



Neutral Citation Number: [2016] EWCA Civ 817

Case No: A2/2016/3148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
The Hon. Mr Justice Hickinbottom
[2016] EWHC 2058 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2016

Before:
LORD JUSTICE BEATSON
LADY JUSTICE MACUR
and
LORD JUSTICE SALES

Between:

(1) Christine Evangelou
(2) Rev. Edward Mungo Lear
(3) Hannah Fordham
(4) Chris Granger
(5) FM (a child by his Litigation Friend HW)
- and -

**Claimants/
Respondents**

Iain McNicol (sued as a representative of all members of the
Labour Party except the Claimants)

**Defendant/
Appellant**

Clive Sheldon QC and Julian Milford (instructed by William Sturges LLP) for the
Defendant/Appellant

David Goldstone QC and Imogen Proud (instructed by Harrison Grant) for the
Claimants/Respondents

Hearing date: 11 August 2016

Approved Judgment

Lord Justice Beatson:

I. Introduction

1. This is the judgment of the court to which all members of the constitution have contributed. The appeal concerns eligibility to vote in the Labour Party's forthcoming leadership election. This depends on the interpretation of the Labour Party's 2016 Rule Book which constitutes a contract between the individual members, and the extent of the power the Rules give to the National Executive Committee of the Party ("the NEC") to define eligibility criteria and set out procedural guidelines for elections. In particular, it concerns the effect of a resolution of the NEC on 12 July 2016 that only those who had been members of the Party for six continuous months, that is had been members since 12 January 2016, could vote in the leadership election. In his judgment ([2016] EWHC 2058 (QB)) handed down on 8 August 2016, Hickinbottom J decided that that resolution, would, if acted upon, be a breach of the Party's contract with its members. His order, also dated 8 August 2016, stated that the claim for breach of contract is allowed and that the judgment stand as declaratory relief.
2. The appellant, Iain McNicol, is the General Secretary of the Labour Party. He appeals against the order with the permission of the judge. The respondents are five members who joined the Labour Party in the period between 12 January and 12 July 2016. One, Chris Granger, joined on 20 January 2016. The other four, Christine Evangelou, the Rev. Edward Mungo Lear, Hannah Fordham, and FM (a child), joined after the EU referendum on 23 June 2016. As a result of the resolution, they are not eligible to vote in their capacity as members. The closing date for applications to become registered supporters was 20 July 2016 and the second, third and fourth respondents, who became registered supporters, are eligible to vote in that capacity. The fifth respondent is under 18 and ineligible to become a registered supporter. The first respondent did not become a registered supporter, both on principle because she was already a member and in the light of financial constraints. The judge's order required the Party to pay £25 in damages to the second, third and fourth respondents in recompense for the fee they had each paid.
3. The judge also considered claims by the respondents based on implied terms, misrepresentation, and unlawful discrimination. In view of his finding on breach of contract, he stated that it was unnecessary to reach a decision on the claims based on implied terms and misrepresentation, although he expressed scepticism about them. As to the claim of unlawful discrimination, he stated that, although jurisdictional problems could have been overcome by transferring the proceedings to the County Court, he did not need to make any specific order in respect of that claim in view of the finding on the contract claim and because the discrimination claim was an alternative to that. It was not suggested below or before this court that the NEC acted irrationally or capriciously in imposing the eligibility requirement that is challenged in these proceedings. The focus of this appeal is therefore confined to the question whether the procedure agreed by the NEC at the meeting on 12 July 2016 was a breach of the contract between the individual members contained in the rules.
4. The issue between the parties is whether the provisions in the Labour Party's 2016 Rule Book entitle all members to vote in the leadership election unless excluded by another rule, as the respondents maintain, or whether, as the appellant maintains, the

rules relied on by the respondents, in particular Chapter 4, clause II(2)(C)(vi) and Chapter 2, clause I(2), only prescribe the general category of persons constituting the electorate and do not provide that all those within the category are necessarily entitled to vote. It is submitted on behalf of the appellant that those rules are not intended to and do not define which members may vote in a particular election, and that the power to determine which members are eligible to vote is vested in the NEC.

5. The appellant's case is that Chapter 4, clause II(2)(C)(vii), which states that the "precise eligibility criteria shall be defined" by the NEC, empowers the NEC to set eligibility criteria for voting in the election which restrict entitlement to vote by reference to a period of continuous membership of the Party commencing before the date when the election process starts. It was submitted that Chapter 4, clause II(1)(A), which states that the NEC "will ... issue procedural guidelines" in respect of the timetable for and other matters relating to the conduct of elections for leader of the Party, read with Chapter 4, clause II(2)(C)(iv) which makes it clear that the timetable will include "any freeze date", empowers the NEC to set a freeze date before the date when the election process starts. These, it was argued, are matters expressly placed within the competence of the NEC by those provisions in the Rule Book. The appellant maintained that this position is consistent with the wide powers given to the NEC under the Rule Book to uphold the Party's constitution and to act as its administrative and procedural authority. We set out or summarise the provisions in the 2016 Rule Book that are material to this appeal in Section II of this judgment. We consider the approach taken by the law to the interpretation of the rules of an unincorporated association such as the Labour Party in Section III.
6. It is relevant to mention that at the meeting on 12 July 2016 the NEC made two other decisions. One was that to which we have referred at [2] above. Affiliated supporters and registered supporters of the Party who were over 18 years of age, on the electoral roll, and whose applications for registration were received between 18 and 20 July 2016 and who had paid a fee of £25 would be allowed to vote. The second was that, in a leadership election, the incumbent leader of the Party is not required to obtain the number of nominations specified in Chapter 4, clause II(2)(B)(ii) of the Party's rules in order to participate. A challenge to the latter resolution was rejected on 28 July 2016 by Foskett J: see *Foster v McNicol* [2016] EWHC 1966 (QB).
7. These proceedings were issued on 21 July 2016 and were heard by Hickinbottom J on Thursday 4 August. With commendable expedition, he handed down his full and well-structured judgment on Monday 8 August. It had been clear at an early stage that the losing party might wish to appeal and, in view of the end of the legal term, arrangements were made to ensure that a Court of Appeal would be able to hear the case with expedition. The case came before this court on Thursday 11 August.
8. Before us, Clive Sheldon QC and Julian Milford appeared for the appellant and David Goldstone QC and Imogen Proud for the respondent. Messrs Sheldon and Goldstone did not appear below and, in view of the need for the case to come on urgently, had little time to prepare. We thank them and junior counsel for their submissions and for ensuring that the appeal was well-prepared in a very short time. The clarity of the submissions has assisted us in producing this judgment on the day after the hearing.

