England and Wales High Court (Queen's Bench Division) Decisions

Neutral Citation Number: [2017] EWHC 3350 (QB)
Case No: HQ17X01056

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
21/12/2017

B e f o r e :

MR JUSTICE EDIS

Between:

ALEXANDER PATRICK STORY	**Claimant**
- and -	
SIR PATRICK McLOUGHLIN (sued as a representative of all members of the Conservative and Unionist Party except the Claimant)	**Defendant**

Mr Richard Price, OBE, QC and Mr. Robert Stokell (instructed by Trowers & Hamlins LLP) for the Defendant
Mr. Francis Hoar (instructed by Carter-Ruck Solicitors) for the Claimant

Hearing dates: 27th and 28th November 2017

HTML VERSION OF JUDGMENT APPROVED

Mr. Justice Edis:

1. The principal issue on this application is whether the claimant has a real prospect of establishing that he is entitled to declaratory relief as a result of a breach of contract by the Conservative and Unionist Party (the Party) when it decided not to certify that he may be returned as an MEP for the Yorkshire and the Humber Region after a vacancy occurred in October 2016. There is a claim for damages in addition, but this is limited to £100 and would hardly, on its own, justify proceedings as demanding as these will be on the resources of the parties and the court. Whether that is right or not, if the claims for declaratory relief fail this will be because no breach of contract has been established, in which case no damages can be awarded. I have therefore not felt it necessary to consider the jurisdiction to stay proceedings as an abuse where they are "not worth the candle", as it is put in some of the cases. If there is a legally viable claim for declaratory relief concerning the right of the claimant to sit as an MEP I would find it hard to say it is "not worth the candle" and thus an abuse of process.

The application

2. This is an application by the defendant for summary judgment under CPR Part 24.2 and an order striking out the Particulars of Claim under CPR Part 3.4(2). The claim is for declaratory relief and damages against the Party of which the claimant is a member. It is brought against the defendant as a representative of that unincorporated association. The claimant limits the claim for damages to £100, which he describes as "nominal damages",

because he is still a loyal member of the Party and does not seek any further money from it.

3. The declarations sought are set out in paragraph 4 of the Particulars of Claim which reads as follows:-

> "The declarations sought are that:
>
> (1) The [Party] was obliged to provide the Claimant with a certificate, pursuant to reg 83(2)(b) [see [6] below], wherever he was the next highest placed candidate on the Party's Regional List after an MEP resigned, died or was disqualified from sitting as an MEP providing only that the claimant remain a Party member.
>
> (2) Alternatively… the Party was required to provide a certificate in the above circumstances in view of the open and democratic selection process that had taken place in 2013.
>
> (3) Alternatively, the manner in which the Party decided not to provide Mr Story with a certificate but to provide Mr. Procter with one instead was irregular, unfair and/or irrational and so unlawful.
>
> And that the Party was in breach of its contractual obligations to the Claimant through failing to provide him with the said certificate leading to the Claimant not being returned as MEP for Yorkshire and the Humber in October or November 2016."

4. The claim is for breach of contract in that the Rules of the Party (its Constitution) are to be treated as the express terms of a contract concluded between the parties when the claimant became of a member of the Party. It is further said that when making decisions under those Rules the Party is subject to implied terms. In written and oral submissions the declarations sought have been refined by Mr. Hoar, who appears for the claimant, as follows:-

i) **The First Declaration**: This relies on an interpretation of a Regulation which it is alleged required the Party to grant a certificate in the circumstances.

ii) **The Second Declaration**: This arises from a contention that if it had a discretion as to whether or not to grant a certificate the Party exercised it in breach of implied terms in the contract. It is said that it failed to give enough weight to the selection of the claimant as a candidate for the 2014 European Elections which was open and democratic, and gave too much weight to the decision of the Candidates' Committee in May 2016 to reject his application to be included on the list of approved candidates for the 2020 UK Parliamentary list, which was not. Inclusion on the UK list carries with it inclusion in the list of approved candidates for the 2019 European Parliamentary Elections. That decision was taken before the Referendum which makes it less likely that there will in fact be any such elections in 2019.

iii) **The Third Declaration**: It is said that the decision not to grant the certificate was unfair in that it resulted in other people in comparable positions being treated better than the claimant.

Short summary of facts and issues

5. The claimant was a candidate for the Party in the elections for the European Parliament on 22nd May 2014. He was second in the closed list of candidates provided by the Party under the European Parliamentary Elections Regulations 2004/293 (the 2004 Regulations), behind a sitting MEP, Mr. Timothy Kirkhope. If the Party had won enough votes for two MEPs from its list to be returned the claimant would have been the second. In the event, it did not and the claimant was not elected. Only Mr. Kirkhope was returned. In October 2016 Mr. Kirkhope accepted a peerage and resigned as an MEP. The claimant contends that he should have become an MEP in his place and that the Party prevented that from happening by acting in breach of its contractual duties to him. The Party denies this, and contends that it was entitled to refuse to certify that he may be returned as its MEP under regulation 83 of the 2004 Regulations because in May 2016 the claimant's application to go on to the Approved List for the 2020 election had been refused because he had failed its assessment process. It argues that by October 2016 he was not therefore on its Approved List although he remained on the list which had been submitted for the purposes of the 2014 election.

