Abbas Meghjee v BW Foundation

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
16 June 2020

No. QB-2020-001575

High Court of Justice Queen's Bench Division

[2020] EWHC 2970 (QB), 2020 WL 03261329

Before: Mr Justice Cavanagh

Tuesday, 16 June 2020

Representation

Mr S. Karim (Solicitor, Advocate) appeared on behalf of the Claimant.
Mr S. Datta (of Counsel) appeared on behalf of the Defendant.

Judgment

Mr Justice Cavanagh:

1. This claim arises in sad circumstances. On 25 March 2020 the claimant's father, Mr Basheer Meghjee, died as a result of Covid-19. On 27 March 2020 he was buried in a graveyard that is reserved for Islamic burials in section J at Woodcock Hill Cemetery in Rickmansworth. The plot is plot J130A. Sadly, because he was self-isolating as a result of the pandemic, Mr Abbas Meghjee, the claimant, was not able to attend his father's interment.

2. The defendant is a charitable non-profit foundation which, amongst other activities, looks after the religious interests for its local religious community. One of its roles is to operate a graveyard for members of the Muslim faith. The defendant holds the relevant area in the graveyard pursuant to a lease with Three Rivers District Council, dated 7 August 2009. There was a later lease in the same terms. It has used this land for Islamic burials since about 2014. The defendant manages and maintains the graveyard, and persons are buried in the plots in the graveyard with the permission of and pursuant to agreements made with the defendant.

3. These proceedings arise because shortly after the claimant's father's burial, on 8 April 2020, another person was buried above him in the same plot. That person was Mr Fadhil Ghalta. Mr Basheer Meghjee was interred at a depth of three metres. Mr Ghalta was interred above him at a depth of two metres. The claimant claims that the defendant acted unlawfully in interring Mr Ghalta in the same plot without his consent. The claimant seeks two injunctions. The first is an order requiring the defendant to exhume the body of Mr Ghalta and to re-bury him in a separate grave in the same cemetery. The second is an order prohibiting the defendant, its servants, or agents from executing a two-tier burial policy over any grave in the graveyard without the prior knowledge and express consent of the family of the deceased.

4. The claimant is represented by Mr Saad Karim, a solicitor-advocate, and the defendant by Mr Shomik Datta, of counsel.

5. An *ex parte* application for these injunctions was first made to the court by the claimant on 4 May this year. The court office directed that the defendant be served with notice before the hearing took place. The claimant's solicitors attempted to do so sometime after 6.00 p.m. on the evening before the hearing, but their attempt was unsuccessful because the wrong email address was used. Eventually, contact was made with the defendant later that evening, and a request to adjourn the hearing was made. At the first injunction hearing on 5 May, which took place in court 37 without the defendant or his representatives being present, Tipples J declined to decide the matter and directed that the claimant should serve the proceedings on the defendant, to include a note of the hearing before Tipples J. The matter came back before Foster J on 10 May at a telephone hearing. The claimant was given until 14 May to notify the court and the defendants in writing as to whether he intended to pursue his application. Foster J then gave directions for service and exchange of evidence if he did so, with a view to the application being dealt with on the first available date after 22 May. On 13 May, the claimant notified the court and the defendant that he did indeed intend to pursue his application, and the matter now comes before me, and a hearing has taken place by way of Skype for Business, and so is a remote hearing.

6. I come to the legal grounds relied upon by the claimant. In his pleaded case, the claimant claims that the second interment on the plot was in breach of the agreement that was made between him and the defendant in relation to his father's burial. That is the only cause of action referred to in the claim form, though there is also reference to breach of Islamic jurisprudence and breach of the Human Rights Act . However, the skeleton argument on behalf of the claimant, which I only received at 5.00 p.m. yesterday, the day before the hearing, relies on a wide range of other causes of action.

