IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No. HC12F02580

Rolls Building
Strand
London

Monday, 18th February 2013

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

PS MARWAHA & OTHERS

Claimants

-v-

SINGH & OTHERS

Defendant

Counsel for the Claimants: MR. CRAMPIN QC & MR. SMITH

Counsel for the Defendant: MR. WINFIELD

APPROVED JUDGMENT

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JUDGE PELLING QC:

INTRODUCTION

1. This is the trial of a claim by which the claimants seek injunctions and declaratory relief relating to: (a) a purported amendment to the constitution of the Guru Tegh Bahadur Gurdwara ("the charity"); (b) the completion of a new list of members of the charity; and (c) for amendment of the scheme applicable to the charity so as to facilitate an election of a new executive committee for the charity. Under the constitution of the charity, that election should have taken place in September 2012 but did not as a result of an interim injunction prohibiting the holding of an election until after the trial of this claim.

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2. The trial took place on 12th and 13th February 2013, and I heard oral evidence from the first claimant on behalf of the claimants, and from the first and second defendants. The statement of Mr Kuldeep Singh was admitted unchallenged.

BACKGROUND

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3. The charity is an unincorporated association and registered charity that provides and manages a Sikh temple in Leicester. The claimants are currently members of the charity. The 1st to 17th defendants are all members of the charity's executive committee. The 18th defendant is the Attorney General, who has been joined as a defendant to the proceedings because they are "charity proceedings", but he has played any part in them and does not appear and is not represented. The proceedings have been authorised by the Charity Commission as required by section 115 of the Charities Act 2011, by orders made on 28th June and 7th November 2012.

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4. These proceedings were commenced on 26th June 2012. An application for summary judgment or an interim injunction to restrain the holding of the 2012 election came before Mr Christopher Pymont QC, sitting as a deputy judge of the Chancery Division on 5th and 6th September 2012. He refused summary judgment but granted the injunction and gave directions for the future conduct of these proceedings which included a direction for an expedited trial.

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5. The constitution of the charity was established by a scheme, approved by Mr Justice Chadwick, as he then was, by an order made on 11th October 1996. The charity is administered by the executive committee which includes 17 members elected by the members from the membership at an election which is required by clause 22 of the constitution to be held in September of each alternate year beginning in 1998. The last election held was in September 2010. The outcome of that election is disputed by the claimants but is not challenged in these proceedings. What is alleged by the claimants to be objectionable about how that election was conducted and the outcome which they maintain was the result of those objectionable aspects of the process are relied on as evidence in support of the claimant's claim for the relief sought in these proceedings.

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6. Within the current membership of the charity there are two groups known respectively as the Baj and Sher groups. The claimants are members of the former, and the defendants the latter. There is a longstanding hostility between the two groups. The same groups also exist in other Sikh temples in Leicester including in particular the Guru Nanak Gurdwara. That temple has been referred to throughout in these

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proceedings as "Holy Bones", I think because that is the name of the road in which that Gurdwara is located. For that reason and that reason alone I continue to refer to the Guru Nanak Gurdwara by that name hereafter.

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7. There was and is a history of each group attempting to exert influence and control in temples across Leicester. One of the purposes of the scheme approved by Mr Justice Chadwick was to eliminate, as far as practicable, those practices in relation to the charity. This it did by providing that members of other Sikh temples could not be members of the charity and by requiring a process of application for membership by both existing and new members of the charity to be undertaken in May and June of each election year.

THE CONSTITUTION OF THE CHARITY

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8. The constitution, as I have said already was set out in the scheme approved by Mr Justice Chadwick and so far as is material the scheme provided as follows:

> "Membership
>
> 3(1) Subject is here and after provide that membership of the Gurdwara will be open to all persons of 18 years of age and over who are resident in Leicester or elsewhere in the county of Leicestershire and who profess the Sikh religion, that is to say the belief in the teachings of the ten gurus and no other, and accept the authority of Guru Granth Sahib.
>
> (2) No person who is a member of any other Sikh or Hindu temple should be entitled to membership of the Gurdwara.
>
> (3) The committee shall maintain a register of members of the Gurdwara and shall enter therein the following particulars:
>
> (a) the name and address of each member;
>
> (b) the date upon which each member became a member; and
>
> (c) the date which any member ceases to be a member.
>
> (4) Persons may become members at any time except between the last day to apply to become a member under the renewal of the membership register pursuant to clause 3(7) below and the date of the next following election.
>
> (5) No person shall be admitted as a member unless they can produce as a means of identification either a driving licence, state pension book, NHS medical card, a passport or some other form of identification as the committee shall from time to time specify.
>
> (6) The committee shall issue a membership card to all registered members of the Gurdwara.
>
> (7) The register of members shall be renewed during the months of May and June in every year in which there is to be an election by requiring all persons wishing to continue as or become members to register on the new register, which will then displace the previous register as the register of members. The

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manner in which such renewals are conducted should be within the discretion of the committee provided that adequate publicity is given to the renewal and adequate means are afforded to give all those potentially interested in applying for membership a fair opportunity to have themselves entered in the new register [...]

The Executive Committee

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5. The Gurdwara should be administered and managed by an executive committee [...]