6. Regulation 83 of the 2004 Regulations is at the heart of these applications and I will set it out now in full:-

> 83.— **Filling of vacancies from a registered party's list**
>
> (1) On receipt of a notice under regulation 82(4), the returning officer shall ascertain from the list submitted by the registered party named in the notice ("the relevant list") the name and address of the person whose name appears highest on that list ("the first choice"), disregarding the name of any person who has been returned as an MEP or who has died.
>
> (2) The returning officer shall take such steps as appear to him to be reasonable to contact the first choice to ask whether he will–
>
> (a) state in writing that he is willing and able to be returned as an MEP, and
>
> (b) deliver a certificate signed by or on behalf of the nominating officer of the registered party which submitted the relevant list stating that he may be returned as that party's MEP.
>
> (3) Paragraph (4) applies where–
>
> (a) within such period as the returning officer considers reasonable–
>
> (i) he decides that the steps he has taken to contact the first choice have been unsuccessful, or

(ii) he has not received from the first choice the statement and certificate referred to in paragraph (2), or

(b) the first choice has–

(i) stated in writing that he is not willing or able to be returned as an MEP, or

(ii) failed to deliver the certificate referred to in paragraph (2)(b).

(4) In the circumstances set out in paragraph (3), the returning officer shall repeat the procedure required by paragraph (2) in respect of the person (if any) whose name and address appears next in the relevant list ("the second choice") or, where paragraph (3)(a) or (b) applies in respect of that person, in respect of the person (if any) whose name and address appear next highest after the second choice in that list and the returning officer shall continue to repeat the procedure until the seat is filled or the names in the list exhausted.

(5) Where a person whose name appears on the relevant list provides the statement and certificate referred to in paragraph (2), the returning officer shall (subject to paragraph (6)) declare in writing that person to be returned as an MEP.

(6) Where–

(a) the returning officer has, in accordance with paragraph (4), asked a second or other subsequent choice the questions in paragraph (2), and

(b) the person who was previously asked those questions then provides the statement and certificate referred to in paragraph (2),

that statement and certificate shall have no effect unless and until the circumstances described in sub-paragraph (a) or (b) of paragraph (3) apply in respect of the second or other subsequent choice.

(7) The returning officer shall give public notice of a declaration given under paragraph (5) and send a copy of it to the Secretary of State.

(8) Where the returning officer is unable to fill the seat under this regulation, he shall notify the Secretary of State that he is unable to do so.

The system

7. The Party's Constitution creates a Board which is the "supreme decision-making body in matters of Party organisation and management" (Article 12) and which has "power to do anything which in its opinion relates to the management and administration of the Party" and "shall oversee all activities within the Party" (article 17). It is responsible for

i) "the maintenance of the Approved Lists of Candidates in accordance with the provisions of Article 19.2 and Schedule 6" (Article 17.5); and

ii) "ensuring that the Party is compliant with the Political Parties, Elections and Referendums Act 2000, and such legislation, regulations or measures amending, supplementing or replacing the same" (Article 17.21).

iii) Establishing and maintaining the Committee on Candidates, see Article 19.2 and Schedule 6.

8. Schedule 6 of the Constitution provides as follows

7. The Committee on Candidates shall establish Lists of Candidates, one of which shall be known as the United Kingdom Parliamentary List and another of which shall be known as the European Parliament List, known collectively as the "Approved Lists".

8. The Committee on Candidates shall prepare a procedure for the selection and review of Candidates onto both Lists and submit that procedure to the Board for prior approval. The Committee on Candidates shall cause the approved procedure for Candidate selection to be published, and Constituency Associations shall be obliged to select Candidates in accordance with such approved procedure.

……..

10. Any Candidate for the European Parliament must be included on the European Parliament List prior to selection.

11. In the case of a by-election in respect of a United Kingdom Parliamentary or European Parliamentary election, the Committee on Candidates may revise the relevant List for the purposes of the by-election.

12. The Board may, through the Committee on Candidates, from time to time publish mandatory rules as to the procedure by which Constituency Associations and other bodies select Candidates for all or any public elections.

9. To avoid confusion about the different lists which these applications concern, it is necessary to explain that the election for the European Parliament is conducted under domestic law and this provides a system of closed lists. A party puts forward 6 names in an order which it has determined and these names appear on a list called the "Regional List". These names are selected by the party by whatever process it chooses. In the case of the Party, it operates a selection process by which 6 names are selected from the very much larger number of names on its Approved Lists of candidates. Candidates for election, as Schedule 6 makes clear, must be on the Approved Lists before they are eligible for selection for the

Regional List. The Approved Lists are created under and for the purpose of the internal processes of the Party. The Regional List is not. It is placed before the electorate and is governed by the relevant legislation. When the votes are counted there are statutory rules which govern how many names from the Regional List have been elected to serve as MEPs, if any, from each party which submitted itself for election and produced its list of 6 candidates which it offered to the electorate. As appears from Regulation 83, it continues to have a significance after that time if the Regional Returning Officer (RRO) is required to fill a vacancy which has occurred between elections. This case concerns its status then.

The claimant's attempts to become MEP for Yorkshire and the Humber Region

10. The claimant has been on the Approved Lists for a number of years. There is a great deal of detail about the history in his witness statement which I do not think it necessary to set out here. At the time of the preparation of the Regional List for the 2014 European Parliamentary Election he was on the Approved Lists. He had been told by email of 6th December 2012 by Gareth Fox, head of Candidates, that the European List to which he was then added would "continue in place until the European Elections in 2014." He was therefore eligible to apply to be included on the Regional List of candidates which the Party would offer to the electorate at that election, and did so. He was then selected by the Regional Selection Sifting Committee to appear on a shortlist of between 10 and 15 names. He was then selected by a secret ballot of the Party's officers in the 53 constituencies for the area (the Yorkshire and the Humber Region) on whose list he was hoping to appear. This reduced the list to seven people and there was then a "Primary" which resulted in his being placed top by the 2,000 members of the Party who voted after weeks of campaigning. He appeared second on the Regional List because Mr. Kirkhope was entitled to appear first as a sitting MEP.

11. After an election in which about 1.3m people voted in the Yorkshire and the Humber region, the Party failed to secure enough votes to entitle it to more than one MEP and so the claimant was not elected. He contends that thereafter he enjoyed the status of "substitute" or "elected reserve" in that the 2004 Regulations provide rules by which any vacancy is to be filled by reference to the Regional List submitted to the electorate at the previous election. By-elections are only required if no candidate is returned under those rules.