II .The Labour Party's 2016 Rule Book:

9. The Rule Book is a detailed document containing 15 chapters and 8 appendices. As stated by Foskett J in *Foster v McNicol* at [28], it is not the product of a single drafting exercise. The result is (see *ibid* at [53]) that it contains examples of what Roskill LJ in *Bristol Equity v Gowing* [1997] ICR 393 described as “untidy draftsmanship”.
10. For the purposes of this appeal, the crucial provisions are Chapters 2 and 4. There are other relevant rules in Chapter 1, clauses II, VIII and X, Chapter 2, clause I, Chapter 4, clauses I and II, and Appendices 1 and 2. It is convenient to set out and summarise the material provisions of the rules in the order in which they appear in the Rule Book.
11. Chapter 1 is entitled “Constitutional Rules”. Its material provisions are:

**“Clause I.
Name and objects**

...

4. The Party shall give effect, as far as may be practicable, to the principles from time to time approved by Party conference.

**Clause II.
Party structure and affiliated
Organisations**

1. There shall be a National Executive Committee of the Party (the ‘NEC’) which shall, subject to the control and directions of Party conference, be the administrative authority of the Party.

...

**Clause VI.
Labour Party Conference**

1. The work of the Party shall be under the direction and control of Party conference ... Party conference shall meet regularly once in every year and also at such other times as it may be convened by the NEC.

...

**Clause VIII.
The National Executive Committee**

...

2. The primary purpose of the NEC shall be to provide a strategic direction for the Party as a whole ...

...

3. In furtherance of its primary purpose and key functions, the duties and powers of the NEC shall include:

A. to uphold and enforce the constitution, rules and

standing orders of the Party and to take any action it deems necessary for such purpose ...

...

H. to propose to Party conference such amendments to the constitution, rules and standing orders as may be deemed desirable; also, in accordance with the rules, to submit to the Party conference such resolutions and declarations affecting the programme, principles and policies of the Party as in its view may be necessitated by political circumstances.

...

M. to issue guidance, give rulings and bring forward rule changes to Party conference to ensure continued compliance with the Party's legal and financial responsibilities ...

...

4. The NEC shall have the power to adjudicate in disputes that may arise at any level of the Party, including between CLPs ["Constituency Labour Parties"], affiliated organisations and other Party units, and between CLPs, other Party units and individuals in those units and in disputes which occur between individual members or within the Party organisation. Where the rules do not meet the particular circumstances, the NEC may have regard to national or local custom and practice as the case may require. The NEC's decisions shall be final and binding on all organisations, units and individuals concerned.

...

Clause X.
Scope of rules

...

5. 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."

Chapter 2 of the 2016 Rule Book makes provision for “Membership Rules”. Its material parts are:

**“Clause I.
Conditions of membership**

1. There shall be individual members of the Labour Party who shall pay a subscription in accordance with these rules, subject to a minimum as laid down in Clause III below.
2. The term ‘individual members of the Party’ shall encompass all grades of membership laid down in Clause III below; all such members shall have equivalent rights within all units of the Party except as prescribed in these rules.

...

**Clause II.
Membership procedures**

1. Individual members of the Party shall be recruited into membership in accordance with these rules and any applicable NEC guidelines which shall be issued to Party units and affiliated organisations from time to time ...
2. Without prejudice to any other provision of these rules, and without prejudice to its powers under Chapter 1.VII, the NEC shall be empowered to determine any dispute or question which may arise in respect of membership of the Party, either by considering the matter itself or by referring the matter to the NEC Disputes Panel for a decision. In such cases the NEC’s decision, or the decision of the Disputes Panel as approved by the NEC, shall be final and binding.

...

4. The NEC shall issue procedural guidelines on issues relating to membership from time to time ...”.

12. Chapter 4 of the Rule Book deals with elections of national officers of the Party, including the Party leader, and national committees. Its material parts provide:

**“Clause I.
General Principles**

1. Internal Party elections for officer posts and the membership of national committees shall be conducted in a fair, open and transparent manner, in accordance with the constitutional rules of the Party and any appropriate NEC guidelines.

Clause II.

Procedural rules for elections for national officers of the Party

1. General

A. The following procedures provide a rules framework which, unless varied by the consent of the NEC, shall be followed when conducting elections for Party officers. 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.

2. Election of leader and deputy leader.

A. The leader and deputy leader shall be elected separately in accordance with rule C below...

...

C. Voting

...

iii. An Independent Scrutineer will be appointed by the Returning Officer to oversee and verify the ballot, and the results shall be declared at a session of Party Conference.

iv. The timetable for the election, including any freeze date, and the procedures for agreeing the list of those eligible to vote must be approved by the Independent Scrutineer.

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.

vi. Votes shall be cast in a single section, by Labour Party members, affiliated supporters and registered supporters.

vii. The precise eligibility criteria shall be defined by the National Executive Committee and set out in procedural guidelines and in each annual report to conference.

viii. No person shall be entitled to more than one vote. Votes shall be cast by each individual and counted on the basis of one person one vote”.

