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*ACPNS Legal Case Notes Series: 2022-53 Bagri and Ors v Arik and.*  
[Working Paper]

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# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## Bagri and Ors v Arik and Ors [2022] SADC 27

District Court of South Australia, Slattery J, 10 March 2022

Appeal of an order to grant an injunction restraining the use of an incorporated association's funds to pay legal costs in a dispute about its rules and the validity of a committee election.

**Key words:** Incorporated Association, South Australia, Appeal, Injunction, Oppression, Undertaking as to Damages, Election, Costs

1. This was an appeal from orders of a Magistrate's Court.
2. The Riverland Singh Society Incorporated (the Society) is an incorporated association under the [Associations Incorporations Act 1985](#) (SA).
3. The Society had factions that had disagreed over a considerable period of time.
4. Notwithstanding the rules of the Society regarding the election of members of the Board of Management, earlier in time the factions agreed between themselves that on alternative years, there would be a particular number of the members of the faction who would sit on the committee of management of the association for a period of time until the next election.
5. There was some evidence that from time to time, during their period of appointment, some of those who were considered to be a member of one faction may have changed their interest or allegiances to another faction, but up until 2019, there was a rotation in existence.
6. It was alleged that by subterfuge, and notwithstanding the convention, steps were taken by one faction to nominate new committee members, all of whom were from one particular faction. In the result, all eight members of the management committee were elected from one faction.
7. In 2021 a further general meeting was held at which new board members were appointed, none of whom were board members in 2019. An application to the Court to prevent that general meeting proceeding failed.

8. One faction filed for redress in the Magistrate's Court (primary Court), naming the other faction's 2021 management committee members and the Society.
9. The Society was separately represented and took no active part in this application.
10. The primary Court characterised the issue between the parties as which faction before the Court was the duly appointed committee of management of the Society. There was also a dispute about which rules governed the Society, and whether there was a serious question to be tried.
11. The primary Court granted an injunction to prevent one faction from using any funds of the Society to pay for the legal fees of the proceedings. The Society could only use its funds to pay for legal fees in respect of discovery of documents, or with the leave of the primary Court.
12. The injunctioned faction appealed this decision claiming that:
  - the primary Court erred in applying the test to grant the injunction;
  - the Society was the only proper respondent to the claims;
  - there were no claims of oppression or unfair conduct on their part personally; and
  - the Society was concerned in the proceedings with more than discovery, such as which rules applied to the 2019 elections, and the fairness of its conduct.
13. The Appeal Court noted that (at [12]):

The court has not yet made any determination about the events surrounding the 2019 election and there will likely be no utility in doing so because there have been further directors appointed in the 2021 year. There is, arguably, no continuing subject of the *lis* between the parties such that there could be an expectation of a *spes* between them. In addition, an open offer has been made that, if there is a challenge to the 2021 elections, a fresh election be held in accordance with the rules. It is contended that on no basis would a court grant injunction in the event that such an offer has been made.
14. The Appeal Court further noted that the constitution of the board had changed, and that it was not obvious against whom costs orders might be made when it was known that some members of the current board were required to respond to the proceedings, but were not board members in 2019.
15. The Appeal Court found that the dispute was not a narrow derivative action but a broader style of action, the benefit of the determination of which would include a benefit to the interests of the incorporated association. The Society had a legitimate interest in the subject matter of the proceedings and so the incurring of costs.
16. In relation to the question of the balance of convenience, the Appeal Court held that the primary Court erred by approaching the matter on the basis of fairness and balance, rather than as questions of injury.

17. Further, as the parties in the primary Court action had personally signed an appropriate undertaking as to damages there was no need for an injunction. This was based on the principles of [American Cyanamid Co v Ethicon Ltd](#) [1975] AC 396, which constitutes the law of Australia following the decision in [Australian Broadcast Corporation v O'Neill](#) [2006] HCA 46 on the question of the governing principles for the grant of injunction, and undertakings as to damages and the balance of convenience.

18. The injunction was discharged.

## IMPLICATIONS



It is of note that there was a substantial delay between the disputed 2019 elections and the decision of the primary Court in 2021. In disputed association elections, the Court invariably seeks the outcome that a valid election is held promptly for the members to decide the matter. Given that an apparently valid meeting was held in 2021, there was no point or utility for the Court to opine on the 2019 election validity.

The case deals with an old issue in company law being that if a wrong is done to a company controlled by a board who for their own reasons use their power not to have the company sue to enforce its rights, can a member or a shareholder enforce that right, and can they use the company's funds to do so?

The common law is encapsulated in what is known as the rule in *Foss v Harbottle*, which deals with the issue of wrongs done to the company. Firstly, the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative. Secondly, the courts will not interfere with the internal management of companies where those who are in management are acting within their powers – that is, not to have the company bring a legal action.

A large number of exceptions to the rule were developed by the Courts as injustices could arise and eventually the statute law intervened to allow shareholders or members to bring actions in the company's name under certain conditions. The greatest barrier to a shareholder/member bringing an action in the company's name was footing the legal costs of doing so, and the Courts developed a series of principles as to when this would be permitted.

## VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SADC//2022/27.html>

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