12. There was a general election in 2015 and it is common ground that the Approved Lists are "scrubbed clean" after a General Election. There is disagreement about whether this is also the consequence of a European Election which is relevant only to the claim for the Third Declaration which challenges the fairness of the process. All directly relevant events occurred after a general election when, as I say, there is common ground. As a result of the "scrubbing clean" of the lists all those who have not been elected and who wish to appear on the Approved Lists for the next general election (then expected for 2020) are required to apply again. The claimant did apply but his application was unsuccessful. He complains that he was given no reasons for this but does not challenge the lawfulness of that decision in these proceedings. The Party has served evidence which says that he failed because he performed poorly in the assessment process. If there were a challenge to the propriety of that decision, then it might be necessary to investigate that factual contention, but there is not. The claimant was informed that he had not been selected by letter of 26th May 2016. This was before the vacancy occurred in the Yorkshire and the Humber Region.

13. In June 2016 there was a referendum which caused the resignation of the then Prime Minister, Mr. David Cameron. This meant that there was a resignation honours list which was the cause of Mr. Kirkhope's ennoblement on resignation as an MEP on 6th October 2016. The process for selecting his replacement was therefore initiated and these proceedings challenge the conduct of the Party in that process. The resignation of Mr. Kirkhope had not come as a surprise to the Party and the Board was required to decide how to proceed, given that the next person on the Regional List from 2014 was the claimant, who was no longer regarded as suitable to appear on the Approved Lists by the Committee on Candidates. Mr. Alan Mabbutt OBE is the Director General and Registered Treasurer for the Party and has made a witness statement dated 13th July 2017 in support of its applications. Mr. Francis Hoar, who appears for the claimant, points to some omissions from it and suggests that I should not take it at face value, or at least give it limited weight. In it, Mr. Mabbutt says that the Board asked him to prepare a briefing paper about the replacement of Mr. Kirkhope and that he did so on 27th September 2016 and he produces a copy. This contains three options which he he listed and explained "for consideration by the Board". These were

> "1. **The Party appoints the next person on the list regardless**. This would create a potential future issue for the Party if no heed is taken of whether or not a nominated candidate is on a current list of Party candidates.
>
> "2. **The Party appoints the next person on the list who is on the relevant approved list**. This has merit in that the Party would be taking note of the vote of members and also the Party Rules.
>
> "3. **The Party chooses a specific person from the list without regard to the original Party listing order**. Assuming the person is on the approved list, this would in effect be the Party following the Constitution but ignoring the wishes of the members."

14. Mr. Mabbutt's briefing note contains the following recommendation

> "**It is recommended that option 2 above is taken**
>
> As the European Parliament List has not been specifically re-opened since 2014, anyone who was on it and wanted to be included for future elections would be expected to apply for inclusion on the UK list. It is normal practice to repanel anyone who was on a previous list and wished to be included on any future list.
>
> The next person on the Yorkshire list did apply for relisting for the UK list and was failed. The Candidates' Committee therefore no longer consider him suitable as a representative of the Party.
>
> The second person on the list has not so far requested relisting. He would have to be approved before being considered. If he was considered not suitable by the Candidates' Committee we would have to consider the third person.

The third person on the list has been relisted and was approved."

15. Mr. Mabbutt's witness statement then says

> "I am informed by Mr. Phillips that members of the Board voted by email, and that a majority voted in favour of the recommended option, Option 2. The Board thereby decided, by 6th October 2016, to appoint the next person on the closed list for the 2014 European Election who was also on the relevant approved list."

16. Mr. Hoar's submission is that this does not say, in terms, that the briefing paper was actually sent to the members of the Board, or that they read it, or that this was the actual basis on which the decision was taken. He points out that requests (but not applications) for disclosure of the email votes and any other documents relating to the decision making process have been made and refused. He invites me to conclude that there may have been something wrong with the process which is not apparent from the exiguous evidence available. It appears to me that on a plain reading Mr. Mabbutt's statement implies strongly that the paper was considered by the Board who therefore had the three options before it and voted for the second. As such, the statement and the briefing paper represent evidence of the decision making process and the reason for the decision. Sir Patrick McLoughlin is the defendant in this case, and none the less so because he also represents a very large number of other members of the Party. He, as litigant, is personally responsible for the conduct of the litigation and invites me to accept the evidence on which he relies as representing the truth. I said on the first day of the hearing that I considered that if the plain meaning of the statement was not actually the truth the statement would be misleading. I did this to give Sir Patrick the opportunity to serve corrective evidence if necessary to ensure that the court was not misled. No such further evidence was served and on that basis I am prepared to accept the statement of Mr. Mabbutt as meaning what it appears to me that it is intended to mean. After discussion of this issue during argument, Mr. Hoar on the instructions of the claimant accepted that the court should proceed on the basis that the note was actually emailed to members of the Board. The Board took a decision having considered his paper and voted by a majority for Option 2. I see no reason to infer that there must be other documents which may show that other considerations, not reflected in the briefing paper, were taken into account. Of course, the documents will not necessarily show everything which each member of the Board had in mind when voting. However, on the basis I have identified I consider that there is a proper evidential basis on which to assess the decision and the process against what are said to be the contractual obligations of the Party.

