have described. I agree with the judge that no one is likely to think less of Mr Modi because he is said to have expressed rebellious ideas for the future of cricket, as it is possible to hold strong dissenting views within an organisation without in any way being dishonourable.
>
> 35. However, although in respect of others who acted as Mr Modi did, it could not be said the e-mail and letter contained anything that was capable of being defamatory, the e-mail is capable of meaning that Mr Modi was acting dishonourably as he was breaking the rules to which he had subscribed. Given his position as a Member of the Board of Control of Cricket in India and an alternate director of the International Cricket Council, the reader would know he had agreed to be bound by the rules and practices of those organisations that govern international and national cricket. The e-mail was capable of meaning that he had by his actions undermined those rules to which he was party whilst professing to be bound by them; he had engaged in secret meetings and was therefore acting dishonourably.

36. The context is important. In my view *Modi v. Clarke* is support for a more limited proposition than the Judge was persuaded to accept. It will not be defamatory of itself to say that someone is working against the interests of an institution or a ruler for the reasons given by Thomas LJ. However, it <u>may</u> be, depending on the particular words used and their context. The circumstances are likely to be crucial. In the case of Mr Modi the words were capable of meaning that he was acting dishonourably by undermining the rules to which he subscribed while pretending to be bound by them.

37. In the present case the article goes further than simply suggesting that the Prince was agitating for reform and acting against the interests of the King of Morocco. The article was not set in a political context, and the focus of the allegations related to the means he used and the motivation ascribed to him. The words 'schemes', 'entrap', 'ploy', 'machinations' and 'weave' are, in my judgment, capable of bearing the meaning that the Prince had shown himself devious, underhand and disloyal. Such a meaning is not the product of 'some strained, or forced or utterly unreasonable interpretation', see Eady J in *Gillick v. Brook Advisory Centres*, approved in Court of Appeal at [2001] EWCA Civ 1263 at [7], and *Jeynes v. News Magazines Ltd and anor* [2008] EWCA Civ 130 at [14]. The article is capable of being regarded by the public generally as an attack on the Prince's integrity and character such as would seriously harm his reputation in the eyes of reasonable people.

38. For these reasons, I would allow the Prince's appeal and permit the amendments which the Judge refused.

Elaph's appeal

39. Ms Rogers accepted that it may be appropriate for a claimant to advance a defamation claim and a DPA claim in the same proceedings; but this is subject to the Court being satisfied that its resources are appropriately and proportionately used in accordance with the requirements of justice, see *Jameel v. Dow Jones & Co Inc.* [2005] QB 946 (CA) at [54]. The Court must be satisfied that the DPA claim would be a necessary and proportionate interference with a defendant's rights under article 10 of the ECHR (the right to freedom of expression), see for example, *Lingens v. Austria* (1986) 8 EHHR 407 (ECtHR) at [41] and [42]; *Criminal proceedings against Lindqvist* (Case C – 101/01) [2004] QB 1014 (ECtJ) at [88] and [89]; and *Lonzim Plc v. Sprague* [2009] EWHC 2838 (QB) at [33]. In the present case, the DPA claim is directed to inaccuracy in a report relating to political activities in France, in circumstances where the article was promptly removed from Elaph's website and where there is no risk of future publication. In the context of the necessity of the interference, it was notable that the DPA claim had not been raised in either the original letter of complaint or the original pleading. In summary, she submitted that the case is either a defamation case or it is nothing; and the notion that factual inaccuracies in the context of political debate should be the subject of a DPA claim would have far-reaching consequences.

40. Mr Rushbrooke submitted that, although the libel and DPA claims were distinct, the weaker the libel claim, the more important it was that the Prince would be able to advance the DPA claim. Although the article had been removed from Elaph's site, there had been no undertaking not to republish it, no admission that its contents were untrue, no offer to correct the article and its contents had been repeated by other publications.

41. In my view the Judge was plainly right to reject Elaph's argument that the application to amend was made too late. There was no significant delay and the application had been made before any Defence had been served.

42. I think he was also right not to attempt to identify any broad overarching principle which should apply where it is sought to join defamation and DPA claims. I would accept that doubts have been expressed about the necessity and proportionality of advancing parallel claims and remedies, when damaging information has been

published which is not defamatory. In *Quinton v. Peirce* [2009] EWHC 912 (QB) Eady J expressed the view relied on by Elaph in the present case at [87].

> I must now turn to the Data Protection Act. I am by no means persuaded that it is necessary or proportionate to interpret the scope of this statute so as to afford a set of parallel remedies when damaging information has been published about someone, but which is neither defamatory nor malicious. Nothing was cited to support such a far ranging proposition, whether from the debate in the legislation or from subsequent judicial dicta.

43. However, in *Law Society v. Kordowski* [2011] EWHC 3185 (QB), Tugendhat J indicated why it may be appropriate to plead a remedy under the DPA in addition to a claim in libel (and, in that case, harassment). The different causes of action are directed to protecting different aspects of the right to private life: the relevant provisions of the DPA include the aim of protection from being subjected unfairly and unlawfully to distress, see [74].

44. I can see no good reason of principle why a claim under the DPA cannot be linked to a defamation claim, and why it should not be added by amendment if the test for amendment is otherwise met. In the present case Elaph contend that the article is not defamatory of the Prince. If that defence succeeds the DPA claim may found an appropriate alternative means of redress, although §8 of the Amended Particulars of Claim, which treats the damage arising under the two claims as effectively the same, will require some further thought by those advising the Prince.

45. This is not to say that the Court is disabled from managing the amended claims in accordance with the overriding objective, including dealing with cases in a way which is proportionate, see CPR Parts 1 and 3.1. On the contrary, this is very clearly a case which calls for careful management so as to ensure that the litigation process is directed to achieving a just result in a proportionate manner, and, emphatically, is not used as a means of stifling criticism under the guise of correcting inaccuracy.

46. For these reasons I would allow the Prince's appeal and dismiss Elaph's appeal. So far as the former is concerned, and subject to any further submissions, I would direct that this Court's order should record that the appeal is allowed from the second judgment.

Lady Justice King

47. I agree.

Lord Justice Patten

48. I also agree.