13. Chapter 5 is concerned with “Selections, rights and responsibilities of candidates for elected external public office”. It was common ground below (and is in this court) that these provisions do not apply to internal leadership elections, which are governed by Chapter 4. In view of the language used in the NEC’s resolution of 12 July and the evidence submitted on behalf of the Party by Mr McNicol, it is appropriate to summarise Chapter 5, clause I(1). That provision contains the “general rules for selections for public office” (emphasis added). It provides (at A) that “all individual eligible members of the Party with continuous membership of at least six months ... are entitled to participate in selections. Any exceptions to this must be approved by the NEC.” Clause I(1)(B) is concerned with nominating criteria of members standing for public office. It provides that, in addition to fulfilling any statutory requirements for the relevant public office, those wishing to stand as a Labour Party candidate must have continuous membership of the party “of at least 12 months ...” and that any exceptions must be approved by the NEC.
14. Appendix 1 to the Rules contains the NEC’s statement on the importance to the Labour Party of its members. It includes the following:

“Members enjoy the formal democratic rights of Party membership as stated within the rules. Party members have the right to participate in the formal process of the Party, vote at Party meetings, stand for Party office and elected office as stated within the rules.”

It also states that Labour supporters will be encouraged to join the Party as full members.
15. Appendix 2 contains the NEC’s procedural guidelines on membership recruitment and retention. It is stated at Clause I(A)(iii) that the Party is anxious to encourage the recruitment of new members and to ensure that they are properly welcomed into it “and opportunities offered to enable their full participation in Party life”. Clause I(A)(iv) states: “The Party is, however, concerned that no individual or faction should recruit members improperly in order to seek to manipulate our democratic procedures”. Clause I(A)(v) states that it is unacceptable for large numbers of “paper members”, who have no wish to participate except at the behest of others, to be recruited in an attempt to manipulate Party processes because it undermines the Party’s internal democracy and is unacceptable to the Party as a whole. The procedural guidelines set out the arrangements for applicants to be issued with provisional membership, which gives only the right to attend branch meetings in a non-voting capacity, and for objections to any applications for membership to be made by CLPs within eight weeks of being notified. Unless there is an objection within eight weeks, membership becomes full: see paragraph B(vi) – (viii) of Appendix 2.
16. Apart from the reference to “any freeze date” in Chapter 4, clause II(C)(iv), the term is mentioned in Appendices 3 and 4 of the Rule Book. The former concerns NEC procedures for the selection of Parliamentary candidates following the boundary

review commenced in 2011, and the latter concerns NEC procedures for the selection of local government candidates. Clause II of Appendix 3 states that following a boundary review a sitting Labour MP may seek selection in relation to a new constituency where there is a substantial territorial overlap with their previous constituency defined by reference to the percentage of registered electors in the previous constituency who will be in the new constituency. Clause IV(1) of Appendix 3 provides that the freeze date for registered electors “shall be 1 December 2010” and that for individual membership eligibility to participate in selection of a new candidate “shall be the date at which the designated representative meets with the executive committee to draw up a timetable”. It is also provided that, where the NEC determines that there are special circumstances or where there is an unforeseen delay to the commencement of the process, a different freeze date for the membership may be fixed by the NEC. Clause IV(2) is concerned with freeze dates determined by Regional Directors for members’ eligibility to participate in selection of a new candidate for a new constituency. It states that in deciding on a freeze date, the Regional Director shall have regard to the state of membership of the CLP and any prima facie evidence of abuse of the code of conduct for membership recruitment and any other factors which the Regional Director may think relevant. This again demonstrates a concern with entryism and packing of the Party.

17. Appendix 4, clause I(ii)(g) provides that a freeze date for calculating the six month eligibility of members to attend meetings for the selection of local government candidates, may be set by the Local Campaign Forum with the approval of the regional director, and that if no freeze date is set, the six months shall be counted from the date of the first meeting convened to discuss a shortlist for a particular electoral area.

III. The approach to the Rules of an unincorporated association

18. The Labour Party is an unincorporated association. As such, it has no separate legal personality from that of its individual members and as a matter of law is not a legal entity distinct from them, as it would have been had it been a company or an industrial and provident society. It is, however, subject to rules, currently those in the 2016 Rule Book.
19. The nature of the relationship between an unincorporated association and its individual members is governed by the law of contract:-
 - (a) The contract is found in the rules to which each member adheres when he or she joins the association: see *Choudhry v Tresiman* [2003] EWHC 1203 (Comm) at [38] *per* Stanley Burnton J.
 - (b) A person who joins an unincorporated association thus does so on the basis that he or she will be bound by its constitution and rules, if accessible, whether or not he or she has seen them and irrespective of whether he or she is actually aware of particular provisions: *John v Rees* [1970] 1 Ch 345 at 388D – E; *Raggett v Musgrave* (1827) 2 C & P 556 at 557.
 - (c) The constitution and rules of an unincorporated association can only be altered in accordance with the constitution and rules themselves: *Dawkins v Antrobus* (1881) 17 Ch D 615 at 621, *Harington v Sendall* [1903] 1 Ch 921 at 926 and *Re*

Tobacco Trade Benevolent Society (Sinclair v Finlay) [1958] 3 All ER 353 at 355B – C.