17. After that decision the next person on the list after the claimant, Councillor John Procter, applied for inclusion on the Approved Lists and was successful by 12th October 2016. Some time later, he was returned as MEP. That is, in itself, some further evidence of the basis of the decision of the Board since he was rendered eligible to be certified by the Party as MEP in place of Mr. Kirkhope by his inclusion on the Approved Lists. Had the decision been on some other basis than appears from the briefing paper this step may have been neither necessary nor sufficient. On 18th October 2016 the Regional Returning Officer for the Yorkshire and the Humber Region (the RRO) wrote to the claimant further to Regulation 83 of the 2004 Regulations and asked him if he was willing and able to be returned as an MEP and to provide a certificate signed by or on behalf of the Nominating Officer of the Party confirming that he "can be" [the Regulation says "may be"] returned as the Party's MEP. On the 24th October the claimant wrote to Mr. Mabbutt asking him to provide the necessary certificate confirming his nomination. Mr. Mabbutt replied on 25th October 2016 saying that he was no longer the Party's nominating officer and adding

> "I am, however, aware that you were not successful in applying to remain on the Party's Candidates' List which would mean that such a certificate would not be forthcoming.
>
> "In such circumstance the next person on the Europe list who is on the Candidates' List will be provided with the certificate."

18. This email clearly explains the reason why the certificate was not issued by the Party and, on the basis of my understanding of Mr. Mabbutt's evidence, does so accurately. He was refused a certificate because he had been unsuccessful "in applying to remain" on the Approved Lists which were being prepared in anticipation of the 2020 election (although events were to require their use in 2017 when the next election actually happened). The phrase "applying to remain" is perhaps technically not quite apt to explain what the Party now says had happened, which was that the lists to which the claimant had been added prior to the 2014 European election had been "scrubbed clean" by the subsequent elections and everyone who had not been elected had to apply again to be included on the lists for the next elections. However, the position was clear enough. The claimant had been required to re-apply and had done so unsuccessfully. This failure was the reason why no certificate was issued.

The First Declaration

19. Mr. Hoar submits

i) that Regulation 83 means that the Party must issue a certificate in favour of the first choice unless that person is no longer a member of the Party at the time when the RRO asks the first choice to provide it.

ii) If that is right then, he argues, a failure to grant a certificate when the Regulation requires that grant would be a breach of contract, because it must be an implied term of the contract between him and the Party that the Party will deal with its functions lawfully.

The second part of that submission is, in my judgment, clearly arguable and there is a realistic prospect that a court would so find. The battle ground relates to the first part of it: should the Regulation be construed as he suggests?

20. Mr. Hoar accepts that this obligation is not created by clear words in the Regulation, but argues that it should be so construed by reference to two sources of material:-

i) Statements made by ministers in Parliament during the debates prior to the making of the European Parliamentary Elections Regulations 1999. Regulation 17 of those Regulations was in identical terms to Regulation 83 of the 2004 Regulations and he submits that the court should construe the

2004 Regulations by reference to statements made when the 1999 Regulations were under consideration by both Houses of Parliament.

ii) The appearance in section 9 of the Government of Wales Act 1998 and section 11 of the Greater London Authority Act 1999 of a provision which does include the limitation for which he contends.

21. The ministerial statements are relevant only if admissible under the rule in *Pepper v. Hart* [1993] AC 593. Mr. Price QC who appears for the Party submits that the requirements of that rule are not met and that there is no realistic prospect that a court would find at trial that it was entitled to look at them. I should therefore resolve this issue on this application rather than leaving the question for a trial. The first question is whether I should accept that invitation. In reaching the conclusion that I should, I have borne in mind the familiar principles which apply to applications for the summary disposal of the proceedings, and in particular the desirability of novel points of law being determined on facts as found at trial rather than on assumed facts. It appears to me that the admissibility of material under *Pepper v. Hart* is particularly well suited to summary determination since it will frequently not involve any question of fact at all. It is a matter of considering the legislation and the passages in Hansard on which reliance is placed and reaching a conclusion on the meaning of the legislation in issue. I shall therefore turn to that exercise now.

22. The rule in *Pepper v. Hart* requires three conditions to be met before it is permissible to turn to Hansard for assistance in construing a legislative provision. They are all to be strictly insisted upon and are an important limitation on the extent to which the old rule excluding such material was relaxed. This is the effect of *R v. Secretary of State for the Environment, Transport and the Regions ex p. Spath Holme Limited* [2001] 2 AC 249, 391D-392A:-

    i) The provision must be ambiguous, or obscure or lead to absurdity;

    ii) The material relied upon must consist of one or more statements by a minister or other promoter of the Bill together with such other Parliamentary material as might be necessary to understand these statements and their effect;

    iii) The effect of these statements must be clear. As Lord Bingham explained in the passage in *Spath Holme Ltd.* to which I have just referred, the statements must be clear and unequivocal which would almost certainly settle the matter immediately, one way or the other. Otherwise, when trying to divine and explain the meaning of a ministerial statement the court might come to violate Article 9 of the Bill of Rights 1688. This "important constitutional prohibition" prevents any court from questioning proceedings in Parliament.

23. I therefore start by considering the terms of regulation 83 to find out whether they are ambiguous, obscure or absurd. Regulation 83(1) provides that the RRO when notified of a vacancy must consult the Regional List from the most recent election and shall find out the name and address of the person whose name appears highest on it, apart from any person who has been returned as an MEP or who has died. That person is the "first choice". The RRO in this case complied with this obligation and correctly identified the claimant as the first choice. The RRO is then required by Regulation 83(2) to contact the first choice to ask whether he will state in writing that he is willing and able to be returned as an MEP and deliver a certificate signed by the nominating officer of [in this case] the Party stating that the first choice "may be returned as" the Party's MEP. That duty also was complied with. The Regulations then provide that if the first choice fails to deliver the certificate, the procedure is repeated with the second choice (the next highest name) and so on until someone on the Regional List does comply with the two requirements and is then returned as an MEP. If no one does then there may be a by-election. The claimant in this case did state in writing he was willing and able to serve as an MEP, but failed to deliver a certificate because the Party refused to give him one.

