

[2018] EWHC 119 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST (ChD)

Claim Number D30BM268

Before His Honour Judge Simon Barker QC sitting as a Judge of the High Court

BETWEEN

MALKIT SINGH BAL

(in his personal capacity and for and on behalf of himself and the members of the Executive Committee of the Gurdwara Guru Nanak Parkash, except the First to Sixth Defendants)

Claimant

-and-

- (1) JASWINDER SINGH
- (2) SANTOKH SINGH PUREWAL
- (3) SUKHBIR SINGH
- (4) SUKHVIR SINGH
- (5) MANJINDER SINGH
- (6) MANPREET SINGH
- (7) HARSIMRENJEET SINGH KHEHRA
- (8) GURWINDER SINGH LIDDAR
- (9) MALE 1
- (10) MALE 2
- (11) PERSONS UNKNOWN
- (12) THE ATTORNEY GENERAL

Defendants

Nicholas Towers instructed by Newhall Solicitors LLP for the Claimant
Lydia Pemberton instructed by Aspect Law Limited for the First to Sixth and Eighth Defendants

COSTS JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this

judgment and that copies of this version shall stand as authentic and be treated as the official transcript

HHJ Simon Barker QC :

In these reasons the Claimant is referred to as 'C' and the Defendants respectively as 'D1' etc; the Gurdwara Guru Nanak Parkash is referred to as 'the Gurdwara'; the Executive Committee of the Gurdwara is referred to as 'EC'; the Charity Commission is referred to as 'CC'

- 1 The represented parties have compromised the issues in the claim and counterclaim ('C/C') in the form of Tomlin Order the schedules to which are an agreement and undertakings given to the court by D1, D3 and D8. The Tomlin Order provides that any costs orders to be made between or against C, D1-6 and D8 are to be determined following written submissions.
- 2 In the litigation C claims personally and as representative of the EC except D1-6. C represents the EC majority, D1-6 represent the EC minority. The Gurdwara is an unincorporated association and a registered charity. It is based in Coventry and has more than 4,000 registered members. The scheme or constitution defines the area (Coventry and surrounding villages and towns) where a person wishing to be a member must reside; it provides for the governance and administration of the Gurdwara by the EC; and, the EC is elected for two years at a time. The next election process is due to commence in March 2018. There is a chasm between the two factions on the EC as to the governance and administration of the Gurdwara.
- 3 There is cogent evidence that both sides have flouted the constitution, albeit to different degrees and in different ways. The EC minority, particularly D1, has done so through his involvement in the purported dissolution of the EC, the exclusion of the EC majority from the Gurdwara, and the freezing the Gurdwara's bank account at HSBC. On material to which I have been referred, the EC majority appears to have sought to circumvent the offices held by the EC minority and to silence or avoid the dissentient voices of the EC minority through sub-committees. In addition, there is credible evidence that C, and others of the EC majority, have been subjected to assault, intimidation, harassment and threats by members and others present at the Gurdwara. This resulted in the granting of interim and final, for the most part time limited injunctions against other defendants (D9-11) and D8 has provided a time limited undertaking in relation to his future conduct. I should make clear at this point, that the terms of the Tomlin Order settlement (which I shall refer to as the Tomlin Order) include that none of the parties to the Tomlin Order make any admission as to wrongdoing, whether as alleged in the pleadings or otherwise. I keep that in mind when considering costs but it does not follow that I am

precluded from forming an evidence based view on the material that I have seen and read, what I have been told over the course of the proceedings, and findings, if relevant, that I have made in earlier applications.