6. The members of the committee should be the 13 office bearers ascribed in clause 17 below and four other persons […]

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7. The term of office of all members of the committee other than co-opted members or members appointed to fill casual vacancies in accordance with the provisions here and after contained should commence at the conclusion of the election at which they are elected and shall come to an end at the conclusion of the next following election but any person may be re-elected […]

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Notices

19. The committee shall at all times maintain in a prominent place on the premises of the Gurdwara a noticeboard ('the Noticeboard').

20. Any notice of an election general meeting or amendment ballot as defined by clause 34.1 below required under these rules must be given:

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(1) by displaying such notice as may be required on the noticeboard throughout the period specified for the giving of notice;

(2) by causing the notice to be read out at all religious ceremonies at the Gurdwara attended by the membership throughout the period; and

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(3) by either placing the notice in a newspaper circulating amongst the Sikh community of Leicester with a publication day before the first day of the notice period or by posting before that day the notice to every member at his or her address shown on the membership register, and if these requirements are met, notice should be deemed to have been given to all members of the Gurdwara.

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Elections

21. The holding and conduct of elections shall be the responsibility of the general secretary subject to the supervision of the committee.

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22. After the first election, elections shall be held on a Sunday in September of each alternate year beginning in 1998.

23(1) Only members of the Gurdwara may stand for election to the committee […]

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24. Notice shall be given of an election for a period of at least 28 days before the election date. The notice must invite nominations for candidates to be lodged with the general secretary, give the latest time and date on which they can be accepted and give the details of the dates and times when nominations can be lodged personally at the Gurdwara [...]

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27. A re-election shall be by secret ballot held on the following terms [...]

(2) The Gurdwara premises should be opened for voting for a period of not less of eight hours on the day of the election and shall be manned at all times by sufficient members of the Gurdwara to ensure that voting is properly supervised.

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(3) Each member of the Gurdwara shall upon production of a membership card be entitled to one ballot paper and shall have one vote in respect of each contested office and four further votes in respect of ordinary members in the event that places as ordinary members are contested [...]

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(5) On attending to vote each member of the Gurdwara shall present his or her membership card to a scrutineer, who shall identify them on the membership list and tick off their names.

(6) The scrutineer shall then hand the member a ballot paper.

(7) The member shall mark his ballot paper in a voting booth provided for the purpose and shall then place it in a ballot box […]

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General Meetings

31(1) There shall be an annual general meeting in connection with the Gurdwara which shall be held in the month of July each year or as soon as practicable thereafter [...]

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(3) Notice of an annual general meeting specifying the nature of the businesses to be transacted should be given not less than 14 days before the day of the meeting [...]

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33. No business shall be transacted at a general meeting unless a quorum of not less than 200 members is present at the time when the meeting proceeds to business. If within one hour from the time appointed for such meeting a core is not present, the meeting, if convened upon the requisition of members of the Gurdwara shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week at the same time and place or to such other date or such other time and place as the committee may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed of the meeting, the members of the Gurdwara present shall be quorum.

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Amendment

34. Any of the provisions of this scheme except clauses 2 and this clause 34 may be amended in accordance with the following provisions of this clause at

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any time after the holding of the first election following the date in which the scheme comes into force:

(1) Any amendment to the scheme shall only take effect if its adoption is approved in a ballot of the membership ('an amendment ballot') in which not less than two thirds of those members who vote, vote in favour of its adoption.

(2) An amendment ballot may be called by the committee any time […]

(5) Notice shall be given of the holding of an amendment ballot not less than 28 days before the date on which it is held.

(6) The notice must set out the terms of the proposed amendment and give a fair summary of its intended effect.

(7) All amendment ballots must be held on a Sunday.

(8) An amendment ballot shall be a secret ballot conducted in accordance with clause 27 but as modified by sub clause (10) below.

(9) The ballot paper shall set out the terms of the proposed amendment and have two boxes for the placing of votes for or against the amendment [...]"

9. The amendment that the defendants allege was made to the scheme is evidenced only by a single document which is on un-headed paper and is to the following effect:

"Amendment proposal – This was done on 20th August 2006.

To amend the clause (7) in the constitution with the following clauses:

(7) The committee shall keep a Register of Members.

(7.1) The Register of Members shall be renewed fully every six years and this shall replace the previous register of members starting from May 2006.

(7.2) Once a person is on the register of members the membership of that person shall be valid until the register of members needs to be renewed fully.

(7.3) Register of members should be updated during the months of May and June in every year in which there is to be an election by requiring all persons wishing to become members to register on the register of members.

(7.4) The manner in which the register of members is renewed/updated should be within the discretion of the committee provided that adequate publicity is given to the renewal and adequate means are afforded to all those potentially interested in applying for membership a fair opportunity to have themselves entered on the register of members."

12. The defendants maintained down to the commencement of the trial that the amendment was brought about as a result of a ballot held in a general meeting. They maintained that the relevant meeting was convened by an undated notice to the following effect which was posted on the charity's noticeboard:

> "Dear Members,
>
> You are kindly invited to attend the general body meeting on Sunday, 6th August 2006 at [The charity]. The meeting will start at 2.30 pm in the main hall.
>
> Agenda
>
> The following agenda will be discussed:
>
> (1) The accounts (July 2005 – 2006).
>
> (2) To extend the validity of membership from two years to six years.
>
> (3) Shaheedi fund accounts.
>
> (4) Any other business.
>
> Note: if anyone wants to post their views or raise any other point please forward your name and point of concern in writing no later than 8 pm on 28th July to the general secretary [...]"

