

Supreme Court  
New South Wales

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Case Name: Gofur v Bangladesh Islamic Centre of NSW (BIC)

Medium Neutral Citation: [2020] NSWSC 652

Hearing Date(s): 18 May 2020

Decision Date: 29 May 2020

Jurisdiction: Equity - Expedition List

Before: Sackar J

Decision: See [78]-[79], [90]

Catchwords: ASSOCIATIONS & CLUBS — Meetings — Annual General Meeting and Election of Executive Council — Where meeting held outside of time prescribed by Constitution — Where notice provided “on behalf of” General Secretary rather than by General Secretary — Whether irregularities validated by s 1322(2) of the Corporations Act 2001 (Cth) — Whether meeting and election should be validated under s 1322(4) of the Corporations Act 2001 (Cth)

Legislation Cited: Associations Incorporations Act 2009 (NSW)  
Associations Incorporation Regulations 2016 (NSW)  
Corporations Act 2001 (Cth)

Cases Cited: Chowdhury v Bangladesh Islamic Centre of NSW  
[2008] NSWSC 1073  
Cordiant Communications (Australia) Pty Ltd v  
Communications Group Holdings Pty Ltd (2005) 55  
ACSR 185  
Elderslie Finance Corp Ltd v ASC (1993) 11 ACSR 157  
R v Justices of Kent (1873) 1 L.R. 8 QB 305 Grahame v  
Cmr for Railways (1946) 46 SR(NSW) 430  
Re Allied Resource Partners Pty Ltd; Atlas Holdings Pty  
Ltd (Trustee) v Allied Resource Partners Pty Ltd (2017)  
122 ACSR 345

Super John Pty Ltd v Futuris Rural Pty Ltd (1999) 32  
ACSR 398

Texts Cited: Austin & Black Annotations to the Corporations Act  
(LexisNexis, looseleaf)

Category: Principal judgment

Parties: Abdul Gofur (first plaintiff)  
Kabir Ahmed (second plaintiff)  
MD. Yunus Ali Mondal (third plaintiff)  
Dr Rashid Raashed (fourth plaintiff)

Bangladesh Islamic Centre of NSW Inc (first defendant)  
Fakhruddin Ahmed Chowdhury (second defendant)  
Further 12 defendants (no representation)

Representation: Counsel:  
C Liedermann (plaintiffs)  
T Rogers (first and second defendants)

Solicitors:  
MIC lawyers (plaintiffs)  
Mitry lawyers (first and second Defendants)

File Number(s): 2019/253790

## JUDGMENT

- 1 These proceedings concern the validity of an Annual General Meeting (“AGM”) held by the First Defendant, the Bangladesh Islamic Centre of New South Wales Incorporated (“BIC”), on 12 May 2019, and the election of the First Defendant’s current Executive Council at that AGM.
- 2 By Statement of Claim filed on the 27 April 2020, the Plaintiffs seek the following declarations:

That Fakhruddin Ahmed Chowdhury, Dr. Shahidur Rahman, Zainul Abedin Masud, Md. Emamul Haque, Khasrul Alam Talukder, Syed Harunur Rashid, Monowar H. Mirdha, Md. Nanu Miah, Mojibur Rahman, Riad Mahmud and Ataur Rahman (**Purported Executive Council**) were not dully elected (sic) at the Annual General Meeting (“AGM”) & Election of Office-bearers and Ordinary Members of the Executive Council of Bangladesh Islamic Centre of NSW Inc. (**BIC**) held on 12 May 2019 in an **AGM & Election** in accordance with the Constitution of the BIC.

That the AGM & Election on 12 May 2019, contravened the Constitution of the BIC.

That the AGM & Election 2019, held before the expiration of the financial year of 2018-19, therefore of the financial year of 2018-19, therefore, invalid and void.

3 The Plaintiffs further seek orders:

That the persons listed below be appointed by the Court as the **Interim Executive Council** of the BIC, and that they be empowered to do all actions and sign all documents necessary to fulfil their functions and duties as members of the Executive Council, including exercising control over any litigation in which BIC is engaged in, and the conducting of a fresh, constitutionally valid AGM & Election of BIC within 6 months of the making of this order.

Dr Rashid Raashed;

Mohammad Yunus Ali Mondal

Mohammad Mohibul Alam;

Mowlana Muhammad Ferdous Alam;

Mohammed Shah Alam;

Shah Mustaq Parvez;

Dihider Jafar Ahmed;

Mohammed Motahar Ali;

Mohammed Muktadir ahmed;

Mohammad Abdul Gofur;

Kabir Ahmed.

That until the AGM & Election of BIC, all persons comprising the Purported Executive Council and through their servants or agents be restrained from fulfilling any function or duties of the Executive Council of BIC as required by the Constitution of BIC or the *Associations Incorporation Act 2009* (NSW).

That until the AGM & Election the **Interim Executive Council** be appointed by the direction of the Court to collect the weekly Donation money at the property held by the First Defendant, Sefton Mosque and deposit to the BIC account every week.

