Neutral Citation Number: [2016] EWHC 1966 (QB)

Case No: HQ16X02502

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2016

Before:

MR JUSTICE FOSKETT

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Between:

MICHAEL FOSTER **Claimant**

- and –

IAIN McNICOL (1)
(sued on behalf of all other members of the Labour Party
except the Claimant and the Second Defendant)

and

THE RT HON JEREMY CORBYN MP (2) **Defendants**

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Gavin Millar QC and Sarah Hannett (instructed by **Simons Muirhead and Burton**) for the **Claimant**
Mark Henderson and Keina Yoshida (instructed by **William Sturges**) for the **First Defendant**
Martin Westgate QC and David Lemer (instructed by **Howe and Co**) for the **Second Defendant**

Hearing date: 26 July 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE FOSKETT:

Introduction

1. This case raises the question of whether the National Executive Committee of the Labour Party ('the NEC') was correct in the decision it reached that Mr Jeremy Corbyn MP, the current Leader of Labour Party and *ex-officio* the Leader of the Parliamentary Labour Party ('the PLP') and Leader of HM Opposition, should be entitled to take part in the forthcoming leadership ballot "automatically" without the need to obtain nominations from the combined membership of the PLP and the European Parliamentary Labour Party ('the EPLP'). The decision was reached by a majority of 18-14 at a meeting on 12 July 2016.

2. The challenge to that decision is brought by the Claimant, Mr Michael Foster, as a member of the Labour Party ('the LP'), which in law is an unincorporated association, who seeks to enforce the contract of membership that the legal status of the Labour Party confers on its individual members. As Stanley Burnton J, as he then was, in *Choudhry & Ors v Triesman* [2003] EWHC 1203 (Comm) said of the LP at [38]:

> "Its constitution is contained in its rules contained in the rule book, which constitute a contract to which each member adheres when he joins the party"

3. It is not disputed that the Claimant has the right in principle to bring this claim.

4. His case is that the relevant rules of the LP require Mr Corbyn to obtain the same minimum number of nominations from the combined membership of the PLP and the EPLP as any other MP wishing to take part in the ballot.

5. The timetable for the leadership ballot was published on 14 July which provided for a nomination period of approximately 48 hours between 18 and 20 July. During that nomination period there were valid nominations for Mr Owen Smith MP (with 90 supporters) and Ms Angela Eagle MP (with 72 supporters). Ms Eagle withdrew her nomination subsequently and Mr Smith is thus Mr Corbyn's opponent in the ballot provided, of course, Mr Corbyn is entitled to take part in the ballot.

6. Various other provisions were made concerning the electoral process, but all that I need record for present purposes is that during the week commencing 22 August the ballot mailing will be despatched to those entitled to vote and the ballot will close at midday on Wednesday, 21 September. A special conference is scheduled for 24 September when the result will be announced, that being the day before the annual Labour Party conference begins on 25 September 2016.

7. It is plain that an urgent decision on the Claimant's challenge is required if that timetable is to be met. I should, however, say that Mr Mark Henderson, who represents the First Defendant, indicated that the NEC would respect and comply with the decision of the court and that the current electoral process was not irreversible. Mr Gavin Millar QC, who represents the Claimant, said that it was not the Claimant's wish that Mr Corbyn should be denied the opportunity to stand in the contest if his (the Claimant's) case succeeded.

8. However, notwithstanding that, these proceedings have been expedited: the Claimant's letter before claim of 13 July 2016 was addressed to the First Defendant, Mr Ian McNicol, the General Secretary of the LP, and was copied to Mr Corbyn. The proceedings were issued on 14 July. Under the careful guidance of Deputy Master Partridge and Master Victoria McCloud, and with the industry of the legal teams for all interested parties (including, by addition as a party, Mr Corbyn), the case was ready for argument on 26 July. I had received the Skeleton Arguments for all parties prior to the hearing together with all relevant documents. I heard oral submissions from Mr Millar QC, Mr Henderson and Mr Martin Westgate QC, for Mr Corbyn, on Tuesday, 26 July.

9. Overall, it has seemed right that I should treat the need for a decision as urgent. In an ideal world I would have valued a little longer to think about the submissions and to produce a more considered judgment, but the circumstances have not afforded that luxury. I have, accordingly, produced this judgment (which was sent in draft to the parties shortly after 9.00 am today) and thus in a relatively short period following the hearing. I have been conscious, of course, that whatever my decision might be, one or other party may wish to challenge it before the Court of Appeal. That is another reason why I have produced the decision quickly.

10. It is obvious that the outcome of these proceedings is of considerable importance to the LP generally and to Mr Corbyn. It will, of course, be of wider interest too. It is equally obvious that it may have significant political implications, both in the short and longer term. I wish to emphasise as strongly as I can (i) that no court brings to any case any political agenda and (ii) that such political consequences or implications as there may be are of no relevance to the legal analysis asked of the court and that analysis is wholly uninfluenced by political considerations or indeed by media or other comment on the issues to be considered.

