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TRANSCRIPT OF PROCEEDINGS

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

7 Rolls Buildings
Fetter Lane
London

[2022] EWHC 2219 (Ch)

Before THE HONOURABLE MR JUSTICE MICHAEL GREEN

IN THE MATTER OF

(1) HARPREET KAUR & 2 OTHERS **(Claimants)**

-v-

(1) GURMAIL SINGH MALHI & 22 OTHERS
(24) KULJINDER SINGH SHERGILL & 8 OTHERS
(33) HER MAJESTY'S ATTORNEY GENERAL **(Defendants)**

MR J WINFIELD appeared on behalf of the Claimants
MR S GILL and MR Z KELL appeared on behalf of EC (20 DEFENDANTS)
MR M WYNNE JONES appeared on behalf of MEC (9 DEFENDANTS)
THE DEFENDANT GURMAIL SINGH MALHI & 2 OTHERS appeared in person

JUDGMENT
9th AUGUST 2022, 17.06-17.37
(AS APPROVED)

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MR JUSTICE MICHAEL GREEN:

1. This is an application for injunctions, effectively mandatory injunctions, brought by Ms Harpreet Kaur and originally four others but now only two other claimants against 33 defendants, who I will explain in a moment. The application and the claim concern the constitution and right to membership of a very large Sikh temple or Gurdwara located in West London. It is said to be the largest Gurdwara outside of India. It is owned and operated by a charity called Sri Guru Singh Sabha, Southall, which I will call the "charity".

2. The Gurdwara is open to the public and very many Sikhs visit, worship, and use the facilities of the Gurdwara every week. But this application is concerned with who is entitled to vote in elections to the executive committee, the equivalent of the trustees of the charity. The election is due to take place on 2 October. It appears that this has been an issue for some time and is causing division within the community.

3. The claimants are worshippers at the Gurdwara but have been denied membership because they are not permanently resident in the four London boroughs specified in the constitution, principally because of their immigration status and they cannot prove that they have the right indefinitely to remain in the UK. As I say, there are now only three claimants, two of whom are husband and wife. The original second claimant and third claimant, who are mother and daughter, yesterday discontinued their claims. As can already be seen, there are divisions everywhere.

4. The claimants are represented by Mr Joshua Winfield, instructed by Lincoln Lawrence Solicitors. The charity is an unincorporated association and has a constitution which prescribes how elections are to be run. It also has an ADR clause requiring the parties to engage in mediation. The 1st to 23rd defendants are the present members of the executive committee. The 24th to 32nd defendants are the members of the election committee, which oversees the election under the constitution. The Attorney General has also been joined, as these are charity proceedings. However, and this is an issue before me, and one which I raised last week immediately on seeing the application, the Charity Commission has not yet given consent to these proceedings and its consent is required by section 115 of the Charities Act 2011, as the claimants accept.

5. The defendants are a little divided, but the vast majority oppose this application. Defendants 2 to 12, 15 to 18, and 20 to 23 are represented by Mr Satinder Gill and Mr Zachary Kell instructed by Longmores. Defendants 24 to 32, the members of the election committee, are represented by Mr Martin Wynne Jones, instructed by Cameron Clarke. The 1st, 13th and 19th defendants are litigants in person, and they sent me a letter on 5 August saying that they are litigants in person and that they do not want this litigation to continue and that they have tried to resolve this matter internally and they wish for peace in the community.

6. The first defendant also filed a respectful position paper saying that he would abide by any order of the court. In fact, the first defendant, who is the president of the charity, made submissions before me, making clear that he personally supported all residents, regardless of their immigration status, being allowed to vote in the election and he said that there were hundreds of people in the same position as the claimants.

7. That only, I think, leaves the 14th defendant, whose position I do not know.

8. It is in my view most unfortunate that this matter has been brought to the court in this way and in the vacation. This is a charity, and it is vitally important that its resources are not wasted on legal disputes that should be sorted out in an amicable and respectful way internally, as I am sure that all parties would wish to do so in accordance with the tenets of their faith, as eloquently expressed by the first defendant.

9. But there are a lot of individual defendants named in these proceedings and they may incur personal expense. That is why there is the protective oversight of the Charity Commission, which is statutorily obliged to consider any applications for permission to bring such proceedings, by reference to what is in the best interests of the charity concerned. Because of the way this application has been brought on, we do not yet know the Charity Commission's view. If any order is or can be made by me before the Charity Commission has decided whether to give permission, there would clearly need to be a very pressing need to do so, such that it could not wait until the Charity Commission has so decided, in particular, in my view, where mandatory injunctions are being sought which may be effectively irreversible.