Any other orders the Court thinks fit to make.

4 By Cross Summons filed on 8 May 2020, the First and Second Defendants (and First and Second Cross Claimants), BIC and Fakhruddin Ahmed Chowdhury, seek the following relief:

Declaration that, in so far as it is found that any or all of the matters alleged in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14 and 16 of the Amended Statement of Claim are established, that such matters are, within the meaning of section 1322 of the Corporations Act 2001 (as applied to the First Cross Claimant by operation of Regulation 18 of the Associations Incorporation Regulation 2016) are defects, irregularities, accidental omissions or other deficiencies which do not invalidate or otherwise affect the efficacy of the matters.

Such further or other orders as the Court considers appropriate including orders as to any interim regime.

Costs.

- 5 On the morning of the hearing counsel for the Plaintiffs made an application for Dr Rashid Raashed to be joined to the proceedings as the fourth plaintiff. This was not opposed and Dr Raashed was joined.
- 6 The hearing which took place by telephone, like so many currently taking place in the courts, was conducted under some considerable difficulty. The medium was not ideal especially for cross-examination. In the end it was impossible for the reporter to transcribe precisely what the witnesses had to say. That said, the evidence in the end and in particular the answers given in cross-examination play little if any role in the disposition of the issues.
- 7 However, the Court should immediately gratefully acknowledge the professionalism of the legal representatives and although bitter factional rivals the candour with which the various witnesses gave their evidence. It is a pity that such an organisation clearly desired by the relevant community is riven by such deep and long standing divisions.

## **Background**

- 8 The First Defendant, the BIC, is an incorporated association governed by a Constitution adopted in August 2005 (“the Constitution”) and the *Associations Incorporations Act 2009* (NSW).
- 9 The Second Defendant, Mr Fakhruddin Ahmed Chowdhury, is the current President and a member of the First Defendant.
- 10 The other Defendants are the current Executive Council of the First Defendant and are members of the First Defendant.
- 11 The Plaintiffs are members of the First Defendant.
- 12 On 31 March 2019, a notice of AGM was published online on the website of the First Defendant. The notice specified that the AGM and an election of the Executive Council of the First Defendant would occur on 4 May 2019.
- 13 The Plaintiffs allege that this notice was not delivered in accordance with the requirements of clauses 37(c) and 52(a) of the Constitution (**First Complaint**).

Clause 37(c) provides that “An Annual General Meeting shall be specified as such in the notice convening it.” Clause 52(a) states that:

For the purpose of these rules, a notice may be served on or given to a person in the following manner:

By delivering it personally; or

By sending it by prepaid post to the address of the member at the members address shown in the register of members; or

By sending it by facsimile transmission or some other form of electronic transmission to an address specified by the person for giving or sending the notice.

14 On 20 April 2019, an undated and unsigned notice of AGM was sent by Emamul Haque on behalf of Harnur Rashid, the General Secretary of the First Defendant. This notice changed the date of the AGM and the Election to 5 May 2019.

15 The Plaintiffs allege that this meeting was not arranged by the General Secretary as required by clauses 23(e) and 35(a) Constitution (**Second Complaint**). Clause 23(e) provides that “The General secretary shall... (e) Arrange all meetings and functions of the Centre with the concurrence of the President.” Clause 35(a) states that:

The Executive Council may, whenever it thinks fit, convene a General Meeting of the Centre. All such meetings shall be called by the General Secretary.

16 On 5 May 2020, a meeting was held but the quorum required by clause 39 of the Constitution was not reached. The AGM and Election were adjourned until 12 May 2019. Quorum was reached and the current Executive Council was elected on that date.

17 The Plaintiffs allege that the 12 May 2019 AGM was not convened in accordance with the requirements for AGMs set out in clause 36(a) of the Constitution (**Third Complaint**). Clause 36(a) states that:

Annual General Meetings shall be held as follows:

(a) With the exception of the first Annual General Meeting of the Centre, the Centre shall, at least once in each calendar year and within the period of 2 months after the expiration of each financial year of the Centre, convene an Annual General Meeting of its members.

18 The Plaintiffs allege that the financial statement for the 2018-2019 financial year was not presented at the AGM held on 12 May 2019 in contravention of

clause 37(b) of the Constitution (**Fourth Complaint**). Clause 37(b) sets out the business which shall be transacted at AGMs. It includes:

iv. To receive and consider the statement which is required to be submitted to members pursuant to section 26(6) of the [*Associations Incorporation Regulation Act 1984*]. This statement shall include a true and fair view of the income and expenditure of the Centre during the financial year and the assets and liabilities of the Centre at the end of the financial year.