11. As will emerge below, what is essentially required of the court is its interpretation of one particular clause in the current Labour Party Rule Book ('the Rule Book') in the context of the rules as a whole. It is therefore a very narrow legal issue. It is upon that issue that this ruling is focused. All other matters are irrelevant unless they are needed to help in arriving at the correct interpretation of those rules. Even then, anything that is arguably to be regarded as "political" would be approached with very considerable caution by any court and, as will be apparent in due course, had it been necessary for me to consider matters that might have trespassed into the political arena I would have trodden a very cautious path. Mr Westgate quite rightly said that the court should be extremely careful not to find itself picking sides in a political debate.

12. I should also say for the record that reports in the media, and indeed in the material put before me, indicate that there is controversy about aspects of the meeting on 12 July 2016. No such issues have been raised with me and I emphasise that nothing in this judgment is intended to reflect on those matters, one way or the other.

The background

13. The story has been played out in the media over the last few weeks and will be well known to those interested in it. Given the time constraints, I will summarise the essential elements of the background very briefly.

14. Mr Corbyn has been the Leader of the LP (and thus Leader of the PLP and HM Opposition) since 12 September 2015. He was elected with 59.5% of the total vote of LP members, affiliated supporters and registered supporters, with a total vote of 251,417 votes out of the 422,664 who voted. Following the result of the referendum on the UK's continued membership of the EU on 23 June 2016, Mr Corbyn lost a vote of no confidence conducted by the PLP on 28 June 2016. 172 Labour MPs supported the motion of no confidence and 40 voted against it. There were 4 spoilt ballot papers and 14 abstained from voting.

15. Notwithstanding that vote, Mr Corbyn has not resigned from the position of Leader of the LP or from the positions he holds by virtue of being Leader of the LP.

16. By 11 July 2016 Ms Eagle had obtained the requisite number of nominations from the members of the PLP and EPLP to mount a leadership challenge and it was against that background that the meeting of the NEC on 12 July 2016 took place. Its purpose was to consider the arrangements for the leadership election including, of course, the question of whether Mr Corbyn required support by way of nominations in order to take part in the election. I have indicated above (paragraph 5) what took place thereafter.

The NEC and what it had to consider

17. The NEC is, subject to the control and directions of Party conference, "the administrative authority of the [LP]": Chapter 1, Clause II.1 of the 2016 Rule Book. The "Party conference" is provided for in Chapter 1, Clause VI. Clause VIII provides in detail for the responsibilities of the NEC which include a duty "to uphold and enforce the constitution, rules and standing orders of the [LP]": Clause VIII.3A.

18. Chapter 1, Clause VII.1(ii) provides as follows:

> "The leader and deputy leader of the Party shall be elected or re-elected from among Commons members of the PLP in accordance with procedural rule Chapter 4 Clause II …, at a Party conference convened in accordance with clause VI above. In respect to the election of the leader and deputy leader, the standing orders of the PLP shall always automatically be brought into line with these rules."

19. Chapter 4 contains the crucial provisions relating to elections for national officers of the LP. Clause II.1A provides that the procedures that follow "provide a rules framework which, unless varied by the consent of the NEC, shall be followed when conducting elections for Party officers [and that the] NEC will also issue procedural guidelines on nominations, timetable, codes of conduct for candidates and other matters relating to the conduct of these elections."

20. The provisions of Clause II.2B were central to the issue to be considered by the NEC and are central to the issue before the court. To the extent material it provides as follows:

> "B. Nomination

> i. In the case of a vacancy for leader or deputy leader, each nomination must be supported by 15 per cent of the combined Commons members of the PLP and members of the EPLP. Nominations not attaining this threshold shall be null and void.
>
> ii. Where there is no vacancy, nominations may be sought by potential challengers each year prior to the annual session of Party conference. In this case any nomination must be supported by 20 per cent of the combined Commons members of the PLP and members of the EPLP. Nominations not attaining this threshold shall be null and void …."

21. In succeeding parts of this clause the word "nominee" is used. For example, in II.2B (iii) it is provided that "[all] nominees must be Commons members of the PLP". Furthermore, II.2B (iv) and (vi) provide respectively as follows:

> "Nominees shall inform the General Secretary in writing of the acceptance or otherwise of their nomination at least two clear weeks before the commencement of the procedures for voting laid out in rule C …. Unless written consent to nomination is received, nominations shall be rendered null and void.
>
> …
>
> Nominees who do not attend the relevant Party conference shall be deemed to have withdrawn their nominations, unless they send to the General Secretary – on or before the day on which the conference opens – an explanation in writing of their absence satisfactory to the CAC[1]."

22. The other use of the word "nominee" to which attention is drawn by Mr Millar is Clause II.2.C(x) which is part of the section headed "Voting" is set out in paragraph 27 below.

23. I will return to those provisions in due course (see paragraph 53 below).

24. The meaning of "vacancy" is important to the interpretation of the foregoing provisions. This can be deduced from Clause II.2E which is headed "Procedure in a vacancy" and provides as follows:

> "i. When the Party is in government and the Party leader is prime minister and the Party leader, for whatever reason, becomes permanently unavailable, the Cabinet shall, in consultation with the NEC, appoint one of its members to serve as Party leader until a ballot under these rules can be carried out.
>
> ii. When the Party is in government and the deputy leader becomes Party leader under i above of this rule, the Cabinet

[1] The Conference Arrangements Committee.