- 4 In this action the claim form, issued on 20.2.17, sought injunctive relief against the defendants following alleged assaults, harassment and intimidation of C and other members of the EC majority at the Gurdwara. In June 2017 the CC made orders authorising the continuation of proceedings for specified purposes. At an interim hearing on 3.8.17, I made interim injunction orders against D1 and D8-11, a delivery up order against D3 and accepted a permanent undertaking from D7. As the issues raised included matters concerning the internal affairs of the Gurdwara, the proceedings were transferred to the High Court and the Attorney-General was joined as D12. On 3.8.17 I gave directions for pleadings and other procedural steps. The Points of Claim ('P/C') sought injunctive relief against (1) D1 to exclude him from the Gurdwara and to forbid him, directly and indirectly, from interfering with or thwarting meetings or the use of the Hall and stage at the Gurdwara and from inviting persons to attend the Gurdwara, (2) D3 to require the return of the reservation book and booking records for the Gurdwara, and (3) D7-D11 to forbid each of them from entering the Gurdwara and from, directly or indirectly, intimidating, assaulting, threatening or harassing C. The relief sought against D7 was unnecessary in the light of the permanent undertaking given to the court on 3.8.17; nothing of relevance to this costs ruling turns on this. The P/C stated that no relief was being sought against D2 or D4-D6 and the claims against these defendants were dismissed on 18.1.18 with costs reserved. The claim against D7 was also formally dismissed then, albeit that it had effectively been concluded on 3.8.17. C did not make an application to discontinue against D2 and D4-6 and they did not make, although they intimated, an application to strike out the claim; their respective counsel explained that their respective reasons were or included to avoid or save costs.
- 5 D1-6 and D8 defended the claim. By the C/C, D1-6 and D8 sought (1) a declaration that the EC majority's resolutions to create access and booking sub-committees was ultra vires and of no effect, (2) a declaration that certain resolutions of the sub-committees and the EC were ultra vires and of no effect, (3) an order requiring the EC to call a special general meeting to consider these proceedings (this was abandoned at trial on 18.1.18), and (4) an order requiring C to reimburse the Gurdwara's funds expended by him in these proceedings.
- 6 The trial was preceded by an application to commit D1 for breaches of the 3.8.17 injunction. One breach was found proven to the requisite standard. Three other alleged breaches were not so proven although D1's conduct was

criticised. The subject matter of the contempt proceedings had already been largely addressed by a further interim injunction order made by HHJ Cooke on 10.11.17. During the contempt hearing I saw filmed evidence of events at the AGM of the Gurdwara on 29.10.17, which gave rise to the committal application, and heard oral evidence from witnesses including C and D1. In so far as that evidence is relevant to the substantive issues I am entitled to and do keep it in mind and attach it some weight. The costs of the committal proceedings have already been dealt with. Of course, the events of 29.10.17 post-date the claim, the C/C and the close of pleadings.

- 7 The trial followed immediately after the contempt proceedings and started at about 3.15pm on 17.1.18. Argument then and on 18.1.18 was confined to challenges to the pleadings, the court's jurisdiction, and procedural and other preliminary matters. No evidence was heard. In the background, the parties were heavily and actively involved in negotiations to settle the proceedings. Given that the election of a new EC is less than three months away, this was eminently sensible. Given the deep division between the EC majority and the EC minority, concluding a settlement will have been no small achievement by the parties and their legal representatives and I commend them for this.
- 8 On 18.1.18, when dismissing the claims against D2 and D4-7 I reserved the costs of the claims against them. I also made permanent injunction orders against D9-10 and a time limited order against the unknown persons who are D11. I ordered that D9-11 are to pay C's costs of the claims against them.
- 9 Also on 18.1.18, the CC clarified that its order of 2.6.17 authorising C to take or continue proceedings for the relief specified in the order was to be construed as applying to the defendants who are counterclaimants in an equivalent way, in other words that the CC has authorised proceedings by D1-6 and D8 for the relief claimed in the C/C.
- 10 In summary, the Tomlin Order provides, on the basis that C, D1-6 and D8 make no admissions as to any wrongdoing, (1) for the conduct of EC meetings and publication of its decisions and the EC members' reasons, (2) for any special general meeting of the Gurdwara's members during the tenure of the current EC, (3) for the rescission of resolutions of the sub-committees and for their dissolution, (4) for membership applications and terminations, (5) for the provision keys and access to the Gurdwara's offices to D2 and to the Gurdwara's general secretary, (6) for undertakings to be given by D1, D3 and D8 replacing the terms of orders made on 3.8.17 and 10.11.17 and for the release of undertakings given by the EC on 10.11.17, (7) for an undertaking by D1, until the earlier of 30.6.18 or the conclusion of elections, in the form of the