The defendants accept that meeting was inquorate and so was adjourned to 20th August 2006. It is said a notice to that effect was given by an undated notice to the following effect:

> "Dear Members,
>
> The general body meeting of 6th August 2006 was cancelled due to not enough being present. The another meeting has been arranged for 20th August 2006.
>
> You are kindly requested to attend the general body meeting on Sunday, 20th August 2006 at [The charity]. The meeting will start at 2.30 pm in the main hall.
>
> Agenda
>
> The following agenda will be discussed:
>
> (1) The accounts July 2005 – July 2006.
>
> (2) To extend the validity of membership from two years to six years.
>
> (3) Shaheedi fund accounts.
>
> (4) Any other business.
>
> Note: if anyone wants to post their views or raise any other point please forward your name and point of concern in writing no later than 8 pm on 19th August 2006 to the general secretary [...]"

13. The evidence of the defendants was that the resolution referred to in paragraph 2 of each of the letters was passed in the course of that meeting. However, I am satisfied, and it is

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now common ground, that the amendment was not validly passed. As will be apparent, virtually none of the rules that apply to the amendment of the constitution were complied with. 28 days' notice of the holding of an amendment ballot was not given. It was contended that at least 28 days' notice of the meeting had been given. I have my doubts about that. Mr Rai did not persuade me that he had any real recollection of the period of notice given having regard to the number of years that have now passed and there is no independent record of when in fact notice was given. In any event the meeting was a general meeting for which the minimum notice period required was 14 days, not 28 days as is required for an amendment ballot.

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14. However, it is not the period of notice that matters. What matters is the fact that it was not an amendment ballot as defined in the constitution. It was plainly a general meeting. That is why it was able to proceed on 20th August with only 50 or so people present – see rule 33 of the constitution. The notice relied on did not comply with rule 34(6) and it was not a secret ballot conducted in accordance with rule 27, contrary to rule 33(8). It is not suggested that the ballot papers complied with rule 33(9). There can be no doubt that the amendment was not validly passed. The submission outlined in paragraph 29 of Mr Winfield's skeleton therefore was not one that he persisted with in his closing submissions, entirely correctly in my judgment.

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THE ISSUES

15 The only issue that remains concerning the amendment is whether the amendment is to be treated as having been made not withstanding that it is technically invalid according to the constitution, applying the principles set out in *Abbatt v Treasury Solicitor* [1969] 1 WLR 1575 or whether the claimants are estopped by convention from denying that clause 3.7 has been amended, applying the principles to be derived in the pension cases of *Redrow PLC v Pedley* [2002] EWHC 983 Ch [2002] PLR 339 and *Icarus (Hertford) Limited v Driscoll* [1990] PLR 1.

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16. The other and main issue that arises in these proceedings concerns the process by which the current general secretary of the charity has carried out so far the preparation of a new register pursuant to clause 3(7). The distinction between the old clause 3(7) and the alleged new one is that under the new clause, a full renewal of the register – that is one that requires existing members to apply to re-join as well as requiring non-members who wish to join to apply – is required only every six years with the intervening renewals being confined to accepting applications for membership by people who are non-members, whereas the old rule required that a full renewal be carried out every two years. This is not a material difference for present purposes because it is accepted by the defendants that the 2012 renewal is required to be a full renewal, even on their case that the amended clause 3(7) applies.

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17. The claimant's case in relation to this process is that when carrying out the 2012 renewal the defendants failed to take all reasonable steps to ensure that persons who are already registered as members of other temples in Leicester were not registered as members of the charity. They contend that they are able to show that at the September 2010 election, when all the Sher candidates and none of the Baj candidates were elected, it was preceded by a membership renewal process conducted pursuant to rule 3(7) that was so flawed as to permit 1,200-odd persons to be registered when they were ineligible for membership by reason of being members of other temples. They contend that

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sufficient steps had not been taken to exclude those who are not eligible for membership from becoming members.

18. The defendant's case is that they had carried out their duties in respect of renewal in accordance with the scheme up until the issue of these proceedings when the process was suspended and that the claim is on that account premature but that, in any event, rule 3(7) affords to the general secretary and committee an unfettered discretion as to the manner in which renewals are to be conducted. The defendants submit, therefore, that in accordance with settled law, established by cases such as *Dawkins v. Antrobus* [1881] LR 17 Ch 615 a court will not intervene in the exercise of such a discretion by the committee of an unincorporated association in the absence of fraud, personal hostility or bias, none of which is alleged by the claimants. Even if the general rule does not apply to charitable unincorporated associations, their position is that they should not be treated as being any different from that of a trustee exercising an unfettered discretion and the court will not interfere in the exercise of discretion by a charitable or any other trustee when acting *bona fide* in what is honestly considered to be the best interests of the beneficiaries, applying *Re Beloved Wilkes' Charity* [1851] 3 Mac & G 440 and *RSPCA v Attorney General* [2002] 1 WLR 448.