24. The argument in this case is about the construction of Regulation 83(2)(b) which imposes a requirement on the first choice that he should deliver a certificate before he can be returned. It also creates a duty on the RRO to ask the first choice to provide a certificate. It does not create any duty on the Party, nor does it contain any provision which seeks to govern the basis on which a party may grant or refuse certificates. It leaves it to the parties to decide that question and was no doubt drawn in the knowledge that parties have rules and those rules are enforceable by an action in contract. The question is whether by doing that it is ambiguous, obscure or tends to absurdity. If so, then the claimant invites me to resolve that problem by reference to a number of statements by reference to statements made in Parliament when the predecessor to Regulation 83 was debated in Parliament. This was Regulation 17 of the European Parliamentary Regulations 1999 which was identical to Regulation 83. Therefore the use of such statements, if any, which are admissible under the rules in *Pepper v. Hart*, is a legitimate aid to construction.

25. In the House of Commons the Minister, George Howarth MP, said this about the duty on the RRO to ask for a certificate:-

> "If that power was used by any political party in an unreasonable way [it] would be subject to legal powers."

And this about the reason why there was a requirement that the first option, or subsequent options, should produce a certificate as a qualification for being returned:-

> "If, under a regional party list system, one accepts that there should be scope to deal with people who have defected, the party is the logical body to do that…"

And

> "I envisage that the regulations would operate if someone who failed to be elected from a list changed their party allegiance. I think that we all accept that those circumstances should be allowed for."

26. In the House of Lords, Lord Williams of Mostyn, as the Minister proposing the Regulations, repeated that the provision was necessary to guard against the possibility that a candidate on the list may have changed parties between the original election and the time of the vacancy. Lord Mackay of Ardbrecknish, speaking for the opposition, then said that he understood that Lord Williams had said that this was the only circumstance in which a party might refuse to certify. He said

"it would be quite wrong for the party to decide that it no longer liked the colour of [a candidate's] tie …or that it preferred a candidate lower down the list. I am glad that the Minister put on record that the only reason would be if the person had left the party."

27. The criticism of the terms of the Regulation made by Mr. Hoar is that it does not provide in terms for any limitation on the circumstances in which a party might decline to certify and does not identify what "legal powers" Mr. Howarth may have had in mind when speaking in the Commons. He submits therefore that these statements should be used to include those provisions which might have been in the Regulations but were not. This is not a submission that the Regulations are ambiguous, or that they are obscure or that they lead to absurdity. No such submission is arguable. The Regulations are not ambiguous, or obscure and they do not lead to absurdity. Accordingly, I refuse to admit the passages from Hansard on which reliance is placed.

28. In case I am wrong about that, I would go somewhat further and say that the third rule in *Pepper v. Hart* is also not satisfied. The only person who said in terms that a party's right to decline to certify was limited to a case where the choice under consideration had left the party was an opposition spokesmen in the Lords. No amendment was proposed to give effect to what he understood the Minister had "placed on the record". Legislation is not passed by Ministers placing things on the record, and certainly not by opposition spokesmen saying that things have been placed on the record. Further, this was an exchange about how a political party might decide to exercise a power to issue a certificate, or to refuse to do so. It is one thing to say, as Lord Bingham did in *Spath Holme Limited* at 392C-D that a Ministerial statement about how "the government contemplated use of a power" might in improbable circumstances lead a court to regard a parliamentary statement on the scope of a power to be properly admissible. It would require a categorical assurance to Parliament that a power would not be used in a given situation. That is a high threshold for admissibility which is not met here. It is in any event quite another thing to say that what Mr. Howarth said might limit the way a political party might choose to act, when the Regulation about which he was talking did not in terms either grant any power to that party or impose any duty on it. This was not the Government limiting its own use of statutory powers which it was seeking, but a Minister suggesting that the freedom of action of an independent party should extend only to refusing a certificate if a person on its list had left the party by the time of the vacancy. That was his argument in favour of the terms of what became Regulation 83 of the 2004 Regulations. He could not properly give any assurance on behalf of any political party (still less all of them) that they would act as he thought they should. He could only limit their freedom by legislation, not assertion. The only source of any legal power by which the freedom of action of that party is limited is the contract between it and its members. Any attempt by Parliament to restrict the terms of that contract or to impose contractual terms on a party and its members would surely, in the interests of democracy, require the clearest of words in a legislative provision. It could hardly be based entirely on statements by Ministers in Parliament. Whatever Mr. Howarth had in mind when he spoke of "legal powers" this observation is hardly "clear" because it does not identify what those powers are and whence they are derived. It is worth quoting one passage in which Mr. Howarth responded to Mr. Letwin who had suggested that the Regulations contained an "incoherence" in that they appeared to enable the party "to exert a little more control". Mr. Letwin said that he could "not understand how otherwise [the certification requirement had] crept in." I have added an emphasis to part of the following extract from Mr. Howarth's answer:-

"The written answer …said that vacancies would be filled by the candidate whose party is still content for him to represent it. I assure the hon. Gentleman that it was not my intention to slip into that written answer a new concept that no-one had heard of before. It has been clear throughout that we are not dealing with eligibility. Those who have defected from a party between the list's publication and the election should not be allowed to fill those vacancies. That is still the intention.

"I am loath to get dragged into discussing legal matters.

"…If that power was used by the political party in an unreasonable way, that would be subject to legal powers. The intention all along has been to protect political parties and their lists from anyone who has in the meantime defected then being able to take up his seat on the basis that his name is on the original list. That is the intention behind it."

29. The first part of that answer suggests that only those who defected between the publication of the lists and the election would be excluded from filling vacancies which arose after the election. This is inconsistent with what Mr. Howarth said in the last extract quoted at [25] above and with what Lord Williams said in the extract quoted at [26]. The position is therefore that although Mr. Letwin in the Commons and Lord Mackay in the Lords pointed out that the Regulations on their plain terms did not limit the circumstances in which a party could refuse to certify and so gave the party greater control than the Minister was suggesting it should have, the Government did not amend them to deal with that. The Regulations were passed by resolutions of both Houses even though their clear meaning had been explained by the Opposition.