> may, in consultation with the NEC, appoint one of its members to serve as deputy leader until the next Party conference. The Cabinet may alternatively, in consultation with the NEC, leave the post vacant until the next Party conference.
>
> iii. When the Party is in government and the deputy leader, for whatever reason, becomes permanently unavailable, the Cabinet may, in consultation with the NEC, appoint one of its members to serve as deputy leader until the next Party conference. The Cabinet may alternatively, in consultation with the NEC, leave the post vacant until the next Party conference.
>
> iv. When the Party is in opposition and the Party leader, for whatever reason, becomes permanently unavailable, the deputy leader shall automatically become Party leader on a pro-tem basis. The NEC shall decide whether to hold an immediate ballot as provided under E above or to elect a new leader at the next annual session of Party conference.
>
> v. When the Party is in opposition and the leader and deputy leader, for whatever reason, both become permanently unavailable, the NEC shall order a postal ballot as provided under E above. In consultation with the Shadow Cabinet they may choose to appoint a member of the Shadow Cabinet to serve as Party leader until the outcome of that ballot."

25. It is common ground that there is no "vacancy" for Leader because Mr Corbyn has not resigned from his position as Leader.

26. The timing of any election for Leader (or Deputy Leader) is provided for in Clause II.D as follows:

> "(i) When the PLP is in opposition in the House of Commons, the election of the leader and deputy leader shall take place at each annual session of Party conference.
>
> (ii) When the PLP is in government and the leader and/or deputy leader are prime minister and/or in Cabinet, an election shall proceed only if requested by a majority of Party conference on a card vote.
>
> (iii) In any other circumstances an election shall only be held when a vacancy occurs, subject to E …."

27. The actual procedure for voting is set out in Clause II.2C. Nothing turns on these provisions save that I should record three particular paragraphs because there is an argument derived from one such paragraph that I will need to consider (see paragraphs 41 and 45 below):

> "v. The procedures shall ensure that each candidate has equal access to the eligible electorate and has equal treatment in all other matters pertaining to the election.
>
> …
>
> ix. Voting shall be by preferential ballot. The votes shall be totalled and the candidate receiving more than half of the votes so apportioned shall be declared elected. If no candidate reaches this total on the count of first preference votes, a redistribution of votes shall take place according to preferences indicated on the ballot paper.
>
> x. The votes cast for each nominee shall be recorded and published in a form to be determined by the NEC as soon as possible following any election." (My emphasis.)

28. The Rule Book runs to some 84 pages and contains a wide range of provisions. I do not know to what extent it was drafted with legal assistance, but the expression "without prejudice to" appears in three places and "for the avoidance of doubt" in five places, both expressions commonly used by lawyers. The expression "null and void" appears in six places and the word "deemed" appears in many places. The inference I draw is that that there has over the years been some legal input into its drafting. What is, however, certain is that it has been altered by various amendments (some major, some minor) over the years and it therefore represents something of an amalgam of instances of drafting at various times: it was not the product of one drafting exercise. That may be of some importance when considering some issues raised in these proceedings (see paragraph 53 below).

29. The NEC received conflicting advice about the effect of these provisions, particularly in connection with Clause II.2B(i) and (ii) (see paragraph 20 above). I will record briefly the nature of the advice available.

30. Apparently, advice as to whether the Leader of the LP would be required to seek nominations if he was subject to a challenge was requested by Mr Corbyn's office well before the events referred to in paragraphs 13-16 above. The request to obtain it was conveyed to Mr McNicol and as a result Mr John Sharpe, a solicitor with GRM Law, was instructed. He provided his advice in a note dated 11 March 2016. It was to the effect that once an election had been triggered by the submission to the NEC of a valid nomination with the requisite degree of support, any person who wanted to participate in the election (including the Leader) would also require a nomination with the requisite support (which in this instance would be 20% of the PLP and the EPLP). He referred to what he said was the precedent for this position created by the stance adopted by Mr Neil Kinnock, as he then was, when faced with a challenge to his leadership. (I will refer to that occasion below: see paragraphs 61, 62 and 68).

31. Mr Corbyn's office invited Mr McNicol to obtain a further advice from Mr Henderson. He prepared an Advice dated 13 April 2016. It ran to 34 pages and provided a detailed analysis of the provisions he considered to be relevant. In a nutshell, he concluded that an incumbent leader who has not resigned does not require nominations and is automatically to be included on the ballot paper.

32. Given this conflict, and in the circumstances that presumably presented themselves with the impending "no confidence" vote (see paragraph 14 above), Mr McNicol commissioned a further Opinion from Mr James Goudie QC. The background to that request is set out in the minutes of the meeting of the NEC of 12 July as follows:

> "The General Secretary further reported that it was not unusual to be faced with conflicting legal advice. However, since there had been no immediate prospect of a contested leadership election that is where the matter was left. However, given the media speculation in the run up to, and immediately following, the European Referendum, and following consultation with the NEC Chair, further authoritative advice was commissioned from James Goudie QC, a leading silk at 11KBW, who has a long history of advising the Party on rule and constitutional issues. His advice, together with the original advice from John Sharpe and the conflicting advice from Mark Henderson were before the NEC."

