



Neutral Citation Number: [2020] EWHC 790 (Ch)

Case No: PT-2019-000607

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CHD)

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 08/04/2020

Before :

HIS HONOUR JUDGE JARMAN QC

Between :

(1) ARSHAD HUSSAIN

(2) MASOOD AHMED

Claimants

- and -

(1) MOHAMMED SHAMSUL ALAM CHOWDHURY

(2) MAHMUDUL HAQUE SHAFI

(3) MOHAMMAD AKHTAR HUSSAIN

**(4) THE CHARITY COMMISSION OF ENGLAND
AND WALES**

Defendants

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am Wednesday 8 April 2020.

Mr James Wynne (instructed by direct access) for the **claimants**
Mr Ahmed (of LeasideLaw) for the **second and third defendants**
The first and fourth defendants did not appear

Hearing dates: 2 April 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. This is a Part 8 claim seeking permission from the Court for the claimants to pursue charity proceedings under s.115(5) of the Charities Act 2011 (the 2011 Act). They were represented before me by counsel acting on direct access and pro-bono, Mr James Wynne. The first defendant has filed an acknowledgment of service saying he does not intend to contest the claim. The fourth defendant (the CC) have indicated that they intend to take no active part in the proceedings. The second and third defendants were represented before me by Mr Ahmed. The hearing took place remotely. After initially making an application on behalf of his clients to adjourn the hearing, which I refused giving reasons orally, Mr Ahmed continued to represent his clients throughout the hearing. I am very grateful to Mr Wynne and to Mr Ahmed for putting the case of their respective clients in a clear and focussed way and for the assistance which each gave to the court during the hearing.
2. I will say at the outset that the conclusion I have come to is not to give permission on the information presently available but to stay the claim until 15 July 2020 in order for the active parties (I shall refer to these hereinafter as the parties) to engage in mediation with a professional mediator. Both Mr Wynne and Mr Ahmed indicated they had instructions from their respective clients that they would engage in such a mediation. Although various efforts in the community have been made to assist the parties to resolve their differences these have not succeeded. The parties attempted on one occasion to engage in mediation with a professional mediator, but such a mediation did not take place.
3. Mr Ahmed submitted that a stay of these proceedings was the appropriate mechanism to enable mediation to take place. Mr Wynne submitted that such stay should take place only after permission has been granted. I will set out my reasons why I prefer the approach suggested by Mr Ahmed.
4. The dispute concerns the proper governance of the At-Taqwa Trust (the trust), a religious charity. It has a protracted and somewhat convoluted history. In light of my conclusion I need not rehearse all of what's gone on but shall summarise the history to the extent necessary to explain my conclusion. This is largely based on witness statements filed by the claimants and a number of other witnesses, and documents exhibited thereto, including notes of trustees' meetings, title documents and entries at the Land Registry, and correspondence between solicitors and with the CC. The defendants were directed to file any evidence in response by 23 January 2020. Mr Ahmed wrote to the claimants' solicitors asking for an extension of a week or so, but in the event no such evidence has been filed. He explained before me that this was because of the complex background and because of family illness and a bereavement in the family of one of his clients. As he accepted, this is not a compelling explanation. However, during the course of his submissions, he took me to a number of the documents in order to illustrate the points he was making and made a few other points upon instruction.
5. That history goes back to 2013, when the trustees of the trust included the parties. They were renting the building from which they carried out religious and community activities of the charity. This comprised a ground floor comprising some five rooms, a WC and store, and a first floor comprising some three rooms plus WC. There were discussions about how the purchase may be funded, and the claimants accept that they were present at meetings where one of the funding options discussed was that the first floor would be leased to a member of the trust's community at a premium to help fund the purchase.

They say that this was a fall-back position in case fundraising did not raise all that was needed. There are handwritten notes of meetings of trustees in November 2013 which show that it was agreed that this proposal would be put into effect and the first floor leased to the second-defendant's father for a premium of £90,000. There is a factual dispute between the parties as to whether these parts of the notes accurately reflect the discussion.

6. In the event, the trust upon purchase of the entire property, purported to grant a 160 year lease from 1978 at a premium of £90,000 and a peppercorn rent to the second defendant, he says at the request of his father who is elderly. The lease was signed on behalf of the trust by two trustees, one of whom was the third defendant, purportedly on the basis that they constituted the majority of the trustees for the purposes of the 2011 Act.
7. The claimants and their witnesses say that they only found out about this in 2014 when there was discussion about moving a kitchen on the ground floor, upstairs, when they say they were told by or on behalf of the second defendant that he owned the upstairs. The second and third defendants say that the claimants agreed to this and rely upon the notes of trustees meetings and a letter from the solicitors dealing with the lease to the second defendant, which on the face of it appears to have been forwarded at the time to the first claimant. In 2014 the claimants sought to challenge the transaction. This lead eventually to their being removed as trustees. They say that this, and subsequent appointments of other trustees, was invalid and not in compliance with governance documentation.
8. The claimants made complaints to the CC. By letter dated 13 July 2015 the latter having investigated the matter found that there were breaches of sections 117 to 120 of the 2011 Act in that the lease to the second defendant amounted to a disposal of property of the trust to a connected person. The CC refused to ratify this retrospectively because of the fundamental dispute between the parties. However, it was indicated that the present trustees had been given clear advice about how to proceed with such a transaction and had undertaken to co-operate with the CC to take such measures. Pending receipt of confirmation of such measures, it was indicated that the file would be closed. In respect of the dispute between the parties concerning governance of the trust, it was recommended that this dispute should be referred to mediation with an independent mediator.
9. It is not clear to what extent if at all these measures were complied with. It is also unclear whether the £90,000 has been paid to the trust. Mr Ahmed asserts on behalf of his client that each of these have been complied with, but in the absence of evidence from them it is unclear how it is said to have been complied with. It appears that his clients may be claiming that £60,000 of this has been paid by way of the forgiveness of a loan to the trust by the second-defendant, and there was subsequent correspondence with the CC concerning that and the outstanding £30,000.
10. The claimants say that as they have been ousted from taking part in governance, they are not clear about the position. However, it does appear that the CC have not indicated that they are not satisfied with the steps taken to remedy the transaction.
11. As for mediating the remainder of the dispute, both sides accept this has taken place, although they give different reasons which are not altogether clear. What is clear is that in 2016 in correspondence with the claimants' then solicitors, the CC gave as one of the reasons, if not the main reason, for refusing permission to bring charity proceedings, that