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19. <u>The Amendment Issue</u>

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The evidence relevant to this issue is limited. At paragraph 9 of his witness statement, Mr Gurham Singh says that the notices I have referred to were placed on the noticeboard of the charity and this notice was given to all the members. In my judgment, that does not assist. The notice was of a general meeting, not of an amendment ballot. The rules could not be changed by such a process. Mr Singh then says at paragraph 12 in his witness statement:

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> "I can confirm that all three of the claimants would have been aware of the resolution. Indeed I can confirm that all three of the claimants became members in the 2006 process and did not renew their membership until 2012. So they were therefore all aware of the renewals process being extended to a period of six years."

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He adds at paragraph 15 that the first time the claimants complained was in 2012 after the commencement of these proceedings.

20. This paragraph was put to Mr Marwaha in cross examination. He denied that the statement was correct. He told me that he first became aware of these changes in May 2008 and that he spoke to the committee about the changes and objected to them. Mr Singh said in cross-examination that firstly, the draft amendment was prepared after the meeting on 20th August, then that it was prepared before it but was not placed on the noticeboard prior to either of the meetings and was read out but not circulated at the meeting on 20th August which was attended in the event by only 52 members. He did not contradict the evidence of Mr Marwaha concerning his objection in conversation with the committee in May 2008.

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21. Against that evidential background, I turn first to the defendant's case that applying *Abbatt* all parties are to be treated as if the amendment had been validly passed. *Abbatt* was concerned with a British Legion Club that changed to a working men's club by resolution. The property of the club was transferred from the trustees of the old club to the trustees of the new club. Thereafter the trustees wished to sell some of the land so

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transferred and the issue was whether they had good title or whether it was held on trust for the Crown as *bona vacantia*. The issue was not raised by any member of the club but by the purchaser's solicitors. The evidence was that each member of the old club was sent a copy of the new rules and none objected to the changes. The key points in that case in my judgment were that:

(a) All the members had been sent copies of the new rules; and

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(b) There was no express power to amend the rules of the old club.

The Court of Appeal held that in such a case where, (i) a majority purported to amend or alter the rules, (ii) the change was made known to the members and (iii) no one objected, then that was to be treated as an assent by all members of the club. That is significantly different from the facts of this case. I am not convinced that the outcome in *Abbatt* would have been necessarily been the same if there had been an express procedure available to amend the rules of the old club which had not been followed. The relevance of that distinction is apparent from what Lord Justice Cross, as he then was, said at page 1584 C-D of his judgment in *Abbatt*.

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22. Aside from that, however, the evidence does not support the application of the principle to be derived from *Abbatt* in any event. There is no evidence to show that the fact of the purported change was communicated to the membership either by individual letter or by notice on the charity's noticeboard or otherwise. There is no evidence that shows whether and if so how widely the constitution is circulated, and no evidence of the degree to which the purported amendment was circulated. The only evidence of its publication is that it was read (but not circulated) at the 20th August meeting. It was the fact of circulation to all members of the new rules in combination with the members continuing as before to enjoy the benefits of the club and meet the obligations of membership without any objection that was significant in *Abbatt*. I do not think that a lack of objection in the absence of the other factors would have been sufficient to justify a finding of assent because silence or lack of objection on its own is ambiguous. People may not object because they do not know about the old rule, or do not know about the new rule, or have not appreciated that the new role has not been adopted lawfully. On that basis I do not accept that mere silence without more is sufficient to enable the court to infer universal assent. In any event, I accept Mr Marwaha's evidence that he objected to the committee in the course of meetings in 2008. For those reasons, I conclude that *Abbatt* does not assist the defendants and that I should not consider that the amendment has become binding by assent following that case.

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23. I now turn to the submissions that the claimants are estopped by convention from denying that the constitution has been validly amended. The substance of this submission is that there were only partial renewals contemplated by the amendment in 2008 and 2010 and the elections that followed in each of those years were conducted by reference to registers prepared in that way, and thus in accordance with the new rather than the old rule.

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24. In my judgment, it is important at this point to step back and note two critical points. First, the claimants do not seek to challenge the outcome of the 2008 or 2010 elections in these proceedings. What they seek to do in essence is to ensure that in future the charity is administered in accordance with its constitution and not by reference to an invalidly passed amendment. Secondly, the point I am now considering is only material to those who have become members as a result of the registration process that

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commenced and should have been concluded in 2012. That process requires all existing members to reapply for membership as well as enabling non-members to apply for membership. There will be an entirely new cadre of members of the charity once the 2012 review process has been completed.

25. Against that background, I turn to the relevant principles. The founding principles are those identified in the third edition of Spencer Bower on Estoppel as applied by a majority of the Court of Appeal in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84. That is:

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> "This form of estoppel is founded not on a representation of fact made by representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed by the convention of the parties as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction, each will be estopped against the other from questioning the truth from the statement of facts so assumed."