- 19 The Plaintiffs further allege that of the 13 persons who contested the elections for the Executive Council on 12 May 2019, 10 did not provide a membership number on their Nomination Form as required by clause 20(f)(i) of the Constitution (**Fifth Complaint**). Clause 20(f)(i) states:

The ballot for the election of office-bearers and ordinary members of the committee is to be conducted at the Annual General meeting in the following manner:

A member who has complied with Rules 9 and 14 of this constitution and who has been entered on the register of members in accordance with rule 13 for a period of not less than six months is entitled to be nominated for any position in the Executive Council

- 20 Clauses (or “rules”) 9, 13 and 14 are as follows:

#### **NOMINATION FOR MEMBERSHIP**

9. A nomination of a person for membership of the Centre:

(a) Shall be made by two members of the Centre in writing in the form set out in Appendix 1 to these rules and shall be lodged with the General Secretary of the Centre;

(b) As soon as practicable after receiving a nomination for membership, the General Secretary shall refer the nomination to the Executive Council which shall then determine whether to approve or reject the nomination for membership.

(c) Where the Executive Council determines to reject the nomination for membership, it shall refer the nomination to the next General Meeting which shall determine whether to approve or to reject the nomination.

(d) Where the Executive Council or the General Meeting determines to approve a nomination for membership, the General Secretary shall:

I. within 28 days of such decision being made, notify the nominee of that approval; and

II. request the nominee to pay within 14 days after the receipt by the nominee of the notification the sum payable under these rules by a member as entrance fee and/or annual subscription (non-refundable) of the Centre.

(e) Notwithstanding rule 9 (d) (ii) and rule 9 (a) above, payment of the entrance fee or any outstanding annual subscription shall be made in accordance to rule 14.

(f) The General Secretary shall enter the nominee's name in the register of members and, upon the name being so entered, the nominee becomes a member of the Centre.

(g) Notwithstanding rule 9 (f) above, the General Secretary shall be under no obligation to enter the nominees' name in the register of members should the nominee and / or nomination fail to comply with rules 9(a) to 9(e), above.

(h) Only those members whose names appear on the register of members shall be entitled to vote at any General Meeting.

(i) Final eligible voters list will be prepared in accordance with rules 9 (e) and 14 (c) and will be made available to the Returning Officer 72 hours prior to the Annual General Meeting. No membership dispute shall be dealt with on the day of the Annual General Meeting.

(j) The Centre will advise member(s) in writing in due time to renew their membership by the deadline as decided by the Executive Council. It is the member(s) responsibility to renew their membership and check the eligibility of the member(s) to vote with the General Secretary 7 days prior to the final membership list being prepared for the Returning Officer by the Centre.

### **REGISTER OF MEMBERS**

13. In relation to the Register of Members:

(a) The General Secretary of the Centre shall establish and maintain a register of members and life members of the Centre specifying the name, address and date of approval and/or renewal of membership of each person who is a member or a life member of the Centre; and

(b) The register of members shall be kept at the principal place of administration of the Centre and shall be open for inspection, free of charge by any member of the Centre at any reasonable hour.

### **SUBSCRIPTIONS**

14. A member shall pay the following fees:

(a) A member of the Centre shall, upon admission to membership, pay to the centre an entrance fee of \$10.00 or the amount as determined by the Executive Council and approved at the General Meeting.

(b) In addition to any amount payable by the member under clause 14(a) a member of the Centre shall pay to the Centre an annual subscription fee of \$10.00 or the amount as determined by the Executive Council and approved at the General Meeting.

(c) The annual subscription shall be due on 1st July of the relevant year to the 30th June of the following year and shall be paid no later than three weeks (21 days) before holding the Annual General Meeting of the Centre and such date of the Annual General Meeting shall be decided by the Executive Council.

(d) A member ceases to be a member if he/she fails to pay the annual subscription within the above mentioned period as stated under rule 14(c). However, such a member can resume their membership by paying the current subscription of the Centre after 10 working days of holding the Annual General Meeting of the Centre.

- 21 The Plaintiffs also say that a notice of a second AGM was published online on the website of the First Defendant on 3 December 2019. The notice specified that a second AGM of the First Defendant would occur on 22 December 2019.
- 22 The Plaintiffs plead that the AGM was held on 22 December 2019. However, the Defendants plead that the quorum was not reached on 22 December 2019 and therefore the AGM was adjourned and held on 29 December 2019.
- 23 The Plaintiffs allege that the second AGM was not convened in accordance with the requirements for AGMs set out in clause 36 of the Constitution because it was also not held “within the period of 2 months after the expiration of each financial year” (**Sixth Complaint**).

## **Submissions**

### *The Plaintiffs’ submissions*

- 24 The Plaintiffs submit that, as a result of the alleged contraventions, the AGMs held on 12 May 2019 and 29 December 2019, as well as any actions taken at those meetings, including the election of the current Executive Council, are invalid.
- 25 In relation to the alleged contraventions of clauses 36(a) and 37(b), the Plaintiffs submit that the BIC has been involved in similar proceedings in 2008, where an AGM was called outside the window of time contemplated by clause 36(a), and where, therefore, no financial reports were available to be examined. The Plaintiffs refer me to *Chowdhury v Bangladesh Islamic Centre of NSW* [2008] NSWSC 1073 (*‘Chowdhury’*) where Hamilton J stated at [11]-[13]:

[T]he business to be conducted at the annual general meeting of this body, which is similar to the business at annual general meetings generally. A vital part of the business is to receive and consider reports, financial and otherwise, on the activities of the body during the last preceding financial year. To make sense, that must mean the financial year that has just ended. That cannot be done if the meeting is held before the end of the financial year. In my view, therefore, this annual general meeting was not convened in the period specified in clause 36(a) and is therefore invalid... As the meeting was not a valid meeting, the action taken in respect of the plaintiff as president cannot be valid action.