10. The claimants have belatedly accepted that their main claim should be stayed, pending permission from the Charity Commission or the court., But by this application, which was issued on 1 August, they still ask the court to make the following interim injunctions.

> (1) First, forbidding the defendants from refusing to register any applicant for membership of the charity based on their immigration status or any ground other than that he or she does not meet the qualifications in paragraph 10.2 of the second schedule to the constitution; or alternatively
> (2) forbidding the defendants from holding any elections to the executive committee, currently fixed for 2 October 2022, until the determination of the claim.

11. The charity is governed by its constitution, which was amended by an order of Master Price in a previous dispute on 20 December 2010. Amongst other things, that order added a mediation clause, which in my view was intended to try to avoid these sorts of disputes coming to court.

12. Under clause 16 of the constitution, the executive committee are re-elected every three years. The last election was in 2017 and, due to the effects of the pandemic, the executive committee has stayed in place after the three years and the next election is, as I have said, due to take place on 2 October this year.

13. Clause 18 provides that elections must be held in accordance with the second schedule. The process has two stages, being (1) the registration of the ordinary members, starting from a blank slate; and (2) the holding of the election.

14. The second schedule provides that:

> (1) first of all the election committee must serve a notice specifying the dates and times of the election and the membership process;
> (2) only applicants who attend at the specified time and place can be registered and they must meet the qualifications set out in paragraph 10.2. Those qualifications are as follows:

> "In order to be registered as a life or ordinary member of the Sabha, the applicant shall do the following:
> (a) have attained the age of 18 years;
> (b) are Sikhs and do not have faith in or follow any other religion or sect;
> (c) have Singh or Kaur as part of their name;
> (d) make a declaration professing his firm faith in the Ten Gurus and Sri Guru Granth Sahib Ji only;
> (e) (and this is the important provision) reside permanently within the London boroughs of Ealing, Harrow, Hillingdon, or Hounslow; and
> (f) shall pay to the election committee a membership subscription of £5 per ordinary membership and £101 for life membership."

Paragraph 10.3 then provided:

> "In order to be registered as a member of the Sabha, the applicant shall produce such evidence, if any, that the election committee shall think sufficient to establish his identity as a person named on the list referred to in paragraph 6 of the scheme and evidence of his place of residence."

(3) And paragraph 10.5 provides that:

> "The election committee may not refuse any applicant for membership who [satisfies the qualifications], but their decision on any application shall be final and unappealable in any manner whatsoever."

15. Following its return to a normal cycle, the membership and election committee was appointed on 20 March 2022. The election committee served an election notice on 12 June 2022. It set the registration period as 11 July to 14 August, from 10 am to 6 pm, and the notice contained an appendix setting out the "*evidence of identity and residence required*," which requires an applicant to prove that he or she is a citizen of Britain, the UK, or Ireland, or "*is exempt from immigration control, is allowed to stay indefinitely in the UK, has the right of abode in the UK, or has no time limit on their stay in the UK with no immigration control*."

16. The claimants say that they satisfy all the qualifications and have applied for membership but have been refused because they all have only limited leave to remain in the UK. There are apparently many other applicants in the same position, but they have not joined in these proceedings. Indeed, as I have said, two of the claimants have just dropped out of the proceedings.

17. The claimants' argument is that their immigration status forms no part of the qualifications and that the defendants have misinterpreted the residence requirement. Mr Winfield suggested that it is a simple question of construction of the constitution on which the claimants have an almost unassailable case. On the basis of this interpretation of the constitution, he urges me to grant this urgent interim relief to forbid the election committee to refuse to register the claimants, and any other applicants who meet the qualifications, regardless of their immigration status or any other extraneous matters so that they can apply or reapply for registration before the window closes at 6 pm, this Sunday 14 August.

Alternatively, they seek an order delaying the election until the issue of whether immigration status is part of the residence requirement has been resolved.

18. On behalf of the executive committee defendants who are defending, there is a witness statement from a Mr Harmeet Singh Gill. These defendants had previously argued for this hearing to be vacated on the basis that the claimants should have used the mediation clause and the failure of the claimants to obtain the Charity Commission's permission under section 115. It appears that it was only after I had raised the point that the claimants actually asked the Charity Commission for permission. There is no basis for suggesting, however, as Mr Gill did, that the claimants deliberately did not seek permission from the Charity Commission at an earlier stage, but it is unfortunate, to say the least, that it was not sought earlier.