mediation had not taken place and that such permission would only be given when all other attempts to resolve the dispute without recourse to litigation had been tried and failed.

12. The claimants then filed a claim on CE-file in this court on 26 September 2017 substantially in the same form as the present proceedings and, as Mr Ahmed, pointed out, with substantially the same evidence in support. Mr Wynne was unable to say precisely why that claim was not proceeded with, other than to say that the claimants were then unrepresented and were unsure or unable to progress the claim, and that is why they thought it better to start afresh with the present claim. I have since checked CE-file, and it appears that the claim was simply filed and then nothing else is entered. There is no correspondence with the court. Giving due allowance to the fact that the claimants were then unrepresented, in my judgment it is not impressive that the claim was simply filed and nothing else done.
13. The claimants then wrote again to the CC in the early part of 2019 to ask them to complete their investigation and included a transcript of proceedings in the First-tier Tribunal concerning the beneficial ownership of another property purchased by the second defendant where the account he gave that he was the sole beneficial owner was rejected as dishonest. The CC again refused permission to bring charity proceedings and in September 2019 closed their file on the trust. That is what led to the present claim.
14. Mr Wynne set out the principles applicable to the grant of permission by the court in his helpful skeleton argument. He submitted that the CC appears to have reviewed the documentation, upholding the transfer of the lease, but has not addressed the claimants' concerns that the proper trustees have been excluded from the trust and do not support the decisions of those purporting to the CC to be the trustees. The present claim is brought to establish proper control of the trust and its property, and to obtain the return of the property unlawfully transferred to the second defendant.
15. S.115(5) states:

“(5) Where subsections (1) to (4) require the taking of charity proceedings to be authorised by an order of the Commission, the proceedings may nevertheless be entertained or proceeded with if, after the order had been applied for and refused, leave to take the proceedings was obtained from one of the judges of the High Court attached to the Chancery Division.”
16. CPR Rule 64.6 and Practice Direction 64A paragraph 9 deals with applications under s.115(5). Norris J gave further guidance in *Rai v Charity Commissioners of England and Wales* [2012] EWHC 1111 (Ch). This may be summarised for present purposes as follows:
 - i) The purpose of the statutory provision has been said to be to prevent charities “frittering away money subject to charitable trusts in pursuing litigation relating to internal disputes” (paragraph 21).
 - ii) When acting under section 115(5), the Court is not acting as an appellate court, but is exercising its own jurisdiction (paragraph 22).

- iii) The Court's jurisdiction is conferred in unfettered terms (paragraph 23).
- iv) In all (save exceptional) circumstances, a leave application should not (even where a with notice hearing is required) be treated as an opportunity for a dress rehearsal of the final hearing of the claim, the hearing is an opportunity for a proposed Defendant to advance any “knockout” points (paragraph 24).
- v) The Court should have at least as much evidence before it as was made available to the Commission (paragraph 25).
- vi) The fact that the Commission has refused permission is relevant evidence, and the Commission's decision is entitled to an appropriate degree of respect given the weight of expertise behind it (paragraph 26).
- vii) Applicants must have a legally sustainable claim to advance in the prospective proceedings, but that is not a sufficient condition for the grant of leave (paragraph 27).

17. In paragraph 28, Norris J said this:

“Last, the approach which I intend to adopt is to ask: if the Applicants have a legally sustainable dispute, is the commencement of litigation the best (or the least worst) course in the interests of the charity as a whole to deal with that dispute? Litigation may be the best course for the Applicants to pursue to achieve their objective. But it is the charity’s interest (not that of the Applicants or proposed Respondents) that is the focus of the inquiry.”

18. I am not satisfied on the information presently available that litigation is the least worse course in the interest of the trust. I agree with the CC that that should not be considered until the parties have engaged in a meaningful way in mediation with a professional mediator. The way in which each side has engaged in litigation has been far from impressive (the claimants in respect of the 2017 claim and the second and third defendants in respect of the present claim). They should engage fully with mediation, which to be successful usually requires give and take on both sides.
19. In this particular case the parties must put the interests of the trust above their own. What evidence there is before me as to its financial position shows that such a position is not good. In the latest accounts in the bundle for the year end 2015, there was very little money in the bank and creditors of over £126,000. A net asset position was obtained only because of the capital value of the trust’s premises. Its community activities are now suspended because of the Covid-19 restrictions. As Mr Ahmed submitted, this dispute is likely to be harming the trust financially. It is also likely to be harming its charitable activities. Litigation is likely to make matters even worse.
20. Accordingly, the parties should make utmost efforts to ensure that mediation is successful. In any further consideration by the court, which it is hoped will not be necessary, the court is likely to look closely, so far as is open to it to do so, at the extent to which each side did so.

21. I will hand down this judgment in writing. Any outstanding consequential matters should be dealt with on the basis of written submissions, which should be filed and exchanged within 14 days of handing down.