7. Specifically, the skeleton argument asserts that, first, it is the local Council, Three Rivers District Council, not the defendant, which owns the burial plots and that under the rules and regulations of Three Rivers District Council, the plots confer exclusive rights of burial for 100 years. Second, that the claimant purchased exclusive rights of burial for 100 years. Third, that the defendant had not complied with the relevant rules and regulations of Three Rivers District Council which provide that an owner has to give consent to the opening of a grave. Fourth, that the defendant did not obtain the valid approval from Three Rivers District Council for second-tier graves. (Pausing there, none of those points have been specifically pleaded.) Fifth, that an agreement about double interment was reached between the claimant and the defendant's burial coordinator, Mr Mohamed Asaria, on 26 March, but this was to the effect that a member of the claimant's family could be buried in the upper tier and that there would be no burial on the upper tier until the graveyard was full, and even then the claimant would have the right to consent or object to any second-tier burial in that plot. Sixth, if a policy document issued by the defendant and signed on the claimant's behalf by his cousin amounted to an agreement consenting to a second burial on the same plot, then this was in breach of the claimant's rights as a consumer under section 62 of the Consumer Rights Act 2015 , in breach of good faith and a breach because it caused a significant imbalance to the parties' rights, and so the agreement is void. (Once again, this was not pleaded.) Seventh, it is alleged that the claimant did not consent to the second-tier burial. Eighth, the claimant says that he was forced to sign the policy declaration at a time when he was dealing with a lot of issues as a result of his father's death, and he did so out of fear of cremation, and therefore it should be set aside as having been obtained by duress. (Yet again, this duress argument is not pleaded.) Ninth, it is alleged that the course of action followed by the defendant was in breach of Islamic law, namely the Islamic law of al-Sistani, as the circumstances meant that Mr Ghalta was buried in usurped land. Tenth, the claimant says that the defendants acted negligently and recklessly in holding themselves out to be a burial authority when they are not, wrongfully denying the claimant's rights to his purchased exclusive rights of burial in not adhering to rules and regulations of the Three Rivers District Council and in not seeking the claimant's consent and in misleading the claimant to believe that the upper grave would be reserved for the claimant's family members, and also negligence and recklessness in relation to a large number of other matters, including refusing genuine attempts by the claimant to set the matter right and to remedy the damage that was caused by the defendant. (These points are also no pleaded.) Finally, and eleventh, there is also a contention that the defendant had acted in breach of Mr Meghjee's rights under the European Convention on Human Rights , implemented into our law by the Human Rights Act 1998 . The claimant asserts that the second burial breaches his Article 8 rights, that is respect for private and family life; his Article 9 rights, freedom of religion, and his rights under Article 1 of Protocol 1 , which is a right to peaceful enjoyment of property. In this regard, the claimant contends that the defendant was acting as a public authority because it was holding itself out as a charity that assists the general public and mankind.

8. I am going to begin with the principles upon which I should decide this application. This is an application for mandatory interim relief in relation to the main relief sought, that is the exhumation. More than that, it is an application for the entirety of the relief which the claimant seeks in these proceedings. The particulars of claim make clear that he does not seek any other significant relief. This is a matter in which the outcome of the interim relief proceedings would, in effect, determine the whole proceedings at least in relation to the main issue, which is whether Mr Ghalta's body should be disinterred and then reinterred in a different plot.

9. In circumstances such as these, the normal *American Cyanamid* principles do not apply. The claimant has to do more than show that there is a serious issue to be tried. As he is seeking a mandatory injunction, he has to show a strong *prima facie* case, a high degree of assurance or (which comes to the same thing) a likelihood of success at trial. In the case of *Nottingham Building Society v Eurodynamics Systems [1993] FSR 468* , Chadwick J summarised the principles to be applied when considering whether a mandatory injunction should be granted. He did so as follows:

> "(1) The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial.
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> (2) In considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the *status quo* .
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> (3) It is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the claimant would be able to establish this right at a trial. That is because the greater the degree of assurance the claimant will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.
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> (4) But even where the court is unable to feel any high degree of assurance that the claimant will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

10. There is a second reason why a higher than *Cyanamid* threshold applies. This is because the claimant is seeking an order which, as I have said, will essentially determine the action. In such circumstances, the claimant needs to establish a strong *prima facie* case: see *NWL v Woods [1979] 1 WLR 1294* HL. If the claimant can surmount the hurdle of showing that the prospects of success meet the relevant threshold, then it is also necessary, as with any interim injunction, to consider whether damages will be an adequate remedy and, if not, where the balance of convenience lies.

11. So, does the claimant have a sufficiently strong case? As I have already indicated, the claimant's case as put forward in his skeleton argument ranges far more widely than his case as pleaded. It covers, for example, negligence, the Consumer Protection Act , duress, who is the contracting party, and the relationship between the defendant and the local authority which is the burial authority.

12. This is not just a pleading point. It means that the defendant has not had any proper opportunity to prepare a response to the points that have been made, as it only received the claimant's skeleton argument yesterday afternoon. Mr Datta is fully entitled to take objection to this. Mr Karim points out that there are no directions for an amended pleading, but if a party is relying on new points of law and new allegations of fact, it is for that party to put forward an application to amend. The court cannot anticipate what they might want to do. Mr Karim also says that much of the preparation for this hearing was done during Ramadan, and that the Covid-19 pandemic also made life difficult. But, as I understand it, Ramadan ended a couple of

weeks ago, and since they have managed to deal with these points in the claimant's skeleton argument I do not see why they could not have prepared a draft amendment a week or so ago. Accordingly, in my view, there is no good reason put forward for the failure to give the other side or the court advance notice, beyond late yesterday, of these new points.