33. Mr Goudie took the view that Clause II.2B(i) and (ii) did not provide an incumbent Leader with any special provision other than the "measure of protection" afforded by the provision that requires a "potential challenger" to achieve 20% support rather than the 15% support required if there is a vacancy. He disagreed with the result of Mr Henderson's analysis. Mr Goudie was invited to attend the meeting on 12 July and answered questions from those present.

34. I understand that Mr Corbyn's solicitors, Howe and Co, commissioned an Opinion from Mr Michael Mansfield QC and Mr Mark McDonald whose combined view was quoted in a letter from Howe and Co to Mr McNicol dated 11 July 2016 from which, for the record, I will quote below. I should say that the Opinion was not put formally before the NEC on 12 July and the NEC voted by a majority of 19 to 13 not to invite Mr Mansfield (or Mr Henderson) to the meeting. However, the view of Mr Mansfield and Mr McDonald (on the basis that there was no "vacancy" for Leader) is demonstrated in the following extracts quoted in Howe and Co's letter:

> "… the wording makes clear and unambiguous reference to the 20% of signatures being required by "potential challengers". It must follow that under any construction of this Clause it is not envisaged that those being challenged i.e. the leader of the party, should reach the 20% threshold. On no reasonable interpretation is an incumbent a potential challenger: they cannot be challenging themselves."

> "Further, there is no provision in the 2016 Rules which requires that an incumbent has to be nominated. The 2016 Rules specify that any nomination by a potential challenger may be sought each year in time for the annual conference. If there is no challenger then as a matter of established fact there is no election for leader: the incumbent remains leader. It must follow that an incumbent is not required to be nominated each year."

> "The rules by which the Labour Party is governed are unambiguous: the leader does not require any signatures to be nominated in a leadership election where there is a potential challenger to the leadership."

35. The plethora of conflicting legal advice must have been confusing even for any members of the NEC with legal training. Nonetheless, the view of the majority was as recorded above (see paragraph 1). The true basis upon which each individual member of the majority reached his or her decision may be debatable, but if they were following the legal opinions put forward, they must be taken to have followed the view of Mr Henderson, perhaps influenced also by what some would have understood to have been the opinion of Mr Mansfield and Mr McDonald.

36. I have referred to these matters because they form the evidential backdrop to the decision made on 12 July. In my view, my task is to decide whether the decision was wrong in the sense of being wrong in law, as the Claimant alleges. It is not, in my judgment, a question of whether it was a reasonable decision to reach out of a number of possible decisions as Mr Westgate and, as I understood him, Mr Henderson submitted. The question is whether it was wrong in law in the sense that the correct interpretation of the rules did positively require Mr Corbyn to obtain 20% support whereas the wrong interpretation placed upon those rules by the NEC was that he did not require that support to take part in the ballot. I will explain later why I see the question needs to be addressed in that way below (see paragraphs 55-58), but before turning to that I propose to consider what seems to me to be the crucial primary issue, namely, the natural and ordinary meaning of the relevant rules.

Why does the Claimant say the decision was wrong from the point of view of the natural and ordinary meaning of Clause II.2B?

37. I propose to focus initially on what the Claimant says about the 2016 rules as they are drafted and without reference to any precedent or previous version of the rules. It is the normal process when interpreting any document to take its wording as it stands, albeit in its appropriate context, and decide whether its meaning is unambiguous or whether it is unclear and/or ambiguous or patently absurd. It is generally only when the latter is the case that it is necessary to look beyond the natural and ordinary meaning of the words used. That constitutes my shorthand summary for the starting point for determining the meaning of any document of a contractual character. It is only after that issue has been addressed that the wider rules of contractual construction reflected in cases such as *BCCI v Ali* [2002] 1 AC 251, *Arnold v Britton* [2015] 2 WLR 1593 and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 may fall to be applied. Those wider rules would indeed apply to the interpretation of the contract constituted by the Rule Book in this case even though that contract is undoubtedly different in character from the kind of commercial contract that has generated the principles set out in those cases.

38. In their Skeleton Argument Mr Millar and Ms Hannett submit that the two most crucial rules (Clause II.2B (i) and (ii)) must be read together because they distinguish between the situations where there is a vacancy for Leader and where there is no vacancy. When there is no vacancy (which they accept is the case here) they say that a contested election for Leader must be triggered by a challenge. So much is clear and not in issue.