- 26 The Plaintiffs submit that there has been a continuing failure on the part of the Defendants to abide by the Constitution.



- 27 The Plaintiffs further submit that the Court cannot find that the alleged contraventions are mere procedural irregularities within the meaning of s 1322 of the *Corporations Act*. They submit that the contraventions represented “significant” failures and that the election of the current “purported” Executive Council is not “essentially of a procedural nature”.

*The First and Second Defendants’ submissions*

- 28 In relation to the notice of AGM published online (the Plaintiffs’ First Complaint), the Defendants submit that the allegation fails because notification was later given by one of the mechanisms set out in the Constitution.
- 29 In relation to the second notice of AGM sent by Mr Haque on behalf of Harnur Rashid (the Plaintiffs’ Second Complaint), the Defendants submit that Mr Haque received authorisation from Harnur Rashid to forward the correspondence on Harnur Rashid’s behalf, and therefore that the complaint is “wrong in law and has no substance”.
- 30 In relation to the timing of the AGMs (the Plaintiff’s Third and Sixth Complaints), the Defendants concede that the meetings were not held during the constitutionally prescribed period. However, the Defendants submit that, by operation of s 1322(1)(b)(ii) of the *Corporations Act*, the calling of the meetings out of time is prima facie valid and only rendered invalid if “the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied” (s 1322(2)). The Defendants submit that these proceedings do not concern circumstances where meetings were hidden from members, or where persons who claimed a right to vote were precluded from voting. The Defendants further submit that the Plaintiffs have not alleged that any persons who stood for office were not eligible to stand.
- 31 The Defendants submit that reference to the 12 May 2019 AGM as the “2019 AGM” is of no significance. They submit that the former Executive Council was attempting to regularise matters in circumstances where there had been no proper meeting for some years due to earlier legal proceedings. They submit that the orders made by Pembroke J on 25 August 2017, which temporarily restrained the holding of the First Defendant’s AGM “until further order”, prevented the Executive Council from holding the AGMs for 2016/17 and

2017/18 in time. Therefore, they submit that the joint AGMs for 2016/17 and 2017/18 “were conducted late but in compliance with the orders of this Court” on 12 May 2019. On the other hand, the Plaintiffs submit that the injunction preventing the Executive Council from holding an AGM was effectively lifted on 2 November 2018 and therefore the delay in holding the AGM was not entirely due to the injunctions made by Pembroke J.

- 32 In relation to the presentation of financial records (the Plaintiff’s Fourth Complaint), the Defendants submit that the most up-to-date records, those of the years 2016/17 and 2017/18, were produced at the AGM held on 12 May 2019.
- 33 In relation to the failure of candidates to provide their membership number on their nomination forms on 12 May 2019 (the Plaintiffs’ Fifth Complaint), the Defendants submit that clause 20(f)(i) of the Constitution does not require them to have done so.

### **Legal Principles**

#### *Irregularities under s 1322 of the Corporations Act*

- 34 Section 96 of the *Associations Incorporation Act 2009* (NSW) permits the executive to make regulations applying provisions of the *Corporations Act 2001* (Cth) to bodies governed by the *Associations Incorporation Act*.
- 35 Pursuant to that section, r 18 of the *Associations Incorporation Regulations 2016* (NSW) declares subsections 1322(1)-(3A) and (4)-(6) of the *Corporations Act* to be such provisions (applicable, axiomatically, *mutandis mutandis*, as correctly submitted by the Defendants’ counsel).
- 36 Relevantly, subsection 1322(1) provides that:
- (1) In this section, unless the contrary intention appears:
    - (a) a reference to a proceeding .....is a reference to any proceeding whether a legal proceeding or not; and
    - (b) a reference to a procedural irregularity includes a reference to:
      - (i) the absence of a quorum at a meeting of a corporation.....; and
      - (ii) a defect, irregularity or deficiency of notice or time.
- 37 Subsection 1322(2) automatically cures “procedural irregularities” unless the Court forms the opinion that the irregularity “has caused or may cause

substantial injustice that cannot be remedied by any order of the Court”, and declares that proceeding to be invalid. The onus is on the party asserting invalidity (see *Re Allied Resource Partners Pty Ltd; Atlas Holdings Pty Ltd (Trustee) v Allied Resource Partners Pty Ltd* (2017) 122 ACSR 345 [31]).