20. Because the nature of the relationship between an unincorporated association and its individual members is governed by the law of contract the proper approach to the interpretation of the constitution and rules is governed by the legal principles as to the interpretation of contracts, and is a matter of law for the court. The approach is thus that set out in cases such as *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14], *Arnold v Britton* [2015] UKSC 36, [2015] AC 169 at [15] and [18], and *Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843. The intentions of the parties to a contract will be ascertained by reference to what a reasonable person having all the background which would have been available to the parties would have understood the language in the contract to mean, and it does so by focusing on the meaning of the words in the contract in their documentary and factual context.
21. The meaning has to be assessed in the light of the natural and ordinary meaning of the words, any other relevant provisions of the contract, the overall purpose of the clause in the contract and the facts and circumstances known or assumed by the parties. In this context, this means the members of the unincorporated association, the Labour Party. In *Foster v McNicol* Foskett J, relying on *Jacques v AUEW* [1986] ICR 683 at 692, stated that the court can take into account “the readership to which” the rules of an unincorporated association are addressed when interpreting them.
22. The effect of the cases, in particular *Arnold v Britton*, is that the clearer the natural meaning of the centrally relevant words, the more difficult it is to justify departing from it. In *Arnold v Britton* the majority of the Supreme Court adjusted the balance between the words of the contract and its context and background by giving greater weight to the words used. In this case, where a very large number of people are parties to the contract, *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571 shows there is another reason for caution about the use of background material. That case was concerned with a security document which secured a variety of creditors, holding different instruments, issued at different times and in different circumstances over a long period. Lord Collins stated (at [37]) that in such a case:

“Where a security document secures a number of creditors ... it would be quite wrong to take account of circumstances which are not known to all of them. In this type of case it is the wording of the instrument which is paramount. The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtor’s business. Detailed semantic analysis must give way to business common sense: *The Antaios* [1985] AC 191, 201”.
23. The court will more readily and properly depart from the words of a contract where their meaning is unclear or ambiguous, or where giving them their natural and ordinary meaning would lead to a very unreasonable result. As to the latter, while it is illegitimate for a court to force on the words of a contract a meaning which they

cannot fairly bear, in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 Lord Diplock stated (at 251) that:

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more necessary it is that they shall make that intention abundantly clear”.

In both categories of case the court will consider the relevant context, being concerned to identify the intention of the parties by reference to “what a reasonable person having all background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”.

24. In the present case, there is no challenge to the rationality of the eligibility criteria and the freeze date, and they are only said to be unauthorised on the true construction of the contract. It is, however, relevant to note that a discretion conferred on a party under a contract is subject to control which limits the discretion as a matter of necessary implication by concepts of honesty, good faith and genuineness, and need for absence of arbitrariness, capriciousness, perversity and irrationality: see *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 134 at [66] and *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661, and the cases on mutual undertakings and bodies exercising self-regulatory powers mentioned at [48] below.

IV. The background

25. We mainly take this from the judgment below. It dealt with the background and changes to the procedure for the election of the Labour Party’s leader since 1981 at [26] – [44]. This included the move to “one member one vote” in 1993, the introduction of a category of registered supporters with less than full membership in 2010, the review by Lord Collins of Highbury published in February 2014 which proposed a single constituency with each eligible individual having one vote of equal weight and the eligible electorate being composed of members, affiliated supporters and registered supporters. The judge summarised the rule changes proposed by the Collins review, which included the rules which now form Chapter 4, clause II(2)(C), which we have set out earlier in this judgment, and considered leadership elections before 2016 and the application of freeze dates to all elections since 1994. He referred to the Party’s 2015 Annual Report, presented at the 2015 Party conference, which emphasised the importance to the Party of the new arrangements for the election of Party leader and stated that the fact that, by the start of July, already tens of thousands of new people had signed up as members, affiliated supporters or registered supporters was a fantastic achievement but there was more to do.
26. The background to the 2016 leadership election and the NEC’s procedural guidelines and timetable paper, published after the meeting on 12 July 2016, were summarised at [44] – [64]. The guidelines and timetable paper before the NEC meeting on 12 July recommended among other things, under the heading of “Timetable and Freeze Date”, that “the Party requires members to hold six months continuous Party membership on the freeze date to be eligible to take part in the selection”. It also stated that, by the first date in the timetable, namely Tuesday 12 July, “timetable agreed and published.

Freeze date and membership eligibility. Registered supporters applications open”. The NEC agreed to that timetable and freeze date. Before the judge, Mr Cragg QC, who appeared on behalf of the claimants/respondents, had suggested that Mr McNicol thought that the six month rule for eligibility to take part in a “selection” under Chapter 5’s requirement for “selections” (see [13] above) applied to leadership elections under Chapter 4. Before us, Mr Sheldon denied that the evidence showed that Mr McNicol had made any such mistake and pointed to the fact that, at the meeting an amendment proposing a freeze date of 24 June was considered but defeated. He observed that even those who did not agree with the 12 January cut-off had proposed a retrospective freeze date.

27. The reasons given by Mr McNicol in his evidence for requiring members to have joined the Party by 12 January 2016 to be eligible to vote in the leadership election are summarised at [53]. These were: (a) that the premise behind Chapter 5, clause I(1)(A)(i), is that members should be able to show by the length of their membership that they have not joined the Party simply to select a candidate, and that as that rationale applied no less to a leadership election it was logical to apply the principle by analogy; (b) concern that individuals had become members or registered supporters before the 2015 leadership election merely in order to vote for candidates and without the intention of participating in the Party’s activities, and that some individuals may have done so to subvert the Party’s procedures for the election of its leader; and (c) the very large numbers joining the Party, particularly as registered supporters, up to two days before the opening of the ballot in 2015, created considerable practical problems in vetting the applicants.

V. The judgment below

28. The judge accepted Mr Cragg’s primary submission on behalf of the claimants/respondents. He stated (at [74]) that the question before him was a question of pure law as to the contract between members of the Party and, while he was aware that the court must be careful not to interfere in political matters, he described the question with which he had to grapple as “apolitical”. He also stated (at [75]) that:

“Chapter 4, clause II(2)(C)(vi), read with Chapter 2, clause I(2), indicates that all members are able to vote in a leadership election unless excluded by some other provision in the Rule Book. That reflects the general democratic foundations of the Party, the Collins review (whence Chapter 4, clause II(2)(C)(vi) is directly derived) which intended to increase the leadership voting constituency, and the Party’s 2015 annual report.”