order made on 3.8.17 (sealed 24.8.17) and, in addition and in line with the order of 10.11.17, not, directly or indirectly, to freeze or restrict the Gurdwara's HSBC bank account, (8) against D3, until the earlier of 30.6.18 or the conclusion of elections, not to obstruct access to, take possession of or remove the booking records and reservation book of the Gurdwara, and (9) against D8, until the earlier of 30.9.18 or the conclusion of elections, not, directly or indirectly, to intimidate, threaten or harass C. these terms embrace and extend beyond the relief sought in the claim and C/C.

- 11 Mr Towers reminded me that there are four carried over costs orders to bear in mind (1) of 8.4.17, costs in the application in respect of D1-6 and D8's application, not determined before trial, challenging the authorisation given by the CC, (2) of 3.8.17, costs in the case of the first hour of the hearing which concerned jurisdiction and whether the proceedings were charity proceedings, (3) also of 3.8.17, C's costs in the case of the application against D1, and (4) of 10.11.17, costs reserved of C's application for interim injunctions which were granted to restore the EC to management of the Gurdwara, unfreezing the HSBC bank account and returning access to the offices of the Gurdwara to the EC. As to (1) and (2), I have not disturbed the authorisation given by the CC. As to (3) and (4), the Tomlin Order effectively continues the substance of the interim orders, albeit as a pragmatic resolution of the litigation and on a time limited basis.
- 12 CPR 44.2 provides that, if the court decides to make an order as to costs, the general rule is that the unsuccessful party pays the costs of the successful party; when making a costs order the court has regard to all the circumstances, including conduct, the extent of a party's success, and any offers to settle.
- 13 Where the substantive outcome has not been decided by the court but has been agreed between the parties there is no default or similar position that the order should be a 'no order' order as to costs. Mr Towers and Ms Pemberton referred to R(M) v London Borough of Croydon [2012] 1 WLR 2607 at [47] – [51]. Key points are (1) the court may but is not obliged to resolve a dispute about costs only and a 'no order' order may be made either after analysing all arguments or without so doing where it appears to the court that such an exercise would be disproportionate; (2) where there has not been a trial or a judgment and it is clear that the claiming party is the successful party, absent good reason the general rule should apply; (3) where that is not so, the degree of success in outcome may justify a partial costs order, particularly where success was on the most important or most expensive issue(s); (4) in many cases of partial success, no order as to costs would be just because of uncertainties and difficulties in matching outcomes and costs; and, (5) where

the settlement terms do not accord with the relief sought it may commonly be difficult to decide who has won, if so ‘no order’ will be appropriate, but if the likely outcome is apparent that would support an order awarding costs.

- 14 Ms Pemberton also referred to R(M) v London Borough of Croydon at [60] for guidance in three types of case (1) where a claimant has been wholly successful, whether following a contested hearing or a settlement, (2) where a claimant has succeeded in part following a contested hearing or pursuant to a settlement, and (3) where there has been a compromise which does not reflect the claimant’s claims. As to (1) the general position should be that the claimant recovers all of his costs. As to (2), consideration should be given to the reasonableness of raising the unsuccessful claims and, where there has not been a hearing, the court will be in greater difficulty; in many cases the court will be able to form a view based on the outcome and the issues, but in some cases this is much more difficult; and, where settlement is on a partial success basis there is much to be said for a ‘no order’ order. As to (3), the court is often unable to gauge success and there is a powerful argument for a default setting of a ‘no order’ order which may be dislodged if it is tolerably clear, by reference to the underlying issues, who would have won had the matter not settled.
- 15 These principles should apply equally to the position of parties to a counterclaim. Considering the justness of a ‘no order’ order becomes more complex where there are several claims against different parties with different ordered or agreed outcomes, some by order and others by agreement, and a C/C involving some but not all defendants which is compromised as part of the agreement. A further layer of complexity is added where the compromise agreement extends to matters outside the claim and C/C.
- 16 D1-6 and D8 make a general complaint as to C’s approach to the litigation procedurally. Both sides refer to the pre-action correspondence. D1-6 and D8 also refer to C’s contention that Part 8 was appropriate as there were no factual disputes and to C, at least initially, disputing the application of s.115 Charities Act 2011. Complaint is also made of C’s approach to disclosure.
- 17 As to D2 and D4-6, the action was not pursued after the hearing on 3.8.17. The claim against D2 was dismissed with costs on 3.8.17. C justifies not seeking to discontinue the claim against these defendants on three grounds (1) as the events of 29.10.17 demonstrate there was a potential for further disruption at the Gurdwara and a credible risk that D2 and D4-6 might have behaved in a way that would justify amending to plead a claim against them, accordingly not discontinuing was costs efficient and proportionate; (2) D2 and D4-6 threatened, but did not pursue, a strike out application if C did not seek to