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It is now accepted that the assumption may be of law as well as fact - see *The Vistafjord [1988]* 2 LLR 343 at 351. It is also now accepted that what is important is proof of a common assumption that has been acted upon - see *The Vistafjord* (ante) at 352.. Thirdly it is now recognised that that an estoppel will not be the inevitable result even if a common assumption can be established. The court will not hold the parties to an incorrect assumption if there is no injustice in allowing a party to resile therefrom - see *The Vistafjord* (ante) at 352, following earlier Court of Appeal authority. Further and finally for present purposes, as was acknowledged in *The Vistafjord* (ante) at 352:

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> "If the estoppel applies it will only do so 'for the period of time and to the extent required by the equity which the estoppel has raised' [Lord Justice Ralph Gibson in *Troop v Gibson 1144*]. Thus once a common assumption is revealed to be erroneous, the estoppel would not apply to future dealings between the parties [...]"

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26. The applicability of the doctrine to pension schemes has been considered in a number of cases. I have identified two that are relied upon by the defendants. For present purposes, it is necessary to note only that in *Redrow PLC v Pedley* (ante), Sir Andrew Morritt V-C held, albeit *obiter*, that estoppel by convention could not affect trusts in which future members could be interested because there can be no estoppel that is binding on future members - see paragraph 62 of his judgment. He also emphasised that in a scheme where it is asserted that estoppel binds all members, it is necessary for a party relying on the estoppel to show that the estoppel is applicable to the general body concerned. Finally, Sir Andrew emphasised at paragraph 64 of his judgment:

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> " … the formulation of the principle shows that what must be proved is that each and every member has by his 'course of dealing put a particular interpretation on the terms of' the rules or 'acted upon the agreed assumption that a given state of facts is to be accepted between them as true'. This involves more than merely passive acceptance. The administration of a pension scheme on a particular assumption as to the yardstick by which contributions or benefits are to be calculated may well give rise to a relevant assumption on the part of the trustees. I suggest that it requires clear evidence of intention or

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positive conduct to bind the general body of members to such an assumption. I doubt whether receipt of the benefit or payment of the contribution, without more, can be enough. It must not be overlooked that if the principle is applicable it may be used to increase the liability or reduce the benefit of a member as well as, in this case, the opposite."

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27. I now return to the facts of this case. As I have said, this part of the case is concerned only with the future. By definition, the issue I am now considering arises at a time when the alleged common assumption has been revealed to be erroneous. Thus I do not see how the alleged estoppel can be applied to future dealings in relation to the affairs of the charity applying the principles approved by the Court of Appeal in *The Vistafjord* set out above. By the same token, I do not see how it can be said to be unjust to allow a party to an alleged common but misplaced assumption to depart from it for the future. No unfairness or injustice arises. If the defendants wish to amend the scheme, the mechanism for doing so is contained within the body of the constitution.

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28. In any event, as I have said, a new cadre of members will be elected once the 2012 process has been completed. That cadre will include old members but new members as well. The fact that new members of the charity will arrive precludes the estoppel taking place for the future, in my judgment.

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29. In the end the simple point is that once the alleged assumption is revealed to be erroneous it cannot apply to future dealings. In those circumstances, and for those reasons, there will be a declaration broadly to the effect sought in the amend particulars of claim. I will hear counsel further as to its terms following the completion of this judgment.

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THE 2012 RENEWAL PROCESS ISSUE

30. I now turn to the claimant's assertion that, in effect, the renewal process that was either carried out or commenced in 2012 should be undertaken afresh before the election that should have taken place in 2012 is in fact takes place. Before turning to the facts, there is an issue of law that arises between the parties. As is apparent from what I have said already, the manner in which membership renewal is conducted is in the discretion of the committee - see clause 3(7) of the constitution. It is submitted on behalf of the defendants that absent fraud, personal hostility or bias, the court will not interfere, applying *Dawkins v Antrobus* (ante), where at page 630 Lord Justice Brett said:

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"In my opinion, there is some danger that the courts will undertake to act as Courts of Appeal against the decision of members of clubs whereas the court has no right or authority whatever to sit in appeal upon them at all. The only question which a court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not and it seems to me that the only questions which a court can properly entertain for that purpose are whether anything has been done which is contrary to natural justice although it is within the rules of a club. In other words, whether the rules of the club are contrary to natural justice. Secondly, whether a person who has not condoned the departure from them has been active against contrary to the rules of the club. Thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of these charges can be made out by those who come before the court, the court has no power to interfere with what has been done. It seems to me that the only question in the present case is upon the last matter, this,

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whether it has been done *bona fide*. The court has no right, in my opinion, to consider whether what was done was right or not, or even as a substantive question whether what was decided was reasonable or not. The only question is whether it was done *bona fide*."

31. It was submitted by the claimants in response to the defendants' reliance on this authority that: (a) the court will intervene to ensure that renewal is carried out properly as part of its supervisory jurisdiction to ensure the proper administration of a charity in the public interest; and (b) in any event, the defendants had a duty to carry out the membership renewal and so the court would compel the defendants to exercise their power in a proper manner, applying *Tempest v Lord Camoys* (1882) 21 Ch.D 571 at 578 and thus the defendants owed a duty in conducting or supervising the membership renewals: (1) to give genuine and responsible consideration to the exercise of their powers of discretions; (2) to take into account relevant matters; and (3) to exercise reasonable care.

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32. In reply to the first of these points the defendants submitted that even if the law relating to private unincorporated associations was of no application to unincorporated associations that are or carry on registered charities, the rule in relation to trustees vested with a discretion was to broadly similar effect, namely that the court should and would not interfere with the exercise of discretion as long as the trustee acted *bona fide* and with no improper motive. Reliance was placed on two authorities.