29. The submission on behalf of the defendant/appellant that the rules enabled “the NEC to set any criteria for who may vote in a leadership election, so long as they do not stray into capriciousness” was rejected by the judge for three reasons. First, the recommendation of the Collins review that the eligible electorate should include “members” without qualification was endorsed by the Party conference and the NEC is bound to comply with and implement that recommendation, which is now contained in Chapter 4, clause II(2)(C)(vi). Secondly, he considered that Chapter 4, clause II(2)(C)(vii) merely allows the NEC to define and set out in “*procedural guidelines*”, “*precise eligibility criteria*”, and does not give the NEC power to set whatever criteria it wishes subject only to the bounds of rationality. He considered

that that provision could not be used to redefine members who were on the system and whose membership had not lapsed at the date set at the timetable so as to “redefine ‘members’ in a wholly artificial way to exclude a category ... from the constituency which Party conference ... determined should be entitled to vote and the Rule Book provides will be entitled [to vote]”. Thirdly, he relied on the fact that there was no evidence that the NEC had used or sought to use its powers in this way in the past, although he acknowledged the need for caution in using subsequent practice to interpret the Rule Book.

30. The judge stated (at [77] – [80]) that, while the setting of a prospective freeze date was, in itself, within the powers of the NEC, there was no power in the Rule Book to impose a distinct voting requirement that a member had to have held membership for six months prior to the freeze date. He so concluded because (see [80(i)]) “as a matter of ordinary language, ‘freeze date’ suggests a crystallisation of matters from a current or future time, not a reversion to a past state of affairs” and in the light of the statement by the Party’s solicitors in another dispute, *Jeffers v The Labour Party* [2011] EWHC 529 (QB), quoted by Wyn Williams J at [29], where it was said that “what the imposition of the freeze date does is prevent additional individuals seeking to become members, especially by reason of encouragement or inducement by candidates, *after the election process has begun ...*”. Finally, the judge referred (at [82]) to the absence of evidence of any suggestion by the Party, the NEC, the Collins review or any member of the Party before the procedures paper prepared by Mr McNicol for the 12 July 2016 meeting that a freeze date could be retrospective.

VI. Grounds of appeal

31. There are two grounds of appeal. Ground 1 is that the judge erred in law in concluding that the NEC had no power under the Labour Party’s Rule Book to restrict members who are able to vote in the leadership election to those who had had continuous membership since 12 January 2016. Reliance was placed on the breadth of the NEC’s powers within the Rule Book as a whole and, in particular, on Chapter 4, clauses II(1)(A), II(2)(C)(iv) and/or (vii).
32. Ground 2 is that the judge erred in law in concluding that the NEC’s power to impose a “freeze date” in any leadership election pursuant to Chapter 4 of the 2016 Rule Book was limited to a power to impose a prospective freeze date. It was submitted that, properly construed, the meaning of “freeze date” within the rules is not so confined but merely connotes a date, whether prospective or retrospective, after which those joining the Party as members will not be entitled to vote in the relevant election.
33. In the notice of appeal, there are references to Chapter 4, clause II(1), of the 2016 Rule Book and the skeleton argument develops a freestanding ground that that provision enabled the NEC to vary the rules framework in Chapter 4 and thus that it had sufficiently broad powers to override the rules framework in a particular case so that, insofar as (contrary to the appellant’s primary case) the six month continuous membership condition is contrary to the rules framework, the NEC was permitted to override it and put in place a different rules framework and, accordingly, the appeal should be allowed on this ground. Mr Goldstone objected to the court considering this ground. First, it was not pleaded below or in the grounds of appeal. Secondly, it was not a pure point of law. It would have needed evidence as to whether the NEC was in fact purporting to override the Rule Book. If the position was not clear, there would

be questions as to whether those who supported a proposal that was said to be within the rules would also have supported one to override the rules. Evidence would have been required. Finally, had the appellant relied on a general power to vary and override the rules, the respondents might have raised a rationality challenge. None of these things had been canvassed before the judge and it was not right to include them now.

34. We accept Mr Goldstone’s submissions. In our view, the only relevance of Chapter 4, clause II(1) is an aid to the construction of other powers and requirements in the Rule Book, which has to be construed as a whole.

VII. Discussion

35. The starting point of the judge’s analysis is his statement at [75] that he agreed with Mr Cragg QC that “Chapter 4, clause II(2)(C)(vi), read with Chapter 2, clause I(2), indicates that all members are able to vote in a leadership election, unless excluded by some other provision in the Rule Book”. The crucial question, however, is whether there is in fact some other provision that either conditions or limits members’ rights to vote by reference to eligibility criteria or creates a power for the NEC to do so. In either event the member will only have that which he or she is given by the rules; that is they will have the rights they are given by the Rule Book, including the right to vote if they satisfy the eligibility criteria and qualify as at the freeze date.
36. The question for us, therefore, is whether power was given to the NEC by the rules to determine eligibility, and, if so, whether it was exercised in this case so as to exclude those who had not joined the Party by the specified date. To answer that question it is necessary to consider whether the NEC’s duty in Chapter 4, clause II(2)(C)(vii) to “define” the “precise eligibility criteria” should be construed broadly or narrowly.
37. One of the judge’s concerns about construing the provision as broadly as the defendant/appellant had argued it should be, was that this in effect enabled the disenfranchisement of a significant number of members, and that so construing the Rule Book leaves no limit on the power of the NEC. The judge stated (at [76(ii)]) that the rules, and in particular the power to set “precise eligibility criteria”, “clearly do not give the NEC power to set whatever criteria it wishes, subject only to the bounds of rationality”. He also expressed concern (see [65]) when dealing with the consequences of the six month membership requirement. That statement (at [76(ii)]) appears to be made on the basis of reading the rules in the context of the Collins review and its recommendations about the electorate for the leadership, which were adopted by the Party conference. The judge also considered in that sub-paragraph that Chapter 4, clause II(2)(C)(vii) only enables the NEC define “how an member or category of elector is to be identified”, and that “members” were those “on the national membership system and whose membership had not lapsed at the date set on the timetable”. He considered that sub-paragraph (vii) could not be used “to redefine ‘members’ in a wholly artificial way” and to exclude a category of members from the constituency which Party conference in adopting the Collins Review “has determined should be entitled to vote and the Rule Book provides will be entitled to vote”.
38. We consider that there are several problems with the judge’s approach to the contract in the Rule Book. The first is that it proceeds from an assumption that members have the right to vote and not that they only have the rights they are given by the Rule