38 In contrast, subsection 1322(4)(a) allows the Court to declare that an act, matter or thing purporting to have been done, or any proceedings purported to have been instituted or taken is not invalid by reason of any contravention of the association’s constitution. This subsection is not limited to “procedural” irregularities (see, e.g., *Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 (“*Cordiant*”) at [97], [134]). However, before making an order under s 1322(4)(a) the Court must be satisfied that: (1) the act, matter or thing, or the proceeding, is essentially of a procedural nature (s 1322(6)(a)(i)); or the person or persons concerned in or party to the contravention or failure acted honestly (s 1322(6)(a)(ii)); or it is just and equitable that the order be made (s 1322(6)(a)(iii)); and (2) that no substantial injustice has been or is likely to be caused to any person (s 1322(6)(c)). The conditions specified in s 1322(6)(i)-(iii) are not cumulative (*Austin & Black’s Annotations to the Corporations Act* (LexisNexis, looseleaf) at [9.1322]; *Cordiant* at [97]). The onus is on applicant in these circumstances (*Elderslie Finance Corp Ltd v ASC* (1993) 11 ACSR 157, 790).

39 In *Cordiant*, Palmer J held (at [103]) that:

what is a “procedural irregularity” will be ascertained by first determining what is “the thing to be done” which the procedure is to regulate;

if there is an irregularity which changes the substance of “the thing to be done”, the irregularity will be substantive;

if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.

40 This is still regarded as the generally accepted approach to determining whether an irregularity is procedural or substantive (see *Austin & Black’s Annotations to the Corporations Act* (LexisNexis, looseleaf) at [9.1322]).

41 In relation to the question of “substantial injustice”, in *Super John Pty Ltd v Futuris Rural Pty Ltd* (1999) 32 ACSR 398, Young J stated (at [14]-[15]) that (emphasis added):

[14] ... detriment per se is not the same as substantial injustice; that must depend on whether the remedial order in giving rise to that detriment is **unjust in the sense of causing such prejudice overall as to be unfair or inequitable, taking into account the interests of all of those directly affected by such dispensation.**

[15] The authorities on the meaning of “substantial injustice” are conveniently summarised in a judgment of Owen J in *Elderslie Finance Corp Ltd v ASC* (1993) 11 ACSR 157 ; 11 ACLC 787 at 790.

I agree with the submission of counsel for the applicant that s 1322(4) of the Law is a remedial remedy and should be given a liberal construction: see *Re Australian Koyo Ltd* (1984) 2 ACLC 429 at 431 ; (1984) 8 ACLR 928 at 930. The onus is on the applicant to establish positively that no substantial injustice has been or is likely to be caused to any person: see *Australian Hydrocarbons NL v Green & Ors*; *Green & Ors v Australian Hydrocarbons NL* (1985) 3 ACLC 779 at 789 ; (1985) 10 ACLR 72 at 83 . **The word “injustice” requires the Court to consider real, and not merely insubstantial or theoretical prejudice. A degree of prejudice to a person or persons may be outweighed if the overwhelming weight of justice is in favour of making the order:** see *Re Compaction Systems Pty Ltd* (1977-1978) CLC ¶40-313 at 29,316 ; (1976) 2 ACLR 135 at 150.

## Evidence

### *The Plaintiffs’ evidence*

#### **Mr Md. Abdul Gofur**

- 42 Mr Gofur’s affidavit was affirmed on 14 August 2019.
- 43 Mr Gofur is a Life Member of the First Defendant.
- 44 Mr Gofur deposed that the Notice of AGM dated 31 March 2020 was published online, and that the Notice of Annual General Meeting that changed the date of the AGM from 4 to 5 May 2019 was later sent to BIC members. He also deposed that a “BIC Notification, 2019 Election Matter”, regarding the appointment of the Returning Officer and informing members of the last date to lodge completed Nomination of Candidates forms, was published online on 20 April 2019. Copies of these three notices were annexed to Mr Gofur’s affidavit.
- 45 Mr Gofur asserted that most of the BIC members boycotted the AGM and Election held on 12 May 2019 because the meeting had been called prematurely. He further asserted that the financial statements for the 2018-19

financial year were not prepared by the Executive Council because the financial year had not ended.

46 Mr Gofur stated that the Life Members of the BIC sent a letter dated 21 July 2019 to the “Purported Executive Council” “regarding the unconstitutional AGM and Election for 2019 held on 12 May 2019.” A copy of that letter was annexed to Mr Gofur’s affidavit. It was signed by four members of the BIC, Mr Mondal, Mr Gofur, Dr Raashed, and a Mr Mohammad Mohibbul Alam. Mr Gofur also stated that the Life Members served this letter on the “Purported President of the BIC” by way of email on 22 July 2019. He stated that the Life Members received no response to these letters.

47 I also note the other annexures to Mr Gofur’s affidavit which include a copy of the Constitution.

**Mr Kabir Ahmed**

48 Mr Ahmed affirmed two affidavits, the first on 31 January 2020 and the second on 11 May 2020.

49 Mr Ahmed was General Member of the First Defendant on 12 May 2019.

50 Mr Ahmed stated that the Executive Council conducted the AGM and Election of BIC for 2019 on 12 May 2019. In his second affidavit, Mr Ahmed stated that the Executive Council conducted a second AGM for 2019 on 29 December 2019. The letter which was sent to members to provide notice of the December AGM, dated 3 December 2019, is annexed to Mr Ahmed’s first affidavit.