discontinue and their failure to do so should be seen as a costs building exercise; and, (3) D2 and D4-D6 are parties to the C/C but did not seek any order on their C/C individual to themselves or distinguishable from that sought by D1 and the relevant costs of the claim exceed those of these parties as counterclaimants. In my view, there is nothing of substance in these points. I accept that D2's position in the claim was finally resolved on 3.8.17 and, further, that he was unnecessary as a counterclaimant. So too were D4-6 unnecessary parties to the C/C. That does not mean that the costs of their witness statements were not costs properly incurred in a representative counterclaim which could have been advanced by D1 only. As the legal representation is common to D1-6, it is immaterial to the costs of the C/C as such whether D1 or D1-6 were the counterclaimants. There is no reason to make a further order in respect of D2 on the claim. There is no reason to do other than treat D4-6 as successful in defeating the claim against them. The C/C challenge to the sub-committees succeeded but the challenge to the funding of the claim, as approved by the CC, failed.

- 18 In relation to D1, Mr Towers submitted that the purpose of securing the proper administration of the Gurdwara, moderating D1's behaviour as to the running of the Gurdwara and towards C, and also regulating D1's behaviour in relation to the bank account has been achieved. Ms Pemberton drew attention to C's failure throughout to obtain an order excluding D1 from the Gurdwara and she submitted that such time limited benefit as C has secured under the Tomlin Order is a considerably pared back version of the relief sought. Ms Pemberton also contended that in substance the C/C has succeeded and that there are additional terms to the compromise which go beyond the issues directly raised in the litigation. Ms Pemberton submitted that a 'no order' order is appropriate, alternatively that a specific order should be made against each defendant and not a joint and several liability order. As to distinguishing between D1, D3 and D8, in relation to the claim D1 and D3 are office holder members of the EC whereas D8 is merely a member of the Gurdwara and in relation to the C/C, D1-6 and D8 are co-claimants without distinction.
- 19 On the claim against D1, D3 and D8, my view is that C has secured a significant degree of success, albeit with no admission of wrongdoing, but also that the procedural and conduct criticisms made are fair and are relevant adversely when it comes to making a costs order in C's favour. Looking at the rationale underlying the claim, namely to maintain good order in the governance and administration of the Gurdwara in accordance with its constitution and to protect those seeking so to go about their business on the EC from unlawful assault, intimidation or harassment, the Tomlin Order has broadly achieved or secured that position for the remainder of the EC's term of

office. As to culpability, D1 and D3 as EC members in the minority group bear significantly more responsibility than D8 who is merely a member of the Gurdwara and in the category of minor defendant. On the other hand, D8 is an equal participant in the C/C.

