

STATE CHAMBERS

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IN THE SUPREME COURT OF NEW SOUTH WALES

Case No. 2017/00141644

CAMBODIAN BUDDHIST SOCIETY OF NSW AND ANOR V MENG EANG THAI AND ORS [2017] NSWSC 1433

Before: SACKAR J

Date of Judgement: 23 October 2017

Case Note

A. INTRODUCTION

1. The Cambodia Buddhist Society (the “**Society**”) is an association incorporated under the Associations Act 1984 (NSW) (the “**Act**”) and is currently governed by the *Incorporated Associations Act 2009* (NSW) (the “**2009 Act**”).
2. This matter revolved around a dispute concerning the internal management of the Society. The primary issues before the Court included:
 - (i) The validity of either the Society’s December 2016 Election or April 2017 Election;
 - (ii) The validity of the Amendment to the Constitution in 2000;
 - (iii) Who was the Abbot of the Society?; and
 - (iv) Who are the members of the Society?
3. The other legal questions that arose in the course of the proceedings included:
 - (i) The proper construction and operation of section 25(2) of the 2009 Act; and
 - (ii) Whether a governance team consisting of an elected President and his hand-picked team was a “Committee” for purposes of the 2009 Act.

B. BACKGROUND FACTS

4. The First Defendant and the other 11 co-defendants (the “**First Group**”) were elected into office as the directors and members of the Society’s management committee (the “**Board**”) pursuant to an election held on 18 December 2016 (the “**December 2016 Election**”).
 5. On 30 April 2017 certain persons purportedly held a Special Meeting and elected to remove all members of the Board pursuant to clauses 28 and 29 of Society’s constitution (the “**Constitution**”) and appoint Mr. Thin Em as President of the Society (the “**April 2017 Election**”). Subsequently, a group led by Mr Thin Em continued to claim rights to leadership of the Society’s Management Committee (the “**Second Group**”).
 6. Hence, there was a question as to which of the two groups (First or Second Group) constituted the valid Board members of the Society.
 7. The Second Group led by Mr. Thin Em claimed that the December 2016 Election was tainted by interference, voter irregularities and was not conducted in accordance with the rules of the Constitution. Inversely, the Defendants case was that the Second Group contravened sections 17, 20, 28, 29 and 41 of the Constitution and as such the April Election 2017 was not a valid election.
- In November 2000, members of the Society voted to amend the Society’s Constitution (the “**Amendment**”). The Amendment left much to be desired in that it heralded a number of inconsistencies in the Constitution. The introduction of the new section 26¹ altered the corporate governance regime of the Society significantly.
9. The New Section 26¹ had the effect of changing the election regime in the Constitution. Consequently, the governing body of the Society consisted of the elected president and his 12 nominees (“**The President and His Team**”).

¹ *(The Abbot and the Assistant Abbot of Wat Khemarangsaram shall automatically be members of the Board of Directors. The members shall vote to elect the President. Once elected, the President shall nominate this team of 12 to work with him.*

The Validity of the Elections and the effect of the New Section 26

10. The Court found that neither the December 2016 Election nor the April 2017 Election was valid because of issues going to the validity of the Amendment, the notion of Committee under the Constitution, and the question of membership.
11. At the heart of the question of validity of the elections was the effect of the Amendment. Also, fatal to both the Plaintiffs' and Defendants' cases was the court's ruling with respect to a handwritten notation at the end of the Amendment document (the "**Notation**"). The Notation indicated that 25 out of the 41 people who attended the meeting voted in favour of the Amendment. This fell short of the three-quarter majority required under section 57 of the Constitution (the "**Irregularity**").
12. On the law relating to the exercise of the court's discretion in the face of a claim for discretionary relief based on a challenge to the validity of an election, his Honour relied on Brereton J's summary in *Re Sri Guru Singh Sabah, Sydney Inc. (The Sikh Association of Sydney)* [2017] NSWSC 1092 at [35]- [37], to state that the materiality of an irregularity in an election will bear on the discretion of the court to grant or withhold declaratory relief.
13. With respect to the Irregularity, the question before the Court was whether clause 57 of the Constitution should be construed strictly or whether there was any legal mechanism to overcome the Irregularity introduced by the Notation.
14. The Defendants submitted that the Irregularity could be overcome by reliance on certain legal mechanisms including the operation of section 1322 of the Corporations Act, the presumption of regularity and/or ratification. On the other hand, the Plaintiffs accepted that the Amendment was ineffective.
15. His Honour found that: (i) the failure to pass the Amendment by the requisite three-quarters majority was a matter of substance which could not be remedied under s 1322 of the Corporations Act. In his view, changes to the questions of governance and membership go directly to the lifeblood of the Society and cannot be construed as matters of procedure; (ii) the Amendment could not be saved by the concept of Ratification or Presumption of Regularity.

16. Conclusively, His Honour found that the Amendment was invalidly passed in contravention of clause 57 of the Constitution and as such the results of both elections should be set aside.