51 Mr Ahmed stated that few of the Nomination Forms of the candidates who contested the election on 12 May 2019 contained the membership number of the relevant candidate. The Nomination Forms for that election were produced under subpoena from the Returning Officer, Mr Lawrence Myers, and annexed to Mr Ahmed’s first affidavit.

52 Mr Ahmed stated that the Returning Officer declared the result of the election conducted on 12 May 2019. The declaration, titled “Bangladesh Islamic Centre of NSW Inc, Election of Executive Council 2019-2020” and dated 12 May 2019, is annexed to Mr Ahmed’s first affidavit.

**Mr Md. Yunus Ali Mondal**

- 53 Mr Mondal affirmed one affidavit on 31 January 2020.
- 54 Mr Mondal is a Life Member of the First Defendant.
- 55 Mr Mondal stated that on or about the first week of April 2019 he found the “Notice of Annual General Meeting dated March 31, 2019” on the BIC website. On or about 20 April 2019, he received the “Notice of Annual General Meeting 2019”, which changed the date of the AGM to 5 May 2019, by post.
- 56 Mr Mondal further stated that he attended the adjourned AGM on 12 May 2019 “in due time”, and that only nine members attended on that day. He deposed to a conversation he said he had with the President, Md. Emanuel Haque, after the President announced the start of business. Mr Mondal said that he asked Mr Haque how it was possible to conduct the 2019 AGM on 12 May 2019, whether he had the financial statement for 2018-19 to submit to the members, and why he signed the notice of AGM on behalf of the General Secretary. Mr Mondal said that Mr Haque answered his questions by informing him that the AGM was necessary because the current Executive Council was not functioning properly and that he had the power to call the AGM at any time, that he had the 2018-19 financial statement but had left it in his car which his wife had taken shopping, and that the General Secretary did not want to sign the notice.
- 57 Mr Mondal left at the conclusion of this conversation and did not participate in the rest of the AGM.

**Dr Rashid Raashed**

- 58 Dr Raashed affirmed one affidavit on 24 April 2020.
- 59 Dr Raashed is also a Life Member of the First Defendant.
- 60 Dr Raashed stated the 12 May 2019 AGM was held some four years after the last AGM.
- 61 Dr Raashed stated that he attended the AGM on 12 May 2019 with Mr Mondal and that “[w]hen [he] challenged, the then President Mr Emamul Hoque, about the absence of an audited financial account, in an apparent joke, he said ‘the financial account is in my wife’s car’” (sic).

62 Dr Raashed also stated that he and nine other Life Members issued a “demand letter” to the current President, Mr Fakhruddin Chowdhury, on 15 December 2019, seeking that he and the current Secretary, Mr Zianal Abedin Masud “come clean on dubious conducting of BIC affairs.” That letter was annexed to Dr Raashed’s affidavit along with Mr Chowdhury’s response.

*The First and Second Defendants’ evidence*

**Mr Fakhruddin Ahmed Chowdhury**

63 Mr Chowdhury affirmed one affidavit on 6 May 2020.

64 Mr Chowdhury was elected as President of the First Defendant on 12 May 2019.

65 Mr Chowdhury stated that prior to the 12 May 2019 AGM there had been no AGM since 2016.

66 Mr Chowdhury stated that Mr Gofur was not present at “either meetings” and that he “saw that [Mr Gofur] was in the vicinity but [Mr Gofur] did not come into the venue at the time of the meetings.”

67 Mr Chowdhury stated that the most recent available financial records for the years 1 July 2016 to 30 June 2017 and 1 July 2017 to 30 June 2018 were presented at the meeting on 12 May 2019. The minutes for the AGM held on 12 May 2019 were annexed to Mr Chowdhury’s affidavit. They are titled “AGM 2016-17 and AGM 2017-2018 combined Meetings Minutes held on 12/05/2019 [10.30AM]” and note that “[t]owards the end of the meeting the financial reports for years 2016-17 and 2017-18 had arrived and presented to the meeting. They were approved after brief discussions.” Mr Chowdhury stated that Mr Haque’s wife was contacted and attended the premises to bring in the financial statements.

68 Mr Chowdhury stated that he received the letter dated 21 July 2019 by email from Mr Ahmed “who was not a signatory to the letter”. He stated that he responded to Mr Ahmed enquiring as to where he had obtained the letter and elected not to respond to Mr Ahmed.

69 Mr Chowdhury stated that there were considerably more than nine members at the AGM on 12 May 2019. A copy of the membership list which was available

at the AGM was annexed to Mr Chowdhury's affidavit. The members who were present signed the list. There are at least 19 signatures on the list.