13. In those circumstances, I am first going to deal with those parts of the grounds now advanced which are connected, even if only tangentially, to the claim as pleaded. That focuses upon the claimant's reliance upon the argument that there was an agreement that only another family member would be placed in the same plot, and that even this would not happen without his consent. In essence, this is a breach of contract claim against the defendant. I will then go on to look at the other grounds that are relied upon even though they have not been pleaded, but I will not do so in exactly the same order as the points were dealt with in Mr Karim's skeleton argument or oral submissions.

14. I start with the point about the agreement. The original application notice and particulars of claim dated 1 May 2020, and the later particulars of claim, stated that the claimant had been advised by the defendant that as a result of the Covid-19 pandemic the defendant was operating a two-tier burial policy, but that the claimant would be informed and his consent obtained before any such second-tier burial took place, and that any such second-tier burials would be limited to family members and would be in accordance with Islamic jurisprudence on burials. The claimant says that, notwithstanding this and without his prior knowledge or consent, the defendant proceeded to bury an unknown body, at the time, on top of Mr Basheer Meghjee on 8 April, without first exhausting all of the other grave spaces in the burial ground, which currently amount to about 297 unused grave spaces. The claimant said that this was in breach of the grant of exclusive burial rights for 100 years in an earthen grave that he had purchased for his father, and that it further violated his human rights, including his freedom of thought, belief and religion. He said that an injunction was urgent because otherwise the earth might collapse on to his father's buried body.

15. In his first witness statement dated 1 May 2020, which was supported by a statement of truth, the claimant said that he spoke to Mr Asaria, a trustee of the defendant Foundation, to arrange to purchase exclusive rights of burial for 100 years in an earthen grave. He said that Mr Asaria had told him that they were operating a two-tier burial policy due to Covid-19 which had led to an increased demand for burial space. He said that Mr Asaria told him that he would still have exclusive rights to the grave but that it could be used to bury another family member on the basis that his father would be buried three metres deep, and the other family member could be buried two metres deep if the need arose. The claimant said that he accepted this and that it amounted to an oral agreement made on 26 March, the day before the burial. He also said in his statement that his cousin, Mohamed Sakalain Meghjee (known as Sakalain Meghjee), who is a volunteer at Stanmore Mosque, was present. I have been provided with a witness statement from Mr Sakalain Meghjee which deals with a number of matters but does not deal with this conversation.

16. The claimant said that he then bought the plot and that under the "fees and charges policy" the price paid was for exclusive rights of burial for 100 years in an earthen grave. The claimant's first statement said that on 26 March, two hours before the burial, Mr Asaria attended Stanmore Mosque and produced some documents. He now accepts that this timing is wrong and that in fact 26 March was the day before the burial, which was 27 March. The claimant said that when Mr Asaria attended the mosque, neither the claimant nor his cousin was present. Mr Asaria gave the documents to Mr Jagani, the head of burials at the mosque. Mr Asaria told Mr Jagani that the documents consisted of a burial policy that needed to be signed before a burial could take place. The claimant acknowledges and accepts that his cousin then did sign this policy on his behalf, and he accepts that, on the face of it, the document provided for the right for the defendant to bury a second body in the same plot, and the document did not say that this would only be another family member or that the claimant's consent was needed first. The claimant's cousin duly signed a declaration on the claimant's behalf, dated 26 March, which states:

> "I have received and read the BW Foundation policy for burials at Woodcock Hill Cemetery, section J. I have signed below to confirm my understanding and acceptance of this policy in full."

There is no dispute that Mr Sakalain Meghjee did this with the claimant's express authority. However, the claimant said that his cousin did not appreciate that the policy contained the new provision about two-tier burials because the form looked like the standard pre-existing form which his cousin had used for his mother and his brother-in-law's burial in the past.

17. The claimant said that he was unaware that Mr Ghalta was buried on the second tier of the same plot on 8 April until his cousin heard a rumour to that effect on 14 April. He said that his cousin called the Council, and the Council directed him to the defendant. The claimant said that it was not until 27 April that Mr Asaria confirmed by a text message that someone else had been buried on top of the claimant's father. The claimant said that they pleaded for this person to be exhumed and re-buried, but the defendant did not respond. Pausing there, the defendant denies that any such plea was made. The claimant said that this was very upsetting and had a significant mental impact upon him and his family. He said that the defendant had denied his father a burial in accordance with Islamic jurisprudence and had violated the family's human rights. He said that this was "inhumane, irrational, unethical and shameful", and was for commercial gain to capitalise on the pandemic, as there were still 297 empty plots available. The claimant said that the defendant normally waited a year for the ground to settle after a burial but had only wait a few weeks before disturbing his father's grave. The claimant said that the defendant covered up its actions by locking the gates to the cemetery while interments took place and unlawfully restricted the number of attendees to four people. I interpose there to say that the defendant's case is that they were required by the coronavirus regulations to lock the cemetery while interments took place and that the number of attendees had to be limited to eight people. Coming back to his statement, the claimant said that the application was of the utmost urgency to exhume the body because the ground is settling day by day, and was making his father's coffin fragile and more difficult to remove.