30. To go further in this analysis would risk violating Article 9 of the Bill of Rights and this exercise illustrates precisely why the relaxation on the rule of admissibility in *Pepper v. Hart* is so circumscribed. Lord Hoffmann in *Robinson v. Secretary of State for Northern Ireland* [2002] NI 390 [40] said that "it will be very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including ministers) during the debates in one or other House of Parliament."

31. For these two reasons, I reject Mr. Hoar's first submission based on statements in Parliament.

32. The second basis on which Mr. Hoar seeks his First Declaration is to rely on s.9 of the Government of Wales Act 1998 (since replaced by s.11 of the Government of Wales Act 2006 which is in identical terms), and on s.11 of the Greater London Authority Act 1999. These provide for elections by closed list, and also require vacancies to be filled from the list by a similar mechanism to that in the 2004 Regulations except that the person who might fill the vacancy must not be a person to whom s.11(4) of the Government of Wales Act 2006 (previously s.9(4) of the 1998 Act) applies, or, for the Greater London Authority, s.11(5). The relevant sub-sections are substantially identical and the exclusion applies to a person if

"(a) the person is not a member of the registered political party, and

(b) the registered political party gives notice to the regional returning officer that the person's name is not to be notified to the Presiding

Officer [or the Greater London returning officer] as the name of the person who is to fill the vacancy."

33. These provisions are legitimate aids to construction because they are part of the material forming the background to the 2004 Regulations (which were previously enacted in 1999). Mr. Hoar says that they make it plain what Parliament intended should be the rules applying to closed list elections and that I should construe the 2004 Regulations as if they contained an identical provision, even though they do not.

34. It may be important to note the dates of the three original provisions under consideration. The Government of Wales Act 1998 came into force on December 1st 1998. The European Parliamentary Elections Regulations 1999 were made on 23rd April 1999 and came into force on 28th April, the Greater London Authority Act 1999 received the Royal Assent on 11th November 1999. Therefore, at or about the same time as the provisions later included in the 2004 Regulations were first considered by Parliament and approved by resolutions of both Houses, Parliament was considering two Bills which included a different provision for filling vacancies. Should that lead to the conclusion that Parliament should be presumed to have used different words because it had a different intention, or to the conclusion that all three provisions should be construed so that they mean the same thing although different words were used? In my judgment it is clearly the former as a matter of ordinary statutory construction. In so far as the other provisions aid at all, they support the position of the Party rather than the claimant. I cannot envisage any logical reason why Parliament should have introduced a different regime for the European Parliament elections than for the Greater London Authority or the Welsh Assembly, but my task is to construe the words of the 2004 Regulations. These lack a provision such as that contained in the two enactments on which reliance is placed. Just as I cannot see any reason why there should be different provisions as between the 2004 Regulations on one hand and the Wales/Greater London elections on the other, I cannot see any reason why the plain words of the 2004 Regulations lead to such an absurd regime that I must presume that Parliament must have intended to include the provision contended for. They leave it open to a party to issue or decline to issue a certificate for any reason which it may choose. No doubt Parliament was aware of the context in which it was legislating, namely that a political party is obliged to comply with its rules when making decisions. Those rules are enforceable in contract by any member who is aggrieved. This is not irrational or absurd. The candidates appeared on the Regional List because they passed a selection process approved by the party and in an order decided by that process. The ones who were not elected at the subsequent election were not elected because the party failed to get enough votes. Whether it is right or not to say that in this kind of election the voters choose the party for whom they wish to vote rather than the candidate, which is a matter of controversy in these proceedings, it is clear that the role of the party in this type of election is even more central than it is in an election for a constituency Member of Parliament. There is nothing absurd about a party being free to choose not to issue a certificate to a person whom it no longer believes is a suitable candidate to represent it. Whether that freedom is desirable in the public interest in securing representation in a democracy is a matter for Parliament to decide and to regulate by passing legislation which reflects its decision in clear terms.

35. For these reasons, I enter summary judgment for the Party on the claim for the First Declaration under CPR Part 24.2 and strike out the relevant parts of the Particulars of Claim under CPR Part 3.4(2).

The Second Declaration

36. There is no rule in the Party's constitution which governs the situation which confronted the Board in September 2016 when it considered the advice of Mr. Mabbutt. It had power under the constitution to decide what to do and was not constrained by rules to decide in any particular way. This means that it had a power to exercise a discretion conferred by a contract. It was required by implied terms in the contract to do so lawfully, and in good faith. I accept for present purposes that there is real prospect (at least) that the implied terms may be such as to render its decision reviewable by the court in a manner comparable to judicial review, although the court's power does not have the same jurisprudential origin. The current state of the law was discussed by Lady Hale in *Braganza v. BP Shipping Limited and another* [2015] UKSC 17 at [28] and on this issue the justices of the Supreme Court were unanimous, see Lord Neuberger at [103]. This means that I approach this application on the basis that the Board was required to conduct itself in a way which was not irrational in the *Wednesbury* sense. This includes the obligation not to take into account extraneous matters and to take into account all relevant matters. It also includes a requirement that the decision-making process leads to the decision being made consistently with its contractual purpose, see Lady Hale at [30]. It nevertheless involves considering the rationality of the decision-making process and not its outcome, because the decision remains that of the decision-maker rather than the court.

37. How that approach might vary when applied to the context of a political party is not a matter for me to decide on an application of this kind. The position is summarised by the Court of Appeal in *Evangelou and others v. Iain McNicol* [2016] EWCA Civ 817 at [24]. It is unnecessary to examine the other authorities which might bear on this question which were cited and I will take the law as there explained.