Book, including a right to vote providing they satisfy the eligibility criteria and qualify as at any freeze date set by the NEC in exercise of its powers under Chapter 4. The rules do not, however, provide that all members can vote. All that Chapter 2, clause I(2), provides is that all individual members “shall have equivalent rights within all units of the Party”, and that is stated to be “except as prescribed in these rules”. The concept of “eligible electorate” is also not defined in the rules. Mr Goldstone’s submission and the judge’s approach appear to require the prescription referred to in Chapter 2, clause I(2) to be expressly stated in the rules rather than by an act of the NEC. We recognise the importance of grounding the power of the NEC in the rules, but consider that the provision allowing – indeed, requiring – it to “define” the “precise eligibility criteria” for participation in a leadership election is a prescription for the purposes of Chapter 2, clause I(2).

39. We also observe that, other than the obligation to define the precise eligibility criteria, the only express requirement in the rules about the “eligible electorate” is that in Chapter 4, clause II(2)(C)(v) that candidates have “equal access” to the “eligible electorate”. This also does not define the “eligible electorate” and is consistent with that being a task given by the rules to the NEC to determine. Although not of great weight in itself, we also note the fact that the statement in Appendix 1 to the rules of the importance to the Labour Party of its members (set out at [14] above), which states the rights Party members have, does not include the right to vote in leadership or other elections. That is consistent with the position that the structure of the contract contained in the rules gives that right to “eligible members”. Appendix 1 also makes clear that the rights which members enjoy are “as stated within the rules”; and it is the rules which set out the power of the NEC to “define” the “precise eligibility criteria” for participation in a leadership election.
40. Secondly, in the light of the principles we have discussed in Section III of this judgment, the starting point is the words of Chapter 4, clause II(2)(C)(vii). In our view the language of that provision is clear. It requires the NEC to define eligibility criteria and not only to put in place systems for identifying whether a person is or is not a member. We reject Mr Goldstone’s suggestion that this provision is only intended to cover situations where there are gaps in the rules which create uncertainty, such as in relation to individuals whose membership lapses. The language used in the provision is entirely general and is not limited in that way. We accept Mr Sheldon’s submission that limiting the provision to identifying members largely denudes the word “define” and the phrase “precise eligibility criteria” of meaningful content. The use, in Chapter 4, clause II(2)(C)(sub-paragraph (v)), of the concept of the “eligible electorate” also supports Mr Sheldon’s submission that rights to vote are subject to the determination of eligibility criteria by the NEC.
41. Because we consider that the language of Chapter 4, clause II(2)(C)(vii) is clear, we also accept Mr Sheldon’s submission that it is not strictly necessary to depart from its words and to consider the background in any deeper way than indicated by Sir Thomas Bingham MR in the passage from *Arbuthnot v Fagan* to which we refer at [42] below. To adapt his words, the 2016 Rule Book “must speak for itself, but it must do so *in situ* and not be transported to the laboratory for microscopic analysis”. In any event, for the reasons given in *Re Sigma Finance Corp*, to which we referred in section III of this judgment, caution is needed in the use of background material in a contract of this nature, which is between all the members of the unincorporated

association, in this case hundreds of thousands of people, and in which ascertaining what the admissible background is is a fraught exercise. As it transpired in the argument before us, neither Mr Sheldon in his principal submissions nor Mr Goldstone in his sought to place weight on the Collins review as an aid to interpretation of the Rules. It is not at all obvious that ordinary members of the public joining the Labour Party would have been aware of it or of any material outside the Rule Book itself. We add only that, to the extent that the background is relevant, the Collins review, which was relied on by the judge, was concerned with categories of electors rather than with who within the categories identified would be eligible to vote. It in fact recommended that the NEC should agree the detailed procedures for leadership elections, including freeze dates, and it appended as draft rules the provisions which became Chapter 4, clause II(C). In our view it does not provide support for the approach of the judge and Mr Goldstone's submissions, even were reference to be made to it.