18. The claimant provided a second witness statement on 21 May. This was provided after he had seen the first witness statement by Mr Asaria on behalf of the defendant. In his second statement, the claimant stressed how upset he was at the time because he was preparing for his father's funeral. He acknowledged that he had had a telephone call on 26 March, which he had not previously mentioned, in which Mr Asaria had told him that the policy pursuant to which two people could be interred in one plot had to be agreed and signed up to or the defendant would not agree to bury anyway. The claimant said that naturally, with the pressure of everything going on at the time, "I agreed to this prior to even seeing the actual policy". He said that he also told Mr Asaria that he needed to see his family and come back to him. He said that Mr Asaria then emailed him the policy and called him back at 3.40 p.m. when the conversation took place that he had previously referred to, in which Mr Asaria said that they would only bury a family member and that he would not bury anyone until the single plots were full and that the claimant would be able to give consent before this happened. The claimant said that he said he would speak to his mother and get back to Mr Asaria. He spoke to his mother, and he said in his statement:

> "I therefore replied by email to Mr Asaria at 7.14 p.m. on 26 March 2020 informing him that I agreed to the terms as we discussed and that Sakalain will sign on my behalf."

The claimant also said in his statement that the lease of the cemetery was until 2134 and that since 100 years of quite enjoyment must be given, the graves will have to be filled by 2034. He also said there is no need for double stacking as, taking account of the number of graves and the speed by which graves have been filled since 2014, the graveyard will not run out of single spaces by 2034.

19. The claimant's claim for an injunction is supported by two further statements. The first is from his cousin, Sakalain Meghjee. He gave evidence about the difference between Islamic and other burials and about the use of the cemeteries by Stanmore Mosque. He said that he explained to the claimant when they spoke on 26 March that it is standard practice for consent to be obtained before a second body is placed on the same plot, and that it will be a family member. He confirmed that he signed the declaration on the claimant's behalf. He also said that the claimant's family had received a partial refund from the Mosque Burial Fund of £1,050 because a second person had been buried in the same plot. As I have mentioned, Mr Sakalain Meghjee did not give any evidence about overhearing the conversation between the claimant and Mr Asaria.

20. The second additional statement was from Dr Nadeen Fadhil. She is the daughter of Mr Ghalta. She and the claimant met for the first time on 22 May at Eid when they were visiting their fathers' graves. Dr Fadhil was understandably upset just after her father died. It had been very sudden. She said that she was told that her father's burial would be a second-tier burial, but that she had also been told that the other family had consented to this, and indeed this was the only option open to her as the policy had changed. She said that she had felt that she had no choice and was compelled to sign the policy declaration. She referred to an email that she sent on 7 April to the defendant, saying:

"I fully accept all terms and conditions. I will send you the documents as soon as I can."

She did then send the signed declaration agreeing to the defendant's policy shortly thereafter. Like the claimant, Dr Fadhil says that she was upset and angry that the defendant had started to bury bodies in two tiers rather than first to use up the available grave space. She now takes the view that her father was not buried in accordance with Islamic jurisprudence. She says that she complained to the defendant, who responded by saying that it was sympathetic but it had acted in accordance with its policies. The defendant told her that they did not use all available graves first because the advice of the local authority had been not to do so, based on the stability of the land, the weight of the excavator, the danger of grave collapse and other factors. The defendant said it would not be possible to move her father's body now. The statement ends by saying that Dr Fadhil feels that she has been misinformed, misled and exploited by the defendant. She did not say expressly in her witness statement that she consents to the move, although it is perhaps implicit that she does by the fact that she is supporting this application. Mr Asaria, I should add, disputes that Dr Fadhil was told that the claimant had consented to a second burial, though of course the defendant's case is that in fact he had done so.

21. I move on to my conclusion on the strength of the arguments in relation to the agreement. In my judgment, it is clear that these allegations do not surmount the hurdle of showing a strong *prima facie* case. Even on the claimant's own evidence, his cousin, as his agent, signed the policy document which made clear that the defendant had the right to inter a second body above the claimant's father's body. There was no promise in that document to obtain the claimant's agreement before a second burial would take place on the plot, or that only a family member would be interred above. The claimant relies on the telephone conversation in which he says that he agreed something different, but this is, on the face of it, superseded by the subsequent written agreement. It is trite law that a written agreement supersedes anything that was said or even agreed orally during prior negotiations.