39. They argue that the purpose of the first sentence of Clause II.2B (i) is also clear, namely, to ensure that the timing of any potential challenge fits with the requirement for the election to take place "at the annual session of Party conference", an expression that appears in both Clause II.2.B (ii) and D(i) (see paragraphs 20 and 26 respectively above). The process, they say, is arranged in this way under the rules to ensure that the contested election can take place at the annual conference without a long period in between the triggering of the election and the annual session. Mr Westgate and Mr Lemer contend in their Skeleton Argument that the words quoted do not have this effect and are merely words of exhortation, not compulsion. They suggest that a challenger can come forward at any time and in that event it is the NEC's responsibility to decide whether to co-ordinate the election timetable with the annual conference or to convene a special conference. Although Mr Millar suggested that the consideration he and Ms Hannett raise is most important, I think I should say immediately that I am not persuaded that much turns on this for the purposes of this case. To the extent that it is of relevance I prefer the analysis advanced by Mr Westgate and Mr Lemer to that advanced on behalf of the Claimant.

40. As I have said, the existence of the distinction made in the Rules between an election when there is a vacancy and one where there is no vacancy is uncontroversial. However, the next step in the argument advanced on behalf of the Claimant is that the remainder of Clause II.2.B (ii) has the same purpose as Clause II.2.B (i), namely, to identify in the case of a challenge (rather than in the case of a vacancy) what is said to be "the mandatory measurable threshold level of support which MPs seeking to be nominees in the contested election must achieve". This is clear, it is argued, because the wording of the two provisions is essentially the same in the sense that (i) says that "<u>each</u> nomination must" be supported by the relevant proportion of the PLP and the EPLP and (ii) says that "<u>any</u> nomination must" achieve the appropriate level of support (my emphasis).

41. They argue that the use of the word "any" in (ii) is a reflection of "the less certain nature of the contest, which in the case postulated [in (ii)] will only occur if there is a challenger who can become a nominee with the specified level of support." The key point, they assert, is that the effect of the words "each" and "any" is the same in the two parts of Clause II.B.2 and means that anyone who wants to be a "nominee" within the meaning of the subsequent rules must attain the prescribed level of support. The "subsequent rules" to which they point are II.2.B (iv) and (vi) (see paragraph 21 above) and II.C(x) (see paragraph 27 above).

42. They argue that the words "[in] this case" in the middle sentence of B(ii) "self-evidently" refer back to the five opening words of B(ii), namely, "[where] there is no vacancy" and not to the second part of the first sentence of B(ii). That part of the sentence, so the argument goes, refers to the possibility of nominations being sought by potential challengers which is not something that can be described as a "case". The word "case", it is said, must refer to a state of affairs and an expression that merely refers to the possibility of something happening is not a "state of affairs".

43. They make the more fundamental point that if this rule is the one by which the Leader acquires a constitutional right to an automatic place on the ballot paper when facing a challenge, it is, they say, "surely so important" that it would have been stated in express terms and not be provided for in effect by default in a provision designed to specify the level of support a challenger would require to mount a challenge to the

Leader. However, there is, they say, no hint of that in the rule. The second sentence of B(ii) does not say, for example, "in this case potential challengers or challengers must be supported by" or "such nominations must be supported by" the relevant level of support. They draw attention to the absence of the word "such" between the words "any" and "nomination" in (ii) which, they contend, would need to be there to support the construction of the rules for which the First Defendant and Mr Corbyn contend.

44. Mr Goudie made a similar point in his Opinion when he asserted that the word "any" was unqualified. The rules, he said, did not say "any except the incumbent" or words to that effect and, as he put it, the rules conspicuously do not say "a nomination by a potential challenger".

45. Those then are the arguments of the Claimant based on the language of the two parts of B(ii). Added to this is the use of the word "nominees" in II.C(x). This could only be understood, it is contended, if "nominees" included any Leader who stood in the election for his/her own position.

The response of the First Defendant and Mr Corbyn to the Claimant's case on the natural and ordinary meaning of Clause II.B.2 (i) and (ii).

46. Mr Henderson took the substantial lead on this issue and Mr Westgate adopted his argument, but added a few observations on behalf of Mr Corbyn.

47. He submits that II.B.2(i) gives MPs and MEPs an initial "gate-keeping function", as he described it, when there is a vacancy for Leader. Only MPs can stand for the leadership and then only if they can demonstrate the support of 15% of MPs and MEPs. He says that the incumbent Leader will always have crossed that threshold and will have won an election and, accordingly, does not have to satisfy the 15% threshold again. That, as it seems to me, is an argument going to the underlying rationale for II.B.2(ii) as he contends it to be rather than the exercise of determining the natural and ordinary meaning of that rule and I set it aside for present purposes.

48. He says that Clause II.B.2(ii) gives MPs and MEPs the power (which is specifically reserved to those two sections of the LP) to force the incumbent to seek re-election by triggering a challenge to the incumbent by conferring on a "potential challenger" the required 20% threshold of support. The Rules do not confer on any other individual or group within, affiliated to, or supporting the LP the power to force the incumbent to face a contested election by which he/she may be removed from office. He submits that the 20% threshold in II.2.B(ii) can only reasonably be construed as applying to a "potential challenger" because the second sentence, which applies the threshold, starts "[in] this case any nomination must be supported by 20 per cent" and the expression "in this case" refers back to the first sentence. The first sentence, he submits, is concerned with "potential challengers" seeking nomination and does not deal in any respect with nomination of the incumbent. Mr Westgate reinforced this argument by submitting that the "nomination" that is being referred to in the second sentence is the nomination of the "potential challenger" and to the whole of what went before in the first sentence. To confine the connection simply to the first five words, as Mr Millar contended, would, he suggests, be an unnatural and unusual approach. He submitted that the way Mr Millar sought to marry up grammatically the words "in a case" in the way referred to above (see paragraph 42) did not stand up to scrutiny.