- 70 Mr Chowdhury stated that the conversation deposed to by Mr Mondal actually took place between Dr Rasheed and Mr Haque. Mr Chowdhury further stated that Dr Rasheed and Mr Mondal left the meeting following that conversation, having only been present for about 10-15 minutes.
- 71 Finally, Mr Chowdhury stated that on 3 December 2019 notice of the AGM for 2019 was forwarded by mail to the members of the BIC, calling a meeting for 22 December 2019. Mr Chowdhury stated that there was no quorum present on that date and the meeting was later held on 29 December 2019. The notice letter and the minutes for the 29 December 2019 AGM were also annexed to Mr Chowdhury's affidavit. The minutes are titled "Minutes of Annual General Meeting-2019 Held on 29 December 2019" and note that "[t]he Treasurer's Financial report for the Financial Year 2018-2019 was presented and was adopted without much discussion."

**Mr MD Emamul Haque**

- 72 Mr Haque affirmed one affidavit on 12 May 2020.
- 73 In March and April 2019, Mr Haque was the President of the First Defendant.
- 74 Mr Haque stated that prior to March 2019, the Executive Council of the First Defendant voted to have an AGM and Election on 5 May 2019.
- 75 He stated that when the notice of meeting was issued it inadvertently referred to 4 May 2019. He stated that he realised that error in April and forwarded correspondence correcting the error. He stated that he had spoken with the Harunur Rashid who authorised him to send out the correcting document.

**Letter dated 28 April 2019 (Ex. D1)**

- 76 The Defendants tendered a letter which was sent by Mr Gofur to the former President (Mr Emamul Haque) and General Secretary (Mr Harunur Rashid) of the First Defendant on 28 April 2019. In the letter, Mr Gofur asserts that:

We had earlier notified you to call for the BIC's Special General Meeting by Requisition, as provided for within the clause 35 (c-g) of BIC Constitution. As you have failed to call for this meeting, it was convened and held last Saturday 27 April 2019 at LMA Centre Lakemba.



This is to notify you that during the above Special Meeting by Requisition, a new executive council of the association was elected, of which I am the President. It is in this capacity I am writing you this letter.

**From now on, please refrain from presenting yourselves as executives of the Association BIC in any capacity.**

77 Clauses 35(c)- 35(g) of the Constitution provide:

(c) The Executive Council shall, on the requisition in writing of not less than one-third of the total number of members, convene a General Meeting of the Centre.

(d) A requisition of members for a Special General Meeting:

- i. shall state the purpose of the meeting;
- ii. shall be signed by the members making the requisition;
- iii. shall be lodged with the General Secretary

(e) If the Executive Council fails to convene a General Meeting to be held within 1 month after the date on which a requisition of members for the meeting is lodged with the General Secretary, any one or more of the members who made the requisition may convene a General Meeting to be held not later than 1 month after that date.

(f) At a General Meeting convened by a member or members as referred to in rule 35 (e) shall be convened as nearly as is practicable in the same manner as General Meetings are convened by the Executive Council and any member who thereby incurs expense is entitled to be reimbursed by the Centre for any expense so incurred

(g) No business shall be transacted at this meeting outside the agenda stated in the requisition.

### **Consideration**

78 For the reasons that follow I am satisfied that none of the Plaintiffs' various complaints have any substance and in so far as there is any irregularity each is procedural only and therefore none of the activities complained of is, by reason of s 1322 of the *Corporations Act*, invalidated. Further, I am satisfied that there was no dishonesty on the part of any of the Defendants, nor did any of them act in bad faith. To that end, I am not satisfied if I need to go so far that there has been any substantial injustice as a result of the particular conduct complained of.

79 In their cross-claim, the First and Second Defendants did not clearly specify whether they were seeking a declaration that the actions complained of were validated by s 1322(2) or making an application for a declaration under s 1322(4)(a). The Defendants' submissions were largely addressed to the operation of s 1322 and given my conclusions above nothing much turns on

this point. I would make the declaration sought by the Plaintiffs under either subsection.

- 80 I should say in passing that I have found the reasoning of Palmer J in *Cordiant* of particular assistance. The reason why I am of the view that each of the matters are procedural and not substantial is that they in one way or another involve mere departures from the prescribed manner in which the particular thing was to be done without altering its substance.
- 81 Here, “the thing to be done” is the holding of an AGM and election of members of the Executive Council. The complaints turn upon the timing of a meeting, who was authorised to notify members of a meeting, the question whether the most up to date financial materials were presented at a meeting and the detail to be included on a nomination form for election to office within the organisation. These are in effect all matters of form in my view rather than matters of substance.
- 82 Complaint is made about the notice of the intended AGM published on the website on 31 March 2019. It can be accepted that such a notification is not one sanctioned by clause 52 of the Constitution. But the complaint goes nowhere. No one was disadvantaged and more importantly no one acted upon it. It was a few days later superseded in any event and is an entire irrelevance.
- 83 Next complaint is made about the fact that a notice otherwise not the subject of any complaint was invalid because it was undated and unsigned but more relevantly because it was neither “arranged” nor “called” by the General Secretary and hence is again in breach of the Constitution. But the Constitution does not expressly require the Secretary personally to do any act. It is therefore open to the Secretary in my view to appoint a person or agent to act on his/her behalf, which is the position at common law: see, for example, *R v Justices of Kent* (1873) 1 L.R. 8 QB 305 at 307; *Grahame v Cmr for Railways* (1946) 46 SR(NSW) 430 at 435. Here of course the notice was quite transparently stated to be “On behalf of Harunur Rashid, General Secretary”. It is not challenged that Mr Rashid was at the relevant time the General Secretary. The Constitution also does not expressly require the notice to be dated and signed. In my view there is no substance in the complaint.