22. As for the argument on duress, the contention that this agreement can be set aside on the basis of duress is, in my judgment, extremely thin. The fact that the claimant was upset by his father's death in the Covid-19 pandemic and that he wanted, for religious reasons, to avoid cremation does not come anywhere near justifying setting aside the agreement on grounds of duress. There was no threat made by the defendant's representatives. Nor does the fact that the claimant felt compelled to agree and signed the policy mean that there was duress. The fact remains that the claimant had a choice, even though, as a matter of practical reality, if he wanted his father to be buried speedily, he had to comply with the conditions imposed by the defendant. The fact that the defendant has now changed its policy declaration (perhaps in response to this case), does not mean that the treatment of the claimant amounted to duress or that this amounts to an implicit admission of duress in the past. The Foundation is entitled to impose conditions on the grant of a burial plot.

23. So, even on the claimant's own case, there is no strong *prima facie* case of breaching the agreement with the defendant or of duress, but the claimant's problems do not stop there. His version of events is disputed, and the defendant's own alternative version is, unlike the claimant's version, supported by the contemporaneous documents. The claimant relies upon the call that took place between him and Mr Asaria on 26 March, but his evidence is flatly contradicted by Mr Asaria's evidence of the same call in which he says that he did not make any promises about only a family member being buried in the plot or that Mr Meghjee would have the right to veto anybody else being buried or that they would only bury anybody there when other plots were filled up.

24. More importantly perhaps, the claimant's evidence in this regard is not consistent with the contemporaneous documentation. I have been shown a text message dated 26 March 2020, timed at 12.21 p.m., from Mr Asaria to the claimant in which he said:

> "As I explained over the phone, the burial is at about 12 foot down. We call it double depth. The top part will not be reserved for the family. It could be opened up to bury another *mayyit* [that is another body and, I take it, another believer] at about six foot down, without disturbing the first burial. The timescale could be anything from one week to six months given the situation now."

That text is wholly consistent with Mr Asaria's version of the conversation and wholly inconsistent with the claimant's version. But there is no indication that the claimant took issue with that text message.

25. Later on the same day, at 2.46 p.m., Mr Asaria wrote an email to the claimant in the following terms:

> "Apology for the delay in sending you the required information. Due to the current situation, we have had to adopt the new policy and procedure. Attached find the relevant policy and explanation. If you need any clarification, please do not hesitate to contact. Please note, as explained on the phone, the burial is at double depth, and the upper level is not reserved for the family. BW Foundation would carry out sequential burials, but we do our best to maintain gender separation. Under the present circumstances of Covid-19, the time period between the first burial and the second burial could be anything from one week to six months. If the terms and conditions are acceptable, please email me as soon as possible. (Inaudible) will give you a similar form which you will need to sign before the burial."

The policy document which was attached to that email provides in terms - I will not read it all out - that each grave space will be used with effect from 16 March to bury two bodies, separated by around a metre of soil. Two bodies will be interred in each grave space at different depths. Interments will be sequential with no spaces being left between graves, and pre-selection of the grave space will not be possible. The claimant again did not take issue with that description of the oral conversation in Mr Asaria's email. Rather, the claimant explicitly agreed to the terms in that email. In response, at 7.15 p.m, he said:

> "I agree to these terms. My cousin, Sakalain Meghjee, will sign the necessary paperwork as I am in isolation."

He did not therefore suggest that his agreement was to a different set of terms altogether, and this email exchange was not mentioned in the claimant's first witness statement.

26. Accordingly, in my judgment, the contemporaneous documents wholly support the defendant's case in relation to the arguments, and in those circumstances the claimant's contention that there was a breach of an agreement falls far short of the standard of arguability required for a mandatory injunction which would result in the grant of, effectively, the full relief sought in the proceedings. It does not even meet the *Cyanamid* standard of a serious issue to be tried.

27. I move on to deal with the other grounds that are now relied upon by the claimant.

28. First, the Consumer Rights Act . There is no arguable case, in my judgment, that the events that I have just described were in breach of the claimant's rights as a consumer under section 62 of the Consumer Rights Act 2015 . There is no arguable case that the defendant or Mr Asaria acted in breach of good faith or in a way that caused a significant imbalance to the parties' rights. At all times the contemporaneous documentation shows that the defendant made clear what it was doing and behaved fairly, properly and in accordance with good faith. The change to the policy was a sensible and proportionate response by the defendant to the problems caused by the pandemic which, especially in March 2020, was feared to cause a flood of deaths.