49. Mr Westgate also sought to answer the proposition advanced by Mr Millar that giving the Leader an automatic right to be on the ballot paper was so important that it should be provided for expressly (see paragraph 43) by arguing that there is no reason for such provision to be made when it is borne in mind (i) that the Leader is not subject to a specific term (unlike other officers of LP), (ii) there is no provision for his/her position to be terminated on the passing of a no confidence motion and (iii) the rules do refer to the Leader's re-election in a way that does not suggest a nomination route. The way the Leader's position may be brought to an end in the event of no voluntary withdrawal from the position is by a challenge through the process provided for in II.B.2(ii). His point is that no express language of the sort suggested by Mr Millar is required in those circumstances and that the argument that Mr Millar advances is only valid if one assumes that a Leader must be nominated

Conclusion on the meaning of Clause II.B.2 (i) and (ii)

50. I have to say that a fair reading of Clause II.B.2 (i) and (ii) reveals a natural and ordinary meaning that seems to me to be entirely clear. My view of their combined effect can be summarised thus:

(a) where there is a vacancy for Leader, anyone who wishes to be considered for the position would require nominations from 15% of the combined Commons members of the PLP and EPLP in order to be a candidate in the election;

(b) where there is no vacancy (because the Leader is still in place), anyone who wishes to challenge the Leader's right to continue as Leader would need nominations from 20% of the combined Commons members of the PLP and EPLP in order to mount such a challenge;

(c) the Leader would not in that situation (where there is no vacancy) be someone who was a "challenger" for the leadership and, accordingly, would require no nominations in order to compete in the ballot to retain his/her position as Leader.

51. To my mind, there is no need for the word "such" to appear between "any" and "nomination" in (ii) (or that the word "any" requires any further qualification) because it is clear that the words "any nomination" in that second sentence refer back to the nominations required by any "potential challengers" as set out in the first sentence. That is clear from the use of the words "[in] this case" at the beginning of that sentence, plainly intending to refer to all the circumstances referred to in the first sentence, those circumstances including the emergence of a "potential challenger" with the requisite level of support.

52. I should say that this impression of the meaning of Clause II.B.2 (i) and (ii) was the one I gained when I first read them before reading the Skeleton Arguments and hearing the oral arguments in this case. I have listened with interest and care to the arguments to the contrary advanced by Mr Millar, but nothing has altered that first impression and Mr Westgate rightly reminded me not too readily to discard a first impression when considering provisions such as these. I am afraid the argument referred to in paragraph 42 above suggests a subtlety of drafting that was almost certainly not intended by the draftsman and the reason why it should have been dealt with so elliptically is equally elusive. But leaving aside the impression that the words have had upon me, I believe that this would be the natural impression that they would

make on the ordinary, objective member of the LP to whom, of course, the rules are in effect addressed. I say "objective" to distinguish the LP member who for political reasons wants to believe the words mean what he or she wants them to say from the person who takes a detached view of the position. The "readership to which they are addressed" is one feature that the court will take into account when interpreting the rules of an unincorporated association: see *Jacques v Amalgamated Union of Engineering Workers (Engineering Section)* [1986] ICR 683 at 692.

53. Clause II.2.B (iii), (iv) and (vi) (see paragraph 21 above) do not, in my judgment, operate as anything more than consequential matters in respect of a person who, by virtue of the operation of (i) or (ii) is a "nominee". They do not have the effect of defining who is a nominee: that is determined by (i) or (ii). When there is no vacancy for Leader a person becomes a nominee if he/she is a challenger to the Leader in the election and has the requisite level of support. I accept that the use of the word "nominee" in II.2.C(x) (see paragraph 27 above) is odd because, on a literal interpretation, it would mean that only the votes of any challenger would be "recorded and published" whereas plainly the votes for all candidates would need to be published. The preceding provisions in Clause II.2C used, where relevant, the word "candidate" (see also paragraph 27 above) and I can only infer that the use of the word "nominee" was an oversight in the drafting which might be characterised as a product of "untidy draftsmanship": see *per* Roskill LJ in *British Equity v Goring* [1997] ICR 393. It is worth recording his elegant appraisal of such issue that arose within the context of construing the wording of the trade union rules in issue in that case:

> "Some reliance was placed upon the differing and somewhat indiscriminate use of words such as "motion," "resolution" and "questions" in the various rules as suggesting that different results were intended to follow according to which word was chosen. If one could discern any coherent or logical pattern in the choice of any of those words, this argument would have force, for the same words should, if possible, be given the same meaning throughout the rules and, when a different word is used, one would be disposed to think, *prima facie* at any rate, that it was deliberately used to convey a different meaning from that which another word would give. But I do not think that is so. The different use, as I venture to think, is attributable in the case of these rules rather to untidy draftsmanship than to meticulous choice of language."