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33. The first was *Re Beloved Wilkes' Charity* (ante). That case was concerned with a charity for the education of a young man from a defined geographical area for the purpose of him becoming a minister in the Church of England. In default of a suitable candidate being identified within the defined geographical area, the trustees were empowered to select one from outside that area. There was thus a duty to fill any vacancy but a discretion as to who should be selected. The trustees selected a candidate from outside the relevant geographical area and there was a challenge. It was held that in the absence of proof that the trustees had exercised their discretion otherwise than fairly and honestly, the court had no jurisdiction to interfere. Lord Truro, Lord Chancellor said this in the course of his judgment:

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"[…] In such cases as I have mentioned, it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention and with fair consideration of the subject. The duty of supervision on the part of this court will thus be confined questions of honesty, integrity and fairness with which the deliberation has been conducted and will not extend to the accuracy of the conclusion arrived at except in particular cases."

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The other authority relied upon was the decision Mr Justice Lightman in the *RSPCA v Attorney General* [2002] 1 WLR 448. That judgment was to similar effect. The council of the RSPCA had a discretion as to who to admit to membership under two particular rules in its charter. The council wished to not admit or to exclude from membership supporters of hunting with dogs. Mr Justice Lightman held that the court would not interfere. At paragraph 36 of his judgment, he said:

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"The powers of the council to exclude from membership are conferred by rules III.(1) (a) and III.(2)(a) (where the power is expressed to be exercisable at the absolute discretion of the council) and by rule III(7) (where the power is

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> expressed in terms of a discretion exercisable 'If the council shall consider that it would not be advisable to accept or retain the subscription'). In both cases the powers are fiduciary and accordingly the obligation is upon the council to exercise the powers for the purposes for which they are conferred in what they consider to be the best interests of the society. I am satisfied that the council is acting in good faith and in what it considers to be the best interests of the society in deciding that it should adopt the membership policy. It seems to me that if the trustees honestly take this view and it is one that they can honestly and reasonably take (subject only to one question to which I will next turn) this is a course which they are entitled to take and which I can and should endorse; see e.g. *Gaiman v National Association for Mental Health* [1971] Ch 317."

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The one issue that remained was a human rights point that does not arise in this case and failed in any event before Mr Justice Lightman. Some emphasis was placed in the course of argument on the use of the word "reasonable" in Mr Justice Lightman's formulation as potentially important. In my judgment, it is not. The case relied upon by Mr Justice Lightman (*Gaiman*) was a judgment of Mr Justice Megarry as he then was. At page 330 of the judgment in that case, Mr Justice Megarry formulated the approach relevant to an exercise of a power to deprive a member of membership exclusively by reference to the question of whether the council of the society that case was concerned with exercised the power IN the *bona fide* belief that to do so was in the best interest of the association.

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34. This issue was considered by Mr Christopher Pymont QC when determining the applications for summary judgment, at paragraph 16 of his judgment where he said in relation to this point:

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> "I agree with Mr Crampin QC. Proceedings of this kind are not limited to the question of whether a particular decision is or is not open to challenge on the limited grounds suggested in cases such as *Dawkins v Antrobus*. The court is entitled, even bound to consider, the wider question of whether any exercise of discretion was a proper one in the circumstances and even whether the constitution of the charity needs to be amended by scheme to accommodate any particular concerns that have been drawn to its attention by the proceedings. The court's concern is with the proper administration of the charity generally."

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No authority was cited by Mr Pymont QC to support the proposition he identified. In any event the question that he was concerned with was whether in the circumstances an interim injunction ought to be granted and I have had the benefit of a much fuller argument than would have been possible at the hearing of an interim application. For those reasons in my judgment limited weight at best can attach to this formulation.

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35. In support of their propositions, the claimants rely upon *Tempest v Lord Camoys* (ante). That case was concerned with a testamentary trust, under which the trustees had an absolute discretion to sell property. However, if they exercised the power then the proceeds were to be applied in the purchase of property, though, again, what property was purchased was a matter for the unfettered discretion of the trustees concerned. One trustee refused to concur in a particular purchase. The Court of Appeal, affirming Mr Justice Chitty, held that the court would not interfere with the exercise of the dissenting trustee's discretion. The leading judgment was given by Sir George Jessel MR. He held

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that the court would not interfere with the exercise of a discretion in the absence of impropriety in these terms:

> "It is very important that the law of the court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The court says that the power, if exercised at all, is to be properly exercised. This may be illustrated by the case of persons having a power of appointing new trustees. Even after a decree in a suit for administering the trust has been made, they may still exercise the power but the courts will see that they do not appoint improper persons."

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He then turned to the issue of the court's approach to duties combined with powers where he said the following:

> "[...] In all cases where there is a trust or duty coupled with the power, the court will then compel the trustees to carry it out in a proper manner and within a reasonable time. In the present case, there was a power which amounts to a trust to invest the fund in question in the purchase of land. The trustee would not be allowed by the court to disregard that trust and if Mr Fleming had refused to invest the money in land at all, the court would have found no difficulty in interfering. But that is a very different thing from saying that the court ought to take from the trustees their uncontrolled discretion as to the particular time for the investment and the particular property which should be purchased. In this particular case it appears to me the testator in his will has carefully distinguished between what is to be at the discretion of his trustees and what is obligatory upon them."