19. So, the first point taken by the defendants is in relation to section 115. There is no dispute that these are charity proceedings and that the claimants need the permission of the Charity Commission or the court, and that they do not presently have that. There are two primary policy concerns behind this requirement. The first is that charities should not be harassed by a multiplicity of hopeless cases. The second is that if there is a dispute about the internal affairs of a charity which can be dealt with through the powers given to the Commission, resort to the court is an unnecessary and unjustifiable expense. The court can either dismiss proceedings begun without permission or grant a stay.

20. Mr Gill says the latter course should only be adopted as an indulgence to the claimants, but they should not have such an indulgence without providing a proper explanation for the lateness in seeking permission. The claimants have now offered a stay of the claim, but the court has to decide whether to accept that or dismiss the claim and require them to start again when permission is obtained.

21. Mr Winfield submitted that the court has jurisdiction to grant interim relief pending a stay for the grant of authorisation or leave and he referred to Birss J, as he then was, in his decision in *Choudhury & Anor v Stepney Shahjalal Mosque & Cultural Centre Limited & Ors* [2015] EWHC 743 at paragraph 27. He said that the urgency caused by the imminent closure of the registration window justifies the exercising of jurisdiction in this case.

22. Mr Gill, however, argued that that was an exceptional and very different case, where there were concerns about the control of funds and the threat of violence. Furthermore, the injunction was originally made in ignorance of these section 115 points. Once it was realised and brought back before Birss J, the question was whether the stay that he was imposing, as a result of the failure to obtain the Charity Commission's permission, would automatically discharge the injunction under CPR 25.10. He decided to continue with the injunction despite the stay, and implicit in that is that he considered he had jurisdiction to do so.

23. In my view, that is quite a different case to this one, where this one is being brought before the court for an injunction that would necessarily interfere in the election process that has been properly set in train. There is no jeopardy to assets and there is no real justification for the claimants having left it so late, both to ask the Charity Commission for permission and to not seek to mediate. Even assuming on the strength of Birss J's decision that there is jurisdiction, I think that the section 115 point is an important factor in deciding whether it would be just and fair to grant the injunction. If the injunction is not granted, then the question of whether to dismiss or stay the claim will arise, and I will consider that in due course.

24. The second point that is raised by the defendants concerns the mediation clause. The court has power to stay proceedings pending mediation under section 49(3) of the Senior Courts Act 1981 or under its inherent jurisdiction. The mediation clause which was inserted by Master Price in 2010 as clause 54 was in the following terms:

> "Any dispute as to the meaning and effect of any provision of the scheme shall first be referred to an independent accredited mediator to be agreed by the parties or (in the absence of agreement) appointed by CEDR, the cost of any such mediation to be shared equally between the parties unless they agree otherwise. The charity is not to pay the costs of any such mediation unless the trustees had first applied for and complied with any advice received from the Charity Commission under section 29 as regards any such payments."

25. Despite knowing of a potential dispute in relation to the immigration status requirements since 12 June, the claimants have taken no steps to use the mediation process to resolve this dispute. Mr Gill referred in his skeleton argument to the decision of O'Farrell J in *Ohpen Operations UK Limited v Invesco Fund Managers Limited* [2019] EWHC 2246 (TCC), where she said at paragraph 32:

> "The following principles can be derived from the above authorities as applicable, where a party seeks to enforce an alternative dispute resolution provision by means of an order staying the proceedings:
> (i) The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution,
> (ii) The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration,
> (iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator, or determine any other necessary step in the procedure without the requirement for any further agreement by the parties,
> (iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion the court will have regard to the public policy interests in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes."

26. It seems to me that where there is a binding ADR clause, the persuasive burden is on the party that is seeking to persuade the court that they should be allowed to continue with the proceedings despite the clause. I also think the public policy interest is stronger in relation to a charity than between commercial parties, as charities should not be wasting money on costly litigation. Mr Gill submitted that clause 54 is clear and enforceable and Mr Gill, the witness, explained in his statement that the order made by Master Price was made to try and prevent disputes of the type currently before the court from going straight to litigation and incurring massive expense for the charity.

27. The claimants have now accepted that there should be a stay of the main claim pending section 115 permission, but as the relief sought in the main claim is essentially the same as that sought in the injunction application, I think there needs to be a convincing explanation as to why the mediation clause should not bite as well and not be enforced by the court. As I have said, there is a strong public policy interest in charities resolving their disputes, particularly their internal disputes, through ADR rather than costly litigation.