42. While it is, of course, true, as Sir Thomas Bingham MR stated in *Arbuthnot v Fagan* [1995] CLC 1396 at 1400, that courts never construe the words of a contract in a vacuum and “to a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief”, his Lordship also stated that “an initial judgment of what an instrument was or should reasonably have been intended to achieve” should not be permitted “to override the clear language of the instrument, since what an author says is usually the surest guide to what he means”. The most recent adjustments of emphasis to the principles governing the interpretation of contracts in *Arnold v Britton* (see Section III above) also gives greater weight to the words used in the document than in some of the earlier authorities. It is possible that the judge, who was also considering non-contractual claims based on misrepresentation and a claim based on implied terms, may have given inappropriate emphasis to the background. He was, in effect, using it to imply a limit into the clear language used in Chapter 4, clause II(2)(C)(vii).
43. Thirdly, there are, in our judgment, a number of powerful indicators that the powers given to the NEC in respect of elections by Chapter 4 of the Rule Book, and in particular the power to define “the precise eligibility criteria” and “any freeze date” in clause II(2)(C)(vii) and (iv) of that Chapter, were intended to be construed more broadly than Mr Goldstone argued. The powers are given to the body which, under Chapter 1, clause VIII of the Rule Book, has the function, the duty and the power to uphold and enforce the constitution and rules of the Party, and to “give rulings”.
44. The rules and principles dealing with concern about the improper manipulation of the Party's democratic procedures in Appendix 2 and Appendix 3, which are part of the Rule Book, are also important pointers to construing the powers given to the NEC broadly. Those provisions, while not creating contractual entitlements in every aspect of what they set out, form part of the scheme of the rules, are legitimate internal aids to the construction of the Rule Book and provide indications as to what factors are relevant to the exercise of the powers conferred under the rules. The Appendices show concern with entryism and the packing of the party at membership level. They indicate a rationale which makes it reasonable to interpret Chapter 4, clause II(C)(2)(vii) in line with the natural sense of the language used in it, so as to provide NEC with the power to define precise eligibility criteria for participation in a

leadership election. They also indicate that the Rules contemplate that, in an appropriate case, it is possible to set a retrospective freeze date in order to exclude suspicious late entrants (such as, in the case of Appendix 3, those who arrive after the new constituency boundaries are announced, but before the Party has put in place its selection procedures).

45. Our fourth reason for considering that there are strong pointers indicating that Chapter 4, clause II(2)(C)(vii) should be interpreted broadly is that Chapter 4(II)(1) empowers the NEC to vary the rules framework set out in Chapter 4. Although, for the reasons we have given, we do not consider that Mr Sheldon is entitled to raise this as a freestanding ground to justify the NEC's resolution, we do consider that the existence of such a broad power is a strong indication that the NEC's power in determining the eligibility criteria was not intended to be limited in the way proposed by Mr Goldstone.
46. It is for these reasons that we reject Mr Goldstone's submission that Chapter 4, clause II(2)(C)(vii) should be construed as only permitting gap filling, which he suggested might particularly be needed in the case of lapsed members, affiliated supporters and registered supporters. We would add that the Rules themselves elsewhere contain express provision regarding lapse of membership (see Chapter 2, clause III(4) and (5) and Appendix 2, clause 1G) and it is not a tenable reading of Chapter 4, clause II(2)(C)(ii) to read it down so as to limit it to these categories of case.
47. We also consider that, while it is understandable for the judge to be concerned about the absence of an express limit to the NEC's powers on the interpretation for which the respondents contend, he underestimated the potency of the limits implied by courts on the exercise of contractual discretions, such as the powers to fix "precise eligibility criteria" and a "freeze date". For example, in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304, Rix LJ reviewed the authorities concerning the control of the exercise of a discretion conferred on a party under a contract, and (at [66]) stated:

"It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care or otherwise deploying entirely objective criteria ...".

That approach was applied in *Braganza v BP Shipping* [2015] UKSC 17, [2015] 1 WLR 1661, in which Baroness Hale stated that the principles to be applied were the same as those applied in public law cases, i.e. not only that the decision is made rationally and in good faith, but also that it is made consistently with its contractual purpose and, we add, that all relevant matters have been taken into account and irrelevant matters not taken into account. See also the judgment of Lewison LJ in *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265.

48. The area in which the consideration of contractual discretionary powers is most developed, in the sense that the public law approach to such powers has been adopted, concerns mutual undertakings such as mutual insurance undertakings and bodies exercising self-regulatory powers over a business, a profession or a sport: see *The Vainqueur José* [1979] 1 Lloyd's Rep 557 at 574; *Shearson Lehmann Hutton Inc v MacLaine Watson and Co Ltd* [1989] 2 Lloyd's Rep 570 at 624; *R v LAUTRO, ex p. Ross* [1993] QB 17; *Swain v Law Society* [1983] 1 AC 598; *Carmichael v General Dental Council* [1990] 1 WLR 134; *Enderby Town FC Ltd v Football Association Ltd* [1971] Ch 591; and *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302. The cases on regulatory bodies, such as the London Metal Exchange, LAUTRO, and the Law Society, are all ones in which the contractual power was held by a person who was, in a sense, holding the balance between different groups. The principles of contractual interpretation and in relation to the limitations regarding exercise of discretion deployed in them enable the proper control of such bodies by the court without denuding their governing bodies of their proper sphere of autonomy.
49. Mr Goldstone relied on the principle of construction identified in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235, at 251, that courts are reluctant to construe a contract in such a way that the result is unreasonable. He argued that a construction which empowers the NEC to impose eligibility criteria which retrospectively deprive significant numbers of members of the right to vote would be a surprising result, and that the clearest language is needed for this. He supported the judge's statement at [86] that "looking at the structures within the Party as set out in the Rule Book, it would be extremely surprising if the Rule Book gave the NEC the power to disenfranchise one quarter of the Party membership as it purported to do". The principle in *Wickman v Schuler* is, of course, a general principle of the construction of contracts but, particularly in the light of the approach in cases such as *Socimer* and *Braganza*, bringing together the principles of limiting ostensibly broad powers in contracts by the deployment of principles of propriety of purpose, relevance, fairness and rationality, it is difficult to see that there is a real danger of unreasonableness if the contract is construed in the way for which the appellant contends. Analytically and as a matter of principle, there may be a difference between the construction of the contract and the application of the principles identified in *Braganza's* case, but it is difficult to see that there would in practice be a difference of result. We consider that a power constrained by requirements of absence of arbitrariness, capriciousness, perversity and irrationality is extremely unlikely to produce an unreasonable result.
50. In view of our conclusion on the power to define the "precise eligibility criteria" contained in Chapter 4, clause II(2)(C)(vii), it is not strictly necessary to consider the arguments based on the express reference to "freeze date" in sub-paragraph (iv) of that provision. We observe that sub-paragraph (iv) in itself does not confer power to impose a freeze date: it is only concerned with the need for the timetable, including the freeze date, to be approved by the Independent Scrutineer. But, read together with the requirement in Chapter 4, clause II(1)(A), that the NEC issue "procedural guidelines on nominations, timetable, code of conduct for candidates and other matters relating to the conduct of these elections", it is clear that the NEC has power to impose freeze dates. The question is whether it is only empowered to impose a freeze date that is the date of the commencement of the election process or a later date, or whether it is empowered to impose a freeze date that is earlier, as was done in