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Lord Justice Cotton concurred with this approach, saying:

> "No doubt the court will prevent trustees from exercising their discretion in any way which is wrong or unreasonable but that is a very different thing from putting a control upon the exercise of the discretion which the testator has left to them."

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36. My conclusions on these authorities are as follows:

(1) *Antrobus* was concerned with the expulsion by the members of a private members club of one of their members. It is immaterial to the issue I have to consider because the case is not concerned with the decision by the members of a private club, but with the exercise of discretion by an elected officer and/or the elected executive committee of an unincorporated association that is or carries on a registered charity and thus is in the position of a trustee of the charity.

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(2) In the absence of any authorities concerning the exercise of pure discretion by charitable trustees, the principles that apply derive from the principles that apply to trustees generally.

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(3) The authorities cited to me established the following propositions:

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(a) The court will enforce the performance of the duty - see *Tempest v Lord Camoys* (ante) where reference is made to an earlier case concerning the same parties and the same will where it was held that such a duty was to be enforced; but

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(b) The court will not interfere with the exercise of pure discretions afforded to trustees in the absence of impropriety – see *Re Beloved Wilkes' Charity* (ante), where the challenge was not to a failure to give effect to the trust but as to how that was to be done, and *Tempest v Lord Camoys* - see the first proposition set out by Sir George Jessel set out above.

(c) *RSPCA v The Attorney General* (ante) does not accord the court any wider powers than that recognised in such cases as Re *Beloved Wilkes' Charity*.

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(d) Where there is a duty coupled with a power, the court will compel the trustees to carry out their obligations in a proper manner but will not interfere with the exercise of discretion other than on the limited basis noted - see the second proposition of Sir George Jessel Master of the Rolls in *Tempest v Lord Camoys* (ante).

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37. The effect of these propositions in this case, in my judgment, is as follows. A court would compel the executive committee of the charity to undertake a renewal of the register of members as required by clause 3(7); would compel the committee when compiling the register to do it properly – that is for example by requiring all persons wishing to continue or become members to register rather than limiting the exercise to persons who are non-members and wish to become members if that in fact is what had occurred – or by compelling the process to be carried out in May to June of each election year if there was any attempt not to do so.

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38. The claimants submit that there is not merely a duty to compile a register of members that satisfies the mandatory requirements of clause 3(7) but there is also a duty to exclude from membership anyone who is a member of another Sikh or Hindu temple. In my judgment that overstates the position. No one who is a member of another Sikh or Hindu temple is entitled to membership but how that rule is carried into effect in relation to the registration process falls within the scope of the discretion of the committee. Thus, unless it can be shown that the committee has failed to exercise that discretion honestly, I do not see any basis on which the court can properly interfere. The introduction of the concept of reasonableness or a duty of care means that the court will rapidly become a Court of Appeal from the decisions of the executive committee or of the general secretary as to how to carry out the renewal process. Absent allegations of impropriety – and none have been made here – that is not, in my judgment, permissible. Thus, if there was evidence that the committee registered as members people who, to the knowledge of the committee, were members of other temples, or the evidence was that they conducted the renewal process in reckless disregard of whether persons who were not eligible were nonetheless applying and being admitted, there may well be a basis for legal challenge. However, that is not the effect of the evidence. Rather, what is alleged is that more could reasonably have been done in the process as it has so far been conducted to draw to the attention of those minded to apply for membership of the charity to the existence of the rule that precludes members of existing Sikh temples from joining the charity by noting it specifically in the newspaper advertisement announcing the commencement of the process, by printing the forms used to apply for membership

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in Punjabi as well as English, and by including within the forms a requirement to answer specifically and affirmatively questions which focus on eligibility rather than merely sign a form which contains a declaration, and by more rigorous questioning in particular of those for whom forms are completed by existing members of the charity. This is all a direct challenge, in my judgment, to the administrative arrangements that have been made by the defendants, and, in my judgment, is impermissible in the absence of an allegation of impropriety. If there is a criticism to be made, it is one that can be addressed by the amendment of the scheme that serves to set out prescriptively things like the language in which notices are to be given, and advertisements and the terms of the forms that are to be used by the persons applying for membership. However, that is for the members to address by way of an amendment ballot and not for this court at any rate in these proceedings.

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39. In the light of these conclusions, the findings of fact that the parties have asked me to make, which critically do not include any allegation by the claimants of impropriety in relation to the 2012 registration process, are largely immaterial. However, had I been required to decide whether all reasonable steps had been taken to draw the attention of potential members to the no dual membership rule, I would have concluded that they had not for the following reasons. First, the newspaper advertisement dated 18th May 2012 that announced the opening of the registration process did not make any express reference to the no dual membership rule, when it could reasonably have done so. As Mr Rai accepted in cross-examination, there was no practical or other reason for this omission. He said, and I accept, that he used the form that had been used in earlier years. This is not an explanation that is consistent with all reasonable steps having been taken, not least because he also accepted in cross examination that the issue of no dual membership had become controversial between the various parties, or at any rate the factions they represent, after the 2010 election. Thus, a reasonable step to be taken would have been to emphasise the existence of the rule in every notice concerning the registration process. The initial announcement was an important step in that process.