38. This approach, prayed in aid by Mr. Hoar, does not take him as far as he needs to go. His submission, essentially, is that the decision to place the claimant on the Approved Lists for the 2014 elections was a democratic decision by the Party and should have been given far more weight by the Board than the decision of its assessors in May 2016. It is not (now) submitted that the May 2016 decision was unlawful but rather that the nature of the process was so much less thorough and testing than the selection process for the 2014 elections that it should not have been given the weight which the Board gave it. It is also submitted that voters cast their votes on that basis of the 2014 Regional List and did so in the knowledge that in previous elections the first and second name submitted by the Party had both been returned as MEPs at the election. They would therefore have been likely to take a particular interest in the first two names and the appearance of the claimant's name in second place may have persuaded some of them to vote for the Party's list. This consideration means that the Party should have placed greater weight than it did on the outcome of the election. These two submissions, though, are submissions about the outcome and not the process. If it was legitimate to give weight to the May decision at all then it was for the Board to decide what weight to give it. The Board decided that the outcome of the elections in 2014 and the selection process which preceded it should have less weight when compared with the fact that in May 2016 the claimant had failed even to pass the first sift which would have led to his inclusion on the 2020 Approved Lists which would qualify him to compete for inclusion in the Regional List for the 2019 European Elections. The issue for me is whether they took that decision lawfully, not whether I agree with them.

39. Mr. Hoar seeks to establish a viable quasi-public law challenge by focussing on the terms of the Mabbutt advice, summarised and interpreted above at [13]-[16]. He says

i) That Mr. Mabbutt advised that in the closed system for the European Elections "electors do not vote for candidates, but vote for a Party". He says that this is a mistake because some voters may be influenced in their decision to vote for or against a party may be influenced by the names on its list. Otherwise, after all, there would be little point in telling the electorate who is on the list. This, however, is a preliminary observation under "background" and was addressed to the Board of the Party which is comprised of professional politicians. They should be taken to understand the way in which elections work and the brief summary of the system is not seriously inaccurate so as to vitiate their decision which was taken on the basis of what follows, rather than the background summary.

ii) That Mr. Mabbutt advised that "the requirement for a certificate was included in the legislation to prevent the situation where someone had been on the Party's original list but since that time no longer had the Party's approval". Mr. Hoar says that this was a legal and factual error. He relies on the suggestion that it misrepresents the history of the requirement which is shown by the proceedings in Parliament to which I have referred above. If he is right about the construction of the 2004 Regulations then Mr. Mabbutt was wrong. I have already held that Mr. Mabbutt was actually right in law and this means that whether or not he made a factually incorrect statement ceased to matter. What matters to the lawfulness of the Board's decision is what the Regulation means and not what Ministers may have hoped it meant.

iii) Mr. Hoar says that Mr. Mabbutt made an error when he:

a) Set out the terms of Schedule 6 of the Constitution and described them as "the relevant rules that apply to this matter"; and

b) advised that "Read together these rules make clear that any candidate put forward by the Party must be on the approved list of candidates prior to their election".

Mr. Hoar suggests that this may have been misread so that members understood that the rules provided that a person under consideration for a vacancy must, under the rules, be on the Approved Lists for the next election, and must not have been rejected from those lists since the election when he had last appeared on the Regional List. If that is what the advice means, then it is wrong because that is not what the rules say. They say that a candidate for election must be on the Approved Lists but do not address the question of whether a person under consideration for a vacancy must be on the Approved Lists at the time when s/he is returned as MEP. However, if the rules had been read as Mr. Hoar suggests they may have been, the Board would not have had any option and would have been bound to reject the claimant. The fact that Mr. Mabbutt's advice went on to give 3 options militates strongly against their having been misled by the advice they received about the rules.

iv) Mr. Hoar suggests that the advice was loaded in favour of Option 2 in a way which meant that the question was not fairly placed before the Board. I have set out the relevant passages at [13] and [14]. The options are very briefly described and the reasoning for or against them is very condensed. It is not altogether clear but the most important fact is that it offers choice and does not dictate the solution. Option 3 is described as "following the Constitution" if the person selected from the list was on the Approved Lists. It was said to involve "ignoring the wishes of the members", which means that a drawback in it was that it failed to give weight to the fact that the order of the Regional List was determined by the members in the open primary. Option 1 was not rejected by Mr. Mabbutt as being barred by the Constitution even though it may have involved selecting someone who was not on the current Approved Lists. It was said only that it "would create a potential future issue for the Party". These words suggest a different approach to the Constitution as between Options 1 and 3 but taken overall, it appears to me that the Board was left with a choice and advised that they had to balance the weight to be given to the decision of the members in the open primary as to the order of candidates on the Regional List and the decision of the Candidates Committee that the claimant was not acceptable as a candidate as at May 2016. This was in fact their task and it was placed before them in a way which they will have understood.

v) For these reasons I reject the submission that there is a real prospect of establishing that the decision of the Board not to certify the claimant was unlawful because of the terms of the Mabbutt advice.

40. As a further quasi-public law ground for attacking the refusal to certify the claimant by the Board, Mr. Hoar submits that there was a duty to give reasons and the Party failed to do this. This challenge appeared to relate to the decision of the Candidates Committee to reject his application in May 2016 and led to an exchange of evidence about why no reasons for that decision were given at a de-brief after the event. It appears that the claimant attended for this purpose to find that Mr. Gareth Fox, the Deputy Director of Campaigning and Head of Candidates for the Party was overrunning in previous meetings and left. Efforts were made to rearrange this appointment but had not been successful by the time that the certificate had been refused to the claimant and granted to Councillor Procter. It is not necessary to investigate this further, because the decision being challenged in these proceedings is not the May 2016 decision, but the October 2016 decision not to certify. As I have explained at [18] above the reason for that decision was made clear enough to the claimant by Mr. Mabbutt in an email. The same reason was given to the claimant by Amanda Sater, Deputy Chairman of the Party, on 7th October 2016 in a telephone call according to the evidence of Mr. Fox in his witness statement at paragraph 38. Although I heard submissions based on the decision of the Court of Appeal in *R v. City of London Corporation, ex p. Matson* [*[1997] 1 WLR 765*] I do not need to decide them. Adequate reasons for the decision under challenge before me were, as a matter of fact, given.