29. The next point is breach of Islamic law. The parties disagree about whether the two-tier burial in this way was a breach of the relevant Islamic jurisprudence. I make clear that I am not competent or an appropriate person to rule on Islamic law, but I note that the arguments of the claimant and of Dr Fadhil in this regard are based on the fact that no consent was given by the claimant to the burial of a second body, when, as I have said, the contemporaneous evidence strongly suggests otherwise. In any event, the defendant has put forward evidence that it consulted with an Islamic scholar who advised that this course of action is consistent with Islamic jurisprudence. Before this whole policy was drafted, the defendant sought advice from a leading Islamic scholar, Dr Fazel Milani, as to whether three-tier burials were permissible under Islamic law. The claimant relies upon rules or laws issued by the Grand Ayatollah al-Sistani, specifically rules 612 and 632. However, Dr Melani, when this matter was raised with him, confirmed to the defendant that these rules do not apply to the policy being applied in this graveyard, in particular because the rules are designed for people who are buried in shrouds, not people like the two individuals in this case who were buried in wooden coffins. The claimant says, through Mr Karim, that Dr Milani was not provided with full information when he provided this advice, and that his answers would have been different if he was aware that there had been no consent by the first family, that the two interments had taken place so quickly together, and that there were other single grave plots that had not been used. Nonetheless, in my judgment, this is far short of being a strong *prima facie* case of a breach of Islamic law, and I bear in mind also that the claimant's cousin's evidence referred to the fact that three of the six cemeteries used by Stanmore Mosque have been actively burying on a double interment basis for a while now, without Mr Sakalain Meghjee suggesting that this was in breach of Islamic jurisprudence.

30. In any event, though, there are two points that are worth making finally under this heading. First, religious law, of whatever denomination, does not give a cause of action in these courts, and, secondly, the complaint in relation to Islamic jurisprudence is predicated on the assertion that no consent was given for a two-tier burial, when, as I have said, the preponderance of the evidence before me is that there was consent given by the claimant to a two-tier burial, including the burial of a stranger, before his father was interred.

31. The next ground that is relied upon is breach of human rights. Once again, this does not give rise to a strong *prima facie* case. The obligations under section 6 of the Human Rights Act apply only to public authorities or to bodies that are performing the functions of public authorities. I do not think there is a strong *prima facie* case or even a readily arguable case that the defendant was performing the functions of public authorities. The fact that it is a charity performing a laudable public function and that it is leasing land from a public authority does not mean that it is governed by the Human Rights Act and that it is within the scope of section 6 of that Act. In this regard, I take account of the guidance given by the House of Lords in the *Aston Cantlow* case [2003] UKHL 37. In other words, to use the language of that case, the defendant is not a hybrid body for human rights purposes. But, in any event, I do not think there is a strong *prima facie* case of a breach of Article 8 , Article 9 , or Article 1 of Protocol 1 , because if the preponderance of the evidence is that there was an agreement, even if reluctantly agreed to, there is no breach of anybody's human rights.

32. The next point I will deal with is the argument relating to the rules and regulations of Three Rivers District Council. The short answer to this point is that it is not pleaded, at least nothing like in the form that it is now argued. For that reason alone, in my judgment, it is not appropriate to form the basis of a grant of a mandatory interim injunction. However, I will go on briefly to examine the argument on its merits. The claimant refers to regulation 10(1)(a) of the Local Authorities' Cemeteries Order 1997 to assert that only a local authority, as a burial authority, can grant exclusive rights of burial in any grave space or grave, and that therefore the exclusive rights of burial for 100 years in an earthen grave as referred to in the fees and charges policy for Three Rivers District Council is the binding agreement that the defendant must comply with. The claimant also refers to the Three Rivers District Council's summary of fees and charges document, which refers to "exclusive rights of burial for 100 years in an earthen grave". Also, a document containing the rules applicable to all sections of the cemetery in section 6 again refers to the same exclusive right.

33. In my judgment, this does not give rise to a strong *prima facie* case. The main obstacle to this argument is that the Council's relationship was with the defendant Foundation, not directly with the claimant. Three Rivers District Council

granted exclusive rights of burial to the Foundation in the section of the graveyard concerned, not to the family of the deceased. The defendant holds the relevant area of section J at Woodcock Hill Cemetery pursuant to the terms of a lease, and therefore it is the leasehold owner of the land in question. It is the defendant that pays the fees for the graves to the Council. How it works in practice is that family pays the burial fee to the mosque, which passes the fee on to the Foundation, part of which is then forwarded on to the Council. The agreement that governs the relationship and the rights and responsibilities between the claimant and the defendant is the agreement between the claimant and the defendant as set out in the policy, and not any agreement between the claimant and Three Rivers District Council. If it were otherwise, then Three Rivers District Council would have been the appropriate defendant. In my judgment, it is clear that the terms that matter are the terms of the agreement between the claimant and the Foundation.