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40. In relation to the form used for registration, Mr Rai also accepted that it would in retrospect have been reasonable for the form to be in Punjabi so that as many as possible of those applying for membership would have an opportunity to read the form for themselves. He denied having considered that point before it was suggested by the claimants, and I accept his evidence in that regard. In relation to the form that was used, Mr Rai did not accept that it was appropriate to ask each applicant to confirm in the form that the applicant was not a member of another temple. I consider that if the test was whether all reasonable steps had been taken to draw attention to the dual membership rule, the form proposed by the claimants would have been one such step. The form was not changed, however, since Mr Rai maintained that it was first proposed after the renewal process had been commenced. He told me, and I accept, that he did not consider it right to change the form once the process had been commenced. Mr Rai accepted there was nothing wrong in principle with using a dual language application form as I have said. Again, I accept, however, that he did not wish to make alterations once the process was started. I make no comment as to whether he was right to reach the conclusion he reached. I am satisfied merely that he genuinely reached that conclusion. Thus, whilst I consider that a reasonable step would have been to use dual language application form that asked questions rather than contained declarations, that was not something that he considered prior to the start of the registration process. It had not been adopted in the past and was not suggested until after the 2012 process had begun.

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41 Mr Rai maintained that the registration process was yet to be completed because it was suspended as a result of the commencement of this litigation. He maintains that he would have and will write to the other relevant temples asking for their membership lists as part of the completion of the process. I regard it as odd that these steps had not been taken earlier but I am not prepared to conclude that Mr Rai was being untruthful in his assertion that such was his intention or that he suspended the process pending the completion of the litigation. I also accept that on his belief of the effect of the data protection legislation: (a) he did not want to expose the charity or the committee to proceedings for breach; and (b) he wished to act on material released by other temples themselves rather than material obtained by the claimants in order to avoid any allegation of data protection breaches. Whether he is right is not the material question. The question is whether he genuinely believed that to be a source of concern and I am satisfied that he did.

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42. There was an issue concerning the eighth and tenth defendants and whether they were members of Holy Bones, and if Holy Bones had members properly so called. It is not necessary that I take up time with this in relation to the eighth and tenth defendants because Mr Rai accepted that it was quite wrong for them to have applied to join the charity in 2012. I see no reason to reject the evidence of Mr Rai that the 2012 process has not yet been completed. As a result of this, and because the 2012 election has not yet taken place, it follows that a scheme will have to be formulated to enable that to happen. Mr Rai says that completion of the registration process will involve the committee considering any complaints. He also accepts that a list will have to be provided to the claimants in order that any queries can be resolved before the election. I will hear the parties in due course as to how best this can be delivered. Provisionally, however, I would have thought this will require a timetabled process in order to enable an election to take place with a fixed future date. I will also hear from the parties on whether I have power and if I have, whether I ought to exercise it, to direct an amendment to the scheme so as to provide for membership lists to be made available to all members or members on request from a fixed date, something which appears to be a lacuna in the current scheme which I note is addressed in the Holy Bones constitution.

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43. The claimants sought a finding that 1,201 ineligible people were admitted to membership of the charity following the 2010 election. Given that the outcome of the 2010 election was not disputed in these proceedings, the value of such a finding in these proceedings is limited. The claimants' case is that the 1,201 people concerned were members of Holy Bones at the time they applied for membership prior to the 2010 election. The point made by the defendants is that no conclusions can safely be drawn from the material relied on by the claimants because the Holy Bones membership list that they rely on shows that the last date of registration for the persons on that list was 29th October 2009. Mr Marwaha accepted in the course of cross examination that membership of Holy Bones lasted for three years under the terms of the constitution but he explained that by reference to some hearsay evidence that the effect of the Holy Bones constitution only took effect in July 2007 and thus, membership continued through until July 2010. The Holy Bones constitution says on its face that it was passed on 28th July 2007 and was drafted on 20th July 2007. It is possible, therefore, that membership ran until July 2010, although there is no direct evidence from officials of the Holy Bones charity which confirms this to be so. If this is correct then it is possible that at least some of those applying for membership of the charity were also members of the Holy Bones charity at the time they made that application. However, it is impossible with certainty to know whether each and every one of the 1,201 people relied upon was

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indeed such a member, though, as I say, it is on the balance of probabilities likely that at least some were.

CONCLUSION

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41. In the result, I consider that the claimants are entitled to a declaration as to the future effect of the purported amendment for the reasons that I have given. I also consider that an amendment to the scheme will be required for the purposes of completing the 2012 registration process and the holding of an election. Entirely provisionally at the moment, I consider that it is at least desirable to incorporate within either the timetable for the postponed 2012 election or, perhaps more generally, within the scheme, a provision relating to the publication and membership lists to all members. Although it is a matter for argument hereafter, I note, as I have said, that that issue has been addressed in the Holy Bones constitution, which may therefore provide an appropriate model for resolving that issue. The challenge by the Claimants of the conduct of the 2012 renewal process however fails for the reasons I have given.

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(End of judgment)

(Discussions as to timetabling follow)

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