54. My conclusion that the natural and ordinary meaning of Clause II.B.2(ii) is as I have set out in paragraph 50 above means that I am satisfied that the NEC also reached the correct legal conclusion in respect of that provision. They were right to conclude that Mr Corbyn was entitled to be on the ballot paper without the need to obtain any level of nominations. That conclusion, which is sufficient to dispose of this case, has not required the re-writing by the court of the relevant provision of the rules and neither has it required any strained meaning to be attributed to those rules. Since, in my judgment, the effect of Clause II.B.2(ii) is unambiguous, it has not been necessary to consider any of the historical material produced or to consider the suggested consequences of taking one interpretation rather than the other (see further at

paragraph 59 below). Accordingly, it is unnecessary for me to deal with those issues in any detail. I will make very brief reference to one or two of those issues in case they are considered by the parties to be of significance. I will, however, say a little more about the argument concerning Clause 1.X.5 of the rules. I will deal with that first.

Clause 1.X.5 – the "ouster" clause

55. Clause 1.X.5 is in these terms:

> "For the avoidance of any doubt, any dispute as to the meaning, interpretation or general application of the constitution, standing orders and rules of the Party or any unit of the Party shall be referred to the NEC for determination, and the decision of the NEC thereupon shall be final and conclusive for all purposes. The decision of the NEC subject to any modification by Party conference as to the meaning and effect of any rule or any part of this constitution and rules shall be final."

56. That provision appears to give the final decision on the meaning of the rules to the NEC. If that is so, Mr Millar contends that it purports to oust the jurisdiction of the court and is, accordingly, void consistent with the case of *Lee v Showman's Guild of Great Britain* [1952] 2 QB 329 and the cases of *Baker v Jones* [1954] 1 WLR 1005 and *Leigh v National Union of Railwaymen* [1970] Ch 326 which followed it. Mr Henderson and Mr Westgate contend that it does not purport to oust the jurisdiction of the court, but suggest that the limit of the court's powers of interference with any decision of the NEC in relation to the interpretation of the rules is simply to decide whether its interpretation is "honest and reasonable". They rely upon what Stanley Burnton J said in *Choudhry* (see paragraph 2 above) at [68], having referred to Clause 1.X.5, when he said this:

> "The members of the Party have agreed by [Clause 1.X.5] that it is the NEC who shall determine disputes as to the interpretation of the rules. The effect of that provision is that the NEC can adopt and apply any honest and reasonable interpretation of the rules."

57. Whilst that observation is, of course, to be accorded appropriate respect, I think it needs to be appreciated that this was an extensive *ex tempore* judgment given on the Monday following argument on the previous Friday on an application for interim relief. It concerned circumstances rather different from those that arise in this case and there was, it would seem, no significant argument about the parameters that the clause sets. I would respectfully agree that there are very many areas where the NEC would be better placed (and indeed far better placed) than any court to determine how best to apply and interpret the rules and that provided an honest and reasonable approach was adopted, the court should not intervene. However, I would for my part not wish to be seen to conclude that some fundamental issue of interpretation of the rules (which is a matter of law), such as that involved in this case, should not remain within the province of the court, the court's power not simply being to determine whether the decision of the NEC was honest and reasonable, but whether it was right or wrong. It is perfectly possible for an honest decision to be made about a matter of law which

turns out to be wrong. However, I find it difficult to understand how a court could conclude that an erroneous interpretation of the rules was reasonable: a conclusion of law is either right or wrong and a member of an unincorporated association has the right to ask the court for its decision.

58. That is why I have approached the issue in this case on the basis of deciding whether the NEC was right or wrong in its conclusion. I am satisfied that it was right. I would have found it impossible to conclude that the decision was reasonable had I been satisfied that it was wrong no matter how honestly the decision was taken.

59. At all events, I think the true effect of Clause 1.X.5 is better left until a case truly raising the question arises. However, because of the court's reluctance to be drawn into any kind of political debate, I do accept unreservedly that where a decision, certainly about the application of any rule that is ambiguous, requires consideration of background material beyond the precise words used in the rule that has significant political connotations, the NEC may well be better placed than the court to consider those implications and to decide accordingly. In this case, had it been necessary to consider the competing contentions about what were said by each side to be the "absurd" and "obviously unintended" consequences arising from the acceptance of the other side's view of the meaning of Clause II.B.2(ii), the court would have found itself in the midst of what Mr Henderson correctly characterised as "intensely political" considerations. Because the problem has not arisen, it is not necessary to speculate on what might have been the result, but I highlight the issue because it brings clearly and vividly into focus the importance of recognising the vital dividing line between the world of politics and the world of the law.

Previous incarnations of Clause II.B.2(ii) and precedent

60. As I have said, the previous versions of the relevant rule have not had any impact on my view of the meaning of Clause II.B.2(ii), but I will draw attention to what Mr Millar advanced by way of argument.