34. This is also, it seems to me, the answer to the suggestion that the defendant is in breach of its lease with the Council. Even if that were so, that does not affect the rights and responsibilities as between the claimant and the defendant. But, in any event, there was evidence before me that the Council had given its consent to the policy. I was provided with a witness statement from Mr Riazali Esmail, a trustee of the foundation, who said in the first of his two witness statements that he discussed the plan to change the policy to introduce two-tier burials with the Council on 18 March and that the Council consented to it. He said that the Council also advised that for operational reasons relating to the stability of the ground, there should be two-tier burials rather than burials in single plots until they were all full. There is no direct evidence to contradict Mr Esmail's evidence in this respect. Next, it is worth observing the regulations to which the claimant refers - regulation 10(1)(a)(ii) - envisages that it is possible for burial authorities to authorise burial in several tiers. Third, though this may be just another way of putting the points I have already referred to, there is no contractual property right that was granted to the claimant in relation to the land above the body of his father. There may also be an issue that exclusive rights of burial for 100 years in an earthen grave means an exclusive right to be buried in a plot. That, I think, is more arguable, but it is beside the point because if the preponderance of the evidence is that the claimant has given his consent, then this overrides any exclusive rights that might otherwise have potentially been granted. So, for all of those reasons, it seems to me that the argument, albeit not pleaded, relying upon Three Rivers District Council is misconceived.

35. The next point is that no approval was given by Three Rivers District Council to the change of policy by the defendant. As I have already said, there is evidence, which has not been controverted directly, from Mr Esmail to the effect that that change of policy was indeed agreed to by the Council. Mr Karim says that it is unlikely that the Council would agree to it, and points out that there are no documents supporting it, but it seems to me highly likely at the time of this pandemic that the Council would have agreed to a course of action such as this, especially as the Council itself carries out double or even triple interments, and, as a matter of common sense, it would be close to inconceivable that a body such as the defendant would do this without the agreement of the burial authority.

36. The next ground relied upon by the claimant is the allegation of negligence or recklessness. As I have said, this is not pleaded but, in any event, in my judgment, and with respect, it is hopeless. The relationship between the claimant and the defendant was governed by contract, not by the law of tort. Putting a challenge in terms of negligence and recklessness does not assist. The suggestion that, with the benefit of hindsight, the defendant has misjudged the amount of burial space that it would need as a result of Covid-19 cannot be a legal basis for finding that somehow this was unlawful.

37. In conclusion on the merits, therefore, for these reasons, the claimant has not satisfied me that there is a strong *prima facie* case that he has a cause of action, whether pleaded or not, that the defendant acted unlawfully in placing a second person on the second tier of the plot. Indeed, I am not persuaded even that he has shown a serious issue to be tried on the standard *American Cyanamid* test.

38. I will, however, briefly go on to consider adequacy of damages and the balance of convenience, though strictly it does not arise. I am persuaded by the claimant that damages would not be an adequate remedy for him. This is not about money. Nor would damages be an adequate remedy for the defendant. The defendant wishes to uphold his policy. So the matter

comes down to the balance of convenience. It is right to acknowledge, as Mr Karim submitted, that, as a practical matter, exhumation would not be difficult as interment was so recent and there are still vacant grave plots nearby, and the defendant does not rely on practical difficulties in its arguments on balance of convenience. There was no evidence from Dr Fadhil to the effect that she does not object to the exhumation of her father. Had she done so, in my view, that would have been an overwhelming point on the balance of convenience. But I am told informally that she does not object, and, perhaps more substantially, the obvious inference from the fact that she has put in a statement in support of the claimant's claim is that she would not object to exhumation and re-interment.

39. However, in my judgment, it is clear, nonetheless, that even if there were a strong *prima facie* case, the balance of convenience is against granting an injunction. There are several cumulative reasons for this. First, as I have already said, the mandatory interim relief that the claimant is seeking will determine the whole proceedings. Mr Karim has said that the claimant is keen to go to trial, but if Mr Ghalta's body is exhumed and moved and re-buried, it is unrealistic to think that it will ever be returned. In the *Nottingham Building Society v Eurodynamics* case, Chadwick J said that the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong. Applying that test, in my judgment, the least risk of injustice is to leave things as they are pending trial. It would be wrong, on that basis, to grant an injunction to exhume the body. We are where we are. The interment of Mr Ghalta has taken place. I am not persuaded by the evidence before me that there is any great urgency to remove the body of Mr Ghalta because of the risk of settling of the ground or fragility of the coffin. There is no evidence, beyond assertion, that this is the case. The two gentlemen were buried in wooden coffins, not in shrouds, and already more than two months have gone by since the second interment. In those circumstances, it is better to maintain the *status quo* pending trial.

40. The claimant relies on Dr Fadhil's statement but, as Mr Datta has pointed out, she said in her statement only that she wants to seek legal and religious advice. She is not a party to these proceedings and, in any event, she gave consent to the double interment and to the defendant's policy at the time. A sense of grievance now is based on the belief that the claimant had not given consent to a double interment in the same plot as her father, and, for the reasons given above, the evidence I have seen does not support that contention.