- 84 There are two complaints which deal with the meetings which took place on 12 May and 29 December 2019, although the Plaintiffs did not explicitly seek relief in relation to the December meeting in their Statement of Claim. Both meetings are said to be in breach of clause 36(a) because neither was held within the prescribed time. It is submitted that because the May meeting took place outside the designated time frame all business conducted at the meeting, which involved the receipt of financial materials which I am satisfied were received and other matters such as the election of office bearers, should be declared invalid. I do not agree. Again, no member was at any disadvantage. Relevantly, each member was given notice of the meeting and the items on the agenda for the meeting. No-one was excluded from attending the meeting or nominating or running for election. It not suggested that any person who stood for or who was elected was not eligible to do so. No-one could possibly have been misled by what was proposed. No-one eligible to do so was precluded from voting. But whilst the timing of the meetings is complained about, it is not suggested that any injustice, substantial or otherwise, occurred.
- 85 In so far as the judgment of Hamilton J in *Chowdhury* is relied upon it is quite clearly distinguishable. First, no reliance was placed upon s 1322 of the *Corporations Act* in that case. However, it would have been difficult for the section to have had application in that case because the meeting resolved to dismiss the President without any notice being given to him, leading to a clear breach of the rules of natural justice. Clearly, the meeting led to a substantial injustice. No such issues arise here and in my view again there is no substance in the complaint.
- 86 The next complaint is that the 2018-2019 financial statements were not presented at the May meeting. They could not be because they were then not in existence. However, I am satisfied that other statements as recorded in the minutes were indeed presented. In that regard, I accept the evidence of Mr Chowdhury and the minutes themselves which are in evidence as corroborating that fact. I therefore also reject the contrary evidence of the Plaintiffs in this regard.

- 87 There is an allegation that the second AGM was notified online on 3 December 2019 and hence was not a notice in accordance with clause 52 of the Constitution. If that were the state of the facts, I agree. However, Mr Chowdhury in his affidavit states that the 3 December notice was sent to members by mail, and he annexes a copy to his affidavit. He was not challenged and I accept his evidence. A copy of that notice was also annexed to the second plaintiff (Mr Ahmed)'s first affidavit. Hence, there was no breach of clause 52. He also states that the scheduled 22 December meeting as notified did not proceed on that day but in fact took place on 29 December instead because of an absence of a quorum on 22 December, and again, he was not challenged. In fact, Mr Ahmed's second affidavit also corroborated that evidence. Further, as appears from the minutes, the 2018-2019 financials were presented at that meeting. The complaint as pleaded cannot be sustained as it first relies upon a factually inaccurate basis. Insofar as the meeting itself took place outside the time prescribed by the Constitution, I am of the view that it is a mere matter of procedure about which in any event there is no substantial injustice relied upon, nor could there be in my view.
- 88 The last complaint relates to the fact that the nomination forms for the May election failed to provide membership numbers with or on the forms. There are several reasons why this complaint is unsustainable. First, there is no provision in the Constitution that provides the form should include such details. Secondly, there was a returning officer to ensure the requisite formalities were followed and there is no suggestion any irregularity was detected. Next, it is not suggested that any person elected was ineligible by reason of not being a member to stand for office to which the person was elected. Last, there has been no suggestion of any substantial injustice that has arisen as a result.
- 89 In addition, in this case there could be no substantial injustice. It is abundantly plain that each of the Plaintiffs, and it might be supposed those supportive of their faction, kept themselves apprised of everything that was happening at the BIC, including the May 2019 AGM and Election. It is not irrelevant that the rival faction purported to hold its own Special General Meeting on 27 April, elect the "new executive council" and a new President, Mr Gofur, in an attempt to take over the Centre (see Ex. D1). The Plaintiffs' awareness of the goings on at the

BIC is further evidenced by their attendance at the May 2019 AGM, or in Mr Gofur's case, the vicinity of the AGM; their knowledge of the notices that were placed online and sent to members; and the letter dated 21 July 2019, which was signed by three of the plaintiffs. That rather puts an end in this case to a legitimate claim to any sort of substantial injustice.

90 It follows that the Plaintiffs have been entirely unsuccessful and are not therefore entitled to any of the relief sought. I would dismiss their proceedings. It follows from my reasons that the Defendants are successful in their Cross-Summons and I would make the declaration sought in paragraph 1 of that pleading. I therefore invite the parties to bring in short minutes to reflect these reasons. I will also hear any argument on the question of costs if necessary.

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