this case if one takes the freeze date to be in substance a composite of the date of 12 July 2016 and the earlier cut-off date of 12 January 2016. Alternatively, each date might be regarded as a distinct freeze date for timetable purposes, with the 12 January one being set retrospectively. The judge stated (at [79]) that there was force in regarding the freeze date as a matter of substance but that, even given the wide area of judgment allowed to the NEC in applying the rules, for the reasons we have summarised at [30] above, he concluded that on the true construction of the rules a freeze date could not be retrospectively imposed.

51. Mr Goldstone submitted that the fact that the freeze date is part of the timetable for an election shows that dates in the timetable, including freeze dates, are dates for the future, and that a freeze date cannot be imposed to pre-date the beginning of the electoral process, because it means the date on which you define your electorate. Our starting point in considering the judge's conclusion and Mr Goldstone's submission is to note that Chapter 4 contains no restriction as to the date which is to be the freeze date. In this, it differs from the provisions in Appendices 3 and 4 to which we have referred at [16] above. One of the freeze dates in Appendix 3 is retrospective although, as Mr Goldstone emphasised, it does not concern the rights of members but the determination of which registered electors are to count for the purposes of determining whether an MP affected by boundary changes is to be a candidate in the new constituency.
52. We accept Mr Sheldon's submission that, as a matter of ordinary language, a "freeze date" for an election is simply the date by which a particular state of affairs must exist in order for a person to be eligible to vote. The imposition of a freeze date has the same effect as the definition of precise eligibility criteria. It necessarily will mean that some members have voting rights while others will not. We do not consider that there is anything in the ordinary meaning of the term which suggests that it can only be prospective. Nor does the purpose to be served by a freeze date indicate that it must in every case be stated prospectively.
53. Guidance as to the approach is also obtained from the provisions in Appendix 2 and Appendix 3. In some cases the concerns identified in Appendix 2, referred to above, may be of a character which could only be fully addressed by setting a retrospective freeze date and it is difficult to see why the rules should be interpreted in a way which deprived the NEC of the power to respond in such a way in such a case. Further, Appendix 3, clause IV(2), deals with setting freeze dates for determining members' eligibility to participate in the selection of the new candidate for a new constituency. It states that, in deciding on a freeze date for this purpose, the regional director shall have regard to the state of membership of the Constituency Labour Party and any *prima facie* evidence of abuse of the code of conduct for membership, recruitment and other factors. As observed above, this again demonstrates a concern with entryism and packing of the Party, and contemplates that it may be appropriate to set a retrospective freeze date in order to exclude suspicious late entrants, for example those who arrive after the new boundaries are announced but before the Party puts in place its selection procedures.
54. The judge also relied on a letter from the Party's solicitors, written in the course of the dispute which led to *Jeffers v The Labour Party* [2011] EWHC 529 (QB), to show that the purpose of freeze dates is to prevent individuals seeking to become members after the election process has begun. He stated (at [81]) that there was no evidence

that a freeze date had previously been used in the way it has been in this case or a suggestion that it could be so used. We consider that reference to a letter written in other litigation as an aid to construction of the Rule Book is misplaced. An ordinary member of the Party could not be expected to know about this sort of material. Further, the judge was wrong to reject, in effect, Mr McNicol's evidence (summarised at [28] above) in circumstances in which Mr McNicol was not cross-examined on this point, by relying on a letter written in the course of other litigation not concerned with this particular point. Moreover, a close examination of what occurred in *Jeffers* shows that the freeze date in that case was in fact retrospective. It concerned elections to membership of BAME Labour in December 2010 and January 2011. A meeting of the NEC organising committee on 26 October 2010 made suggestions for a timetable which included a freeze date of that day. The timetable, however, was not set that day but at a meeting of the NEC on 9 December 2010, and the timetable adopted on that day setting a freeze date of 26 October 2010 in fact set a retrospective freeze date.

55. Finally, we turn to Mr Goldstone's submission that the powers of the NEC set out in Chapter 4, clauses II(1)(A), (C)(iv) and (C)(vii) are only as to procedural matters, and should not be construed as extending to matters of substance such as who should be eligible to vote. We reject this submission. On any view (and as Mr Goldstone himself accepted would be necessary even on his submissions as to the meaning to be given to these provisions) an element of important line-drawing is involved in the exercise of these powers, in determining who exactly is to be eligible to vote in leadership elections. Even if one describes these as matters of procedure, these provisions state that the NEC is to have such powers to delineate rights of participation and it is necessary to give those provisions their true meaning and effect. The fact that the powers are contained in Chapter 2, clause 4, headed "Procedural rules for elections for national officers of the Party" and are described as "procedural guidelines" in clause II(A)(1) does not provide any reliable guidance as to this. In any event, the suggested contrast between matters of procedure and matters of substance is inapposite in this context. As already pointed out above, a member's entitlement to vote in a leadership election is not a product of him or her simply being a member, but is the result of him or her being a member who satisfies the precise eligibility criteria defined by the NEC and any freeze date provisions set by the NEC in the timetable for the election.
56. For the reasons we have given, we have concluded that the appeal should be allowed and the judge's order that his judgment stand as a declaration of the rights of the respondents be set aside.