28. Mr Winfield submitted that even if the mediation clause satisfied the principles (i) to (iii) in O'Farrell J's judgment, the court should exercise its discretion not to deny the claimants the interim relief sought because, first of all, a constitution is not a commercial agreement and, secondly, the underlying dispute relates to the construction of a provision within the constitution which is difficult to mediate and has caused disputes within the community in the past. There needs to be a solution, he says, that binds all present and future members, not just a compromise between these parties. He also submitted that there must be a public policy interest in allowing the court to grant interim relief in urgent cases where a mediation will not take place in time for one of the parties to have any prospect of agreeing to the relief to which it may be entitled.

29. I understand these points, but they are undermined by the total failure both to seek to mediate, which could possibly have led to a solution that would clear the matter up for the whole community, or to seek section 115 permission. Furthermore, they left it so late that it required this application to be made in the vacation, and then the lateness has been used as an argument as to its present urgency because of the membership window closing soon and there being no time to mediate or get the section 115 permission. The claimants really are the architects of the problems that they now face.

30. Turning to the substance of the application and the well-known American Cyanamid principles, Mr Winfield submitted that there is clearly a serious issue to be tried on a relatively straightforward construction question of whether the residence requirement encompasses the applicants' immigration status. He said that damages would not be an adequate remedy, as this is all about voting rights in the election, which is something that cannot be valued.

31. However, there are now only three claimants, and it is difficult to see how those three voters, out of an electorate, I am told, that is in the thousands, will have any impact on the outcome of the election. The claimants say, and this was endorsed by the first defendant, that there are potentially a large number of other affected applicants, but I do not see that they can take the benefit, those other applicants, of an interim injunction not in their name, where the underlying substantive claim has not been determined in their favour.

32. The defendants say that there will be losses suffered if the injunctions are wrongly granted. Mr Gill set out the anticipated wasted costs of a delayed election, but this only goes to show that damages may be an adequate remedy for them. Mr Gill submitted that there are potentially reputational issues at stake that may affect future donations to the charity, and that this could be significant.

33. More significantly to my mind is the fact that if the non-refusal injunction is granted and the claimants are allowed to vote, they have effectively got the relief that they were seeking in the claim. It basically determines the claim in their favour. If the election results were then challenged on the basis that the votes were wrongly allowed, further costs will be

wasted on this issue and there is a danger that the election result will be nullified and the whole thing would have to be run again. That would be in no one's interests.

34. As is well known, if this is effectively deciding the main claim, there needs to be a consideration of the likelihood of the claimants succeeding on the merits. The claimants obviously say they have a strong case, but against them is the fact that these requirements were used in the two previous elections in 2014 and 2017 and apparently the Charity Commission rejected a complaint of a similar nature in 2017. It is therefore entirely possible that the Charity Commission will not give permission on the section 115 application.

35. The defendants say that there is good reason for the residence requirement, and that is to avoid entryism by people on short-term visas coming into the area at the last minute to influence the result of the election. They say that a similar problem in the 1990s led to the charity going into administration. But against that, the claimants say that the constitution is clear, and the first defendant powerfully says that the view taken by the majority of the defendants is not conducive to a harmonious and respectful community of all Sikhs living in the relevant area.

36. I have taken all these careful submissions into account and am particularly concerned about prolonging any division that exists within the community. But I am afraid that, because of a number of factors, I am not going to make any interim injunction at this stage. The factors that I take into account are as follows:

(1) first, while there is a serious issue to be tried, the merits are not so strongly on the claimants' side that would justify granting effectively final relief and disrupting the election process which may then subsequently have to be unwound.
(2) Secondly, this is an *a fortiori* case where the claimants do not even yet have permission to bring these proceedings under section 115 and where they have failed to comply with the mediation clause despite having had time to do so. These are important protections to a charity and there has to be a good reason from the three claimants out of the many thousands of members to be allowed to disrupt the election process and cause the charity to incur substantial expense while having to deal with this.
(3) Thirdly, I do believe that matters of constitutional change or clarification in relation to charities should be made in consultation with the Charity Commission and the charity's current membership. It is not appropriate for these issues to be brought before the court by three claimants on an interim application of this sort. The matters need to be considered calmly and reflectively in the interests of the charity as a whole, not in one small group's own personal interest.
(4) Fourth, the inclusion of the mediation clause was precisely to avoid this sort of litigation and it is unfortunate that the claimants, when they knew that they would be denied membership for the purposes of the election, did not pursue mediation and engagement with the charity and the Charity Commission, which surely is the best way forward.
(5) Fifth, undertakings were offered in the claimants' witness statements as to costs. But that does not quite cover it, and although the draft order included a proper cross undertaking in damages, there is no real evidence as to their ability to comply with any enforcement of that cross undertaking.