Construction of Section 25(2) of the 2009 Act

17. In the course of the proceeding a question arose as to whether the Model Constitution² provisions relating to “Committee” were incorporated into the Constitution by reference, pursuant to the operation of s 25(2) of the 2009 Act. This brought to the fore the question – when is section 25(2) of the 2009 Act enlivened?
18. The Plaintiffs submitted that section 25(2) should include the word “adequately,” so that it reads “*If an association’s constitution fails to adequately address a matter referred to in Schedule 1, the provisions of the model constitution with respect to the matter are taken to be part of the association’s constitution*”. Thus, the substance of the terms of a provision in an association’s constitution must be “sufficiently robust so as to leave no scope for the application of the model constitution
19. *Consistent with the Defendants’ submission on section 25(2), his Honour found that “Under section 25, an association can either adopt all the rules of the Model Constitution (section 25(1)), Constitution (section 25(1), part of those rules, or none of the rules. So long as the association’s constitution addresses the matters set out in Schedule 1, section 25(2) will not be enlivened. Thus, in determining whether section 25(2) is engaged, reference must be had to the matters set out in Schedule 1, and not the proposed rules for those matters under the Model Constitution.”*

The Concept of “Committee” under the Act vs the Presidential Style Regime

20. Here, the question was whether the presidential style of governance set up pursuant to the new section 26 can be construed as “Committee” for the purpose of the 2009 Act.
21. The court accepted the Defendants view and submission that the notion of a “Committee” is broad both under the 2009 Act and in ordinary parlance and could include a “Committee” of only one elected official. However, the his Honour was of the view that the object of the 2009 Act contemplates a transparent, accountable and democratic form of corporate governance and not a presidential style regime like the one introduced by the new section 26.

² (see schedule 1, Part 3 of the 2016 Regulation

Section 8 and the issue of Membership

22. Section 8 of the Constitution requires persons who intend to become members of the Society to (i) make a written request to the Board of Directors, (ii) be accepted by the Board of Directors, (iii) voluntarily make yearly contributions to the Association, and (iv) abide by the rules of the Association.
23. The question that arose with respect to membership, following the Amendment and the new section 26, was whether section 8 could be construed to be effectively amended by implication, to provide that membership should be approved by the President only.
24. The court found that section 8 should be strictly construed given that the provision of the constitution governing membership of any organization is a fundamental provision.

The Question of Abbot

25. One of the questions before the Court was who between the Second Plaintiff (*as advanced by the Plaintiffs*) and the Eleventh Defendant (*as advanced by the Defendants*) was the authentic Abbot. The Constitution is silent on the appointment of an Abbot. Prior to April 2017, the Second Plaintiff was the Abbot and the Eleventh Defendant was the Assistant Abbot. However, in April 2017, the December 2016 Team appointed the Eleventh Defendant as Abbot.
26. The Defendants accepted that the office of the Abbot was not an office subject to election by general membership of the Society but by virtue of his monastic office, *ex officio*, he is a member of the Management Committee: ***Sengthong v Lao Buddhist Society of NSW Incorporated* [2016] NSWSC 1408 at 49**
27. However, the Defendants argued that the question who is Abbot is subject to Buddhist law, whether written or unwritten. There was no expert evidence before the court to ascertain the laws governing the removal or appointment of an Abbot in accordance with monastic laws. Consequently, the Defendants queried whether the question was justiciable. The Defendants submitted that the question was a theological question and as such was not justiciable.

Typically, a claim that calls for the determination of a purely political or theological question, rather than a legal question, may be characterized as not justiciable: ***Ahmad v Chowdhury* [2012] NSWSC 1452 at 63.**

28. The Court found that the device used by the December 2016 Team to appoint the Eleventh Defendant as Abbot did not have the effect of removing the Second Plaintiff as Abbot. Consequently, the court ruled that the Abbot and Assistant Abbot should remain in office, provided they were elected by usual custom and practice.

Conclusion

29. The Court found that the December 2016 Election was plagued with irregularities and there was strong doubt as to whether the election was validly conducted in accordance with the Constitution.

30. With respect to the April 2017 Election, the Court found that in conjunction with the finding that the 2000 Amendment invalidated every election conducted pursuant to the Amended Constitution, the April 2017 election was conducted in such a way that it was impossible to determine which of the voters, if any, was actually a member of the Society. The Court held that the December 2016 and April 2017 election results were both invalid as they were predicated on the governance of the society being the presidential style regime set out pursuant to New Section 26.

31. His Honour proposed to appoint a receiver as an officer of the Court to undertake management of the business of the Society. The receiver will oversee the Society's adoption of the Model Constitution, manage the timely admission of members and supervise the calling and conduct of the election of the Society's board of directors to enable the management of the Society.

Uche Okereke-Fisher

Barrister, State Chambers, Sydney

24 November 2017