61. Prior to 1981 the MPs of the PLP elected the Leader of the LP. By 1983, following the Wembley Conference, an electoral college had been implemented by virtue of which the votes given to the leadership candidates were in the proportions 30% for the PLP, 30% for the Constituency Labour Parties and 40% for the Affiliated Organisations (including trade unions). The results in the three sections were then combined to produce an overall result. Under this system the MPs had the ability to nominate the candidate MPs from within their own number. The rules adopted in 1983 did not draw any distinction between a leader and a potential challenger to the leader. All candidates had to be nominated with at least 5% support from the PLP. Mr Neil Kinnock was first elected under this system.

62. The rules were not changed until after Mr Tony Benn's unsuccessful attempt to challenge Mr Kinnock for the leadership took place in 1988. Mr Benn secured more than the 5% for the purposes of nomination. After that election the rules were changed from those that had applied since 1983. Mr McNicol says in his witness statement of 21 July 2016 that at the 1988 annual conference the 5% threshold was amended to 20%, but that NEC or other LP papers have not been located showing the precise reason for the changes. However, he says that "published sources" suggest

that the primary reason was "to limit challenges to an incumbent, such as the one that Mr Benn had been able to make to Mr Kinnock that year."

63. By the time of the 1993/94 Rule Book, rule 5(1) read as follows:

> "(b) In the case of a vacancy for Leader or Deputy Leader each nomination must be supported by 12.5 per cent of the Commons members of the Parliamentary Labour Party. Nominations not attaining this threshold shall be null and void.
>
> (c) In the case where there is no vacancy, nomination should be sought on an annual basis. Each nomination must be supported by 20 per cent of the Commons Members of the Parliamentary Labour Party to be valid. Nominations not attaining this threshold shall be null and void."

64. This would seem to represent the beginnings of the current formulation although the phraseology used in that version almost certainly went back to what was agreed at the 1988 Annual Conference.

65. By 2010 the formulation of the second provision was as follows:

> "Where there is no vacancy, nominations shall be sought each year prior to the annual session of party conference. In this case any nomination must be supported by 20 per cent of the Commons members of the PLP. Nominations not attaining this threshold shall be null and void."

66. In the 2011 Rule Book the wording of the first sentence of the rule was changed so that it read as follows:

> "Where there is no vacancy, nominations may be sought by potential challengers each year prior to the annual session of conference …."

67. The current formulation is as set out in paragraph 20 above.

68. All I would say is that the history of these formulations (which have not changed materially over the years) does not, in my view, throw doubt on the interpretation of the current Clause II.B.2(ii). Equally, with respect to those who think otherwise, the evidence I have seen does not suggest that the manner in which the contest between Mr Kinnock and Mr Benn was conducted constitutes any kind of precedent for the situation that now presents itself. In any event, one instance would not represent a sufficient basis for saying that an established basis for interpreting the rule had been achieved.

The current practice for the "re-election" of the Leader

69. Mr McNicol deals with this in his witness statement in the following way:

> "33. Rule D of the 2016 Rules provides that "When the PLP is in opposition in the House of Commons, the election of the

> leader and deputy leader shall take place at each annual session of Party conference". This provision has applied, I understand, applied since 1981.
>
> 34. In practice, in years when the Party is in opposition and no vacancy arises, no 'election', in the sense of any formal electoral process took place annually at conference or otherwise. Nominations were not sought expressing invited on an annual basis. The amendment to the Rules at the 2010 conference ensured that they were consistent with the practice of not expressly seeking nominations from potential challengers.
>
> 35. There is no formal process by which the incumbent leader and deputy leader are declared re-elected unopposed for a further year at each annual session of Party conference). This means that formal nomination for re-election each year is not required of an incumbent. My understanding of how the Party considers that Rule D is complied with is that the incumbent is deemed, implicitly, to be elected unopposed until the next annual session of conference, unless a potential challenger attains the 20% threshold of support to stand for election."

70. There does, therefore, seem to be an established practice for what happens when there is no vacancy and no challenge to the Leader (and indeed the Deputy Leader). This does not affect the interpretation of Clause II.B.2(ii).

Conclusion

71. Because of time constraints I have focused solely on those parts of the argument on each side of the debate that have seemed to me to be relevant. If I have not mentioned something it is because I have not felt it relevant to the decision I must make.

72. It is quite obvious that one side will be pleased with the outcome of the case and the other side will not. Doubtless the dichotomy of view on the outcome will reflect the well-publicised divisions that exist within the LP. I repeat as firmly and unequivocally as I can that the resolution of the narrow legal issue I have been asked to decide is wholly uninfluenced by which side will be pleased with the outcome. Mr Henderson suggested that it is possible that those responsible for the drafting of the rules never foresaw that the situation that has arisen recently might arise. It is not for me to speculate, but if he is right, it is not for the court to try to re-write the rules to provide a solution. The responsibility for that lies elsewhere.

73. I would express my appreciation to all Counsel for their helpful submissions and to them and their Instructing Solicitors for putting the material before the court so efficiently.