37. Just dealing with that undertaking point further, and this was particularly argued by Mr Wynne Jones, I was handed by Mr Winfield during the course of his submissions two bank

statements said to show that the claimants would be good for the money on their cross undertaking. The statements were not supported by any evidence from the claimants. Instead, I was told that the first statement was that of the first claimant's husband. It showed a balance in his account, as of 31 July, of just under £10,000. However, as Mr Wynne Jones pointed out, this is a current account and yet in July only a sum of £41 was paid out, clearly not enough even for living expenses. This does not tell the whole story as to the first claimants' means, clearly. In fact, it does not tell me anything about the first claimants' ability to satisfy the cross undertaking, nor indeed how she is funding this litigation.

38. The other statement was from the fourth claimant, and that showed a balance of just over £10,000 as of yesterday, but that was only because of a payment in of £10,000 by someone of whom I know nothing. The average balance on the account for the past month was around £500. This is wholly inadequate evidence produced at the last minute and I am not satisfied that it provides any comfort that the claimants will be good for the money.

39. Quite apart from the costs of defending this litigation, which will be payable by the claimants if they lose it, when the cross undertaking might then become enforceable, it indicates that the claimants are not able to meet such an undertaking, and that militates strongly against any sort of injunction being made at this stage.

40. I should say that Mr Wynne Jones, on behalf of the election committee defendants, largely supported Mr Gill's submissions and the points taken by him on the mediation clause, section 115, and the merits of the application. He also argued that his clients were not proper parties to the application because they are not trustees, and that trustees are the only true representatives of the charity. However, it is fair to say that the election committee is responsible for the conduct of the election, including the admission to membership, and I can see that if there was merit to the application, the claimants would want those defendants bound also.

41. There are, therefore, serious and substantial difficulties with this application, as I just explained, and frankly this hearing should not have happened in the vacation without any proper explanation as to why the necessary hoops were not gone through by the claimants. I did pause to consider whether a delay to the election would be the least disruptive course to take, in that it would not pre-judge the substantial claim and it would not cause a huge amount of costs to be wasted. But, on reflection, I do think that that sort of disruption to the election process is not justified and there could be a very lengthy delay as a result of waiting for the Charity Commission, any possible challenge to their decision, and then a substantive judgment and possible appeal thereafter on the main claim.

42. I do not think that such a delay can be justified. The claimants are going to have to wait to see what the Charity Commission do, and then decide whether to pursue their claim, which will have evolved, I assume, to a challenge to the validity of the election.

43. If I were to have gone the other way and granted the injunction, the onus would have been on the defendants to challenge the election result, and I do not think that that would be in the charity's overall best interests. So, I am going to refuse both alternative injunctions for the reasons that I have just expressed.

44. I need to decide, in those circumstances, whether to stay the action or dismiss it. It is fair to say that Mr Gill and Mr Wynne Jones were not pushing hard for either alternative,

although they did say that it was for the claimants to satisfy me that it is appropriate to grant them the indulgence of a stay rather than a dismissal of the claim.

45. In my view, it is appropriate to keep the claim alive, subject to the stay, because this is a matter that needs sorting out one way or the other. I do not think that this was the right way of going about it, but I think it would be harsh to dismiss the claim at this stage when there is a possibility that the Charity Commission will give permission, in which case the matter would be brought to a head and the interpretation of the constitution clarified.

46. Alternatively, the constitution could be amended by using the democratic process provided for in the constitution, so that the will of the majority on this contentious issue could prevail. I am conscious that that means this is hanging over the defendants, who are individuals both acting as trustees or as officers of the charity, but I think that the best course is to leave the proceedings where they are but stayed pending a decision of the Charity Commission.

47. Can I finish by saying that I would hope that, now that this hearing is out of the way, the parties will be able to respectfully talk and attempt to come to a satisfactory solution. This is no way to resolve the charity's internal disputes and will only lead to further division and entrenchment. I therefore urge the parties to find a satisfactory solution to come together in the spirit of compromise and in accordance with the principles of their wonderful religion. I dismiss the application.

This transcript has been approved by the Judge