- 20 As to the extent of the costs of the claim recoverable from D1, D3 and D8, it is appropriate to factor in adjustments for (1) the costs incurred against D2, D4-6, D7 and D9-11 which have already been dealt with or are dealt with separately in the order I shall now make; (2) the fact that C totally failed in his attempt to exclude D1 from the Gurdwara and that D1 is entitled not only to seek the disallowance of C's costs attributable to that issue but also to recover his own costs attributable to that issue; and, (3) the procedural and preliminary criticisms made (such as in relation to disclosure) which, in my view, are relevant and fair. I also bear in mind that the parties have agreed that there are no admissions of wrongdoing by D1, D3 and D8.
- 21 I am not in a position to make anything other than an impressionistic evaluation. My impression is largely confined to a comparison of the pleadings with the Tomlin Order's terms supplemented by my knowledge of documents such as the Gurdwara's constitution and documented events and by the relevant evidence, submissions and findings in other hearings before me in these proceedings. I do not carry over from the committal proceedings against D1 any view as to D1's or C's or anyone else's motives or attitudes and I proceed on the basis that both the EC majority and the EC minority have sincerely held differences of view which have caused the chasm between them. However, I do bear in mind that D1 and the EC minority, while plainly being at loggerheads with the EC majority, were not prepared to wait until the next election (due to commence in March 2018) before seeking the replacement of the EC majority and were involved in disruption of the orderly governance and administration of the Gurdwara. I do consider that C had cause to initiate and continue these proceedings. In principle, I do not think a 'no order' order would do justice as between the parties in the circumstances of this case.
- 22 After making allowance for the matters referred to above, and on the limited information available, the best that I can do is make an order awarding C 50% of the costs of his claim. A 'no order' order is, in principle, inappropriate because there was a proper underlying rationale for C's litigation and without it there would have been unlawful disruption of the management of the Gurdwara.
- 23 There is a further refinement necessary because D1, D3 and D8 are not in the same category as defendants to the claim. D1 is an EC member and is fully

involved. D3 is an EC member but the relief obtained against him, by acceptance of an undertaking, and the general relief agreed in relation to the running of the Gurdwara applicable to him is markedly more limited than as against D1. D8 is not an EC member, but is a member of the Gurdwara, and the relief against him is confined to his undertaking not to intimidate, threaten or harass C; of course this goes back to the origins of the claim and is the subject of two incidents pleaded in the Points of Claim, one of which is not directly answered in the Points of Defence. It would be unjust to order D3 and D8 to share responsibility for 50% of the C's costs. D3, as an EC member and in the light of his undertaking should be jointly and severally liable with D1 for 30% (ie not for 20% otherwise recoverable from D1) of C's costs. D8, given the very limited nature of his undertaking and the likely costs of a discrete action confined to assault and intimidation, should be jointly and severally liable with D1 and D3 for 10% of C's costs (ie not for 40% otherwise recoverable from D1 and not for 20% otherwise recoverable from D3).

- 24 As to the C/C, there were broadly two issues, (1) the validity or otherwise of the EC majority's use of the sub-committee provisions in the constitution and (2) the funding by the Gurdwara of the claim. The effect of the Tomlin Order's terms is that the former succeeds and the latter fails. Again, a 'no order' order would not reflect the justness of the C/C. having regard to the relevant material drawn to my attention, an order that the counterclaimants recover 50% of their costs of the C/C seems to me to accord with the approach to be adopted when considering costs of a claim which has settled.
- 25 Given that the representation of the counterclaimants and of D1, D3 and D8 as defendants is the same and that the issues in the C/C also concern the internal affairs of the Gurdwara, it is just to order that the costs recoverable on the C/C are set against the costs payable on the claim. As to the order of priority of offset, this should be proportionate so that if, as I think likely, a net sum is payable to C, liability for that net sum should be joint and several in the ratio D1 fully liable, D3 jointly and severally liable with D1 for 60% of the net sum, and D8 jointly and severally liable with D1 and D3 for 20% of the net sum.
- 26 As a final check before actually making a costs order to reflect the conclusions I have reached in this judgment, I must stand back and take an overall view of the terms and effect of my order set against a 'no order' order. In so doing I bear in mind the added costs and practicalities of agreeing or assessing a series of costs orders. On balance, albeit a fine balance, I think that the overriding objective of doing justice between the parties at proportionate cost better served by making costs orders as set out in this judgment.

29 January 2018