41. I will add very briefly that, Mr Karim's skeleton argument acknowledged, it would at present be a statutory offence, contrary to section 25 of the Burial Act 1857 , to disinter Mr Ghalta's body. Where you have consecrated ground such as this, disinterment can only occur under licence from the Secretary of State for Justice. If I was otherwise minded to grant an injunction, I would not have refrained from doing so on this basis. As Mr Karim said, we could get around this with appropriate directions to seek the Secretary of State's consent. It is in practice highly unlikely that the Secretary of State would have objected. However, for the reasons I have given, the balance of convenience is not in favour of an injunction.

42. I should add that there is also a problem with the cross-undertaking as to damages. The claimant was directed by Foster J to provide sufficient information about his assets. All he has done is provide an extract from a bank account (which is probably his bank account, but is not plainly so) and that shows a balance of £40,000. Given the costs that have so far been incurred in this litigation, there is some doubt as to whether that shows a sufficient balance to meet a cross-undertaking as to damages. But, in any event, as I have said, not only do I think that the strength of the arguments is not sufficient to justify an injunction but, in any event, in my view, the balance of convenience is plainly in favour of declining to grant the injunction to disinter Mr Ghalta's body.

43. As for the second part of the injunction, in my judgment, there is no possible basis for granting the wider injunction to require the defendant to abandon the policy of having two-tier burials in the cemetery. This is of no interest to the claimant. More than that, it would potentially adversely affect third parties who may find that there is no space to bury their family members in a Muslim cemetery if, sadly, the cemetery is filled up with single-tier burials.

44. For these reasons, I refuse the injunction. I do not need to go into the question of material non-disclosure, though it is right to observe that there is, on the face of it, a good argument that there was material non-disclosure at least when the application was originally filed, as the claimant did not disclose the texts and emails of 26 March, and that non-disclosure indeed tended to give a misleading impression. There has been no good explanation given for why the claimant chose to go *ex parte* and why there was no pre-action correspondence before going to court.

45. Before I leave this matter, however, it is appropriate to observe that, on the basis of the evidence that I have seen, the emotive and highly critical language used by the claimant against defendant such as "inhumane, irrational, unethical and shameful", and "blighted by their desires to commercialise and capitalise on the Covid-19 pandemic" is not merited. On the basis of the evidence before me, the Foundation and its officers have behaved properly and with sensitivity throughout and they do not deserve the opprobrium that had been heaped upon them. So my decision is that the injunction is refused.

Ruling on Costs

46. At the end of this hearing in which I have declined to grant an injunction to the claimant, Mr Datta, on behalf of the defendant, seeks costs under CPR 44.2 in the sum (supported by a schedule of costs) of £28,336.80. The main reason of course why he seeks those costs is that he has been successful in today's hearing, but he relies on other grounds. He submits that the litigation could have been avoided with pre-action correspondence, and as early as 11 May the claimant and his legal adviser were sent the texts and emails on 26 March which show how difficult the claimant's own case was in relation to the agreement, and they were warned that it would be said that there was a breach of the duty of full and frank disclosure. Mr Datta is also critical of the claimant for not taking up the opportunity, by 13 May, of reconsidering whether to proceed after the hearing in front of Foster J. He also points out that the case was effectively re-pleaded by way of skeleton argument yesterday afternoon. Mr Karim, amongst his responses, points out that the fact that an *ex parte* application was made initially did not have any effect on costs because, by definition, the defendant was not involved in that application, and therefore did not incur any costs.

47. It seems to me it is appropriate to award the defendant its costs in this case, for the standard reason that they were successful, and, since this was a hearing lasting less than a day, I can make a summary award of costs on the standard basis without the need to consider whether or not to award costs on an indemnity basis. I therefore look at the schedule of costs that has been provided by the defendant. As I have said, they are in the sum of £28,336.80. That compares with a schedule of costs on behalf of the claimant which was a total of £26,733. Both of those figures include VAT. It is clear therefore that they were not far off from each other.

48. Mr Karim makes the valid point that as the claimant was the claimant, he would normally incur some greater costs in the preparation of the case, but the defendant in this case has had to put in a number of witness statements to correct apparent inaccuracies in the claimant's evidence. Also the claimant did not use counsel, whereas the defendant did, and it seems to me it is wholly appropriate, in a case of this importance, for counsel to be used. Somewhat surprisingly perhaps, Mr Karim described counsel's fees as extortionate in this case. In my judgment, they were eminently reasonable given the amount of work that Mr Datta had to do. Finally, in terms of the figures, Mr Karim objects to the fact that a grade A solicitor was used for the entirety of the preparation of this case. But it seems to me that consistency is a useful virtue in preparation of this sort, and that the hourly rate charged by the solicitor concerned is not overly high, and the amount of hours charged again are not overly high.

49. So I will award the defendant its costs, and make an award of costs in the sum of £28,336.80.