41. If the submission is that the Board should have carried out a quasi-public law review of the May 2016 decision before giving it any weight, and should have "quashed" it because of the lack of reasons, then I reject that. The procedure was established under Schedule 6, see [8] above. No claim is made in this case that the procedure was unlawful. It does not provide for a reasoned decision, although, it would appear, there is a facility for feedback. Feedback is the provision of an explanation of a decision after it has become effective. There has been limited evidence about the procedure in this claim, no doubt because it is not under direct challenge. There is no basis on which the statement of Mr. Fox in his witness statement at paragraph 17 should be rejected, at least as representing a view of the process which was reasonably open to the Board and not irrational in the sense used as shorthand for the relevant test as explained above:-

"Along with all the other candidates, of which there were 490, of which 359 were approved for inclusion on the Approved Lists (not

including elected members of either Parliament with the Party whip as noted above), the claimant then underwent a robust assessment process by trained assessors, which applied to all candidates, was endorsed by the Committee on Candidates and was fair."

42. On his application form dated 5th February 2016 seeking inclusion on the 2020 Approved Lists, the claimant signed to show his acceptance of certain conditions. In a claim in contract such conditions are of importance. He was required to tick a box showing acceptance of each of the following propositions, which contained a degree of repetition which no doubt was intended to add emphasis. He was then required to sign to show that he had read and understood the complete form and agreed to abide by its terms and conditions. He agreed

    i) That the decision of the Committee on Candidates regarding his re-application to the Party's Approved Lists would be final, and that no appeal would be considered;

    ii) That he would abide by the final decision of the Candidates' Committee;

    iii) That there will be no Appeal against any decision made by the Candidates' Committee on his Re-Application.

43. In these circumstances in my judgment there is no real prospect of establishing that the Board acted unlawfully in September 2016 when giving weight to the May 2016 decision because of any suggested procedural failure in the earlier decision. A "first sift" of this kind, followed by feedback if desired, is a very conventional method of reducing applicants for desirable positions to a manageable number for more intensive consideration and it is not irrational to give it weight. The Party did not, of course give it weight only in the case of the claimant. 130 other applicants also failed the first sift at the time of his application and were not included on the Approved Lists. Their hopes of becoming a candidate either for Westminster or the European Parliament were equally dashed.

44. It seems to me, therefore, that once it is accepted that it was open to the Board to give weight to the failure of the claimant's application to be listed on the Approved Lists in May 2016 in its decision, the attack on the way in which the decision was taken falls away. That has to be accepted as a consequence of my decision in relation to the First Declaration.

45. For these reasons, I enter summary judgment for the Party on the claim for the Second Declaration under CPR Part 24.2 and strike out the relevant parts of the Particulars of Claim under CPR Part 3.4(2).

Third Declaration

46. This is based on a claim that the claimant has been treated less favourably than other people who he says are in so similar a position to his that different treatment necessarily involves unfairness.

47. The first unfairness relied upon is the choice of Councillor Procter who was not on the Approved Lists in 2015 and 2016 and was only placed on those Lists when it was known that there was to be a vacancy, see the Mabbutt Advice set out above at [14] for his status at the relevant time. The lists had been "scrubbed clean" by the 2015 general election and Mr. Procter had not applied to be included in the 2020 lists by September 2016. He did so when he knew that there was to be a vacancy. He then passed the selection process which the claimant had failed. That means that their situations were not comparable. Different treatment of cases which are different is not evidence of irrationality or unfairness. If the claimant had passed, he would have been certified, as was Mr. Procter when he passed. There is no basis for this contention at all.

48. The claimant then seeks to compare his treatment with that of two sitting MEPs who had been elected as UKIP MEPs but later defected to the Party which permitted them to take the Conservative whip. They had, obviously, not been on the Approved Lists of the Party when they were elected as MEPs. This is also a different case. They were MEPs and the claimant was not. They wished to join the Party as sitting MEPs which they would continue to be. They were not applying for selection from among other members of the Party as candidates, although they no doubt planned to secure an advantage when they did so when the next Regional List was drawn up for the next election. The decision to accept them into the Party's group of serving MEPs was a political decision for the Party which did not involve a consideration of fairness as between members of the Party who were not, but wished to become, MEPs. The difference between the claimant's position and that of MEPs wishing to "cross the chamber" is explained in the letter of response at his paragraph 55.

49. The claimant also seeks to rely on events since the 2017 general election in June 2017. Two English MEPs were elected as Members of Parliament thus causing vacancies in the European Parliament, and one Scottish MEP was ennobled after failing to be elected as a Member of Parliament also causing a vacancy. Vacancies were filled from the Regional Lists although the Approved Lists had been, so it is said, "scrubbed clean" by the general election and none of the replacements could therefore have been on them.

50. I am prepared to accept that it is arguable that the sudden election of 2017 caused a degree of inconsistency in the treatment of the persons who sought to become MEPs by filling vacancies caused by the election. However, it follows from what I have said above that this does not render the decision in relation to the claimant unfair. There was no rule which the Board could apply in his case and they took a case-specific decision about him in the circumstances which prevailed in September 2016. The principal reason for it was that he had been rejected as a candidate in May 2016. His non-appearance on the list was not because he had not re-applied after being removed when it was "scrubbed clean". There is no evidence that any of those who were chosen to fill vacancies after the 2017 election had been rejected by the process established by the Party for the maintenance of Approved Lists. They were therefore not comparable cases. If the Party had certified a person who had been rejected for the Approved Lists for the next election then that would require consideration but on the evidence before me this is not what happened.

51. It therefore appears to me that the claim for this declaration has no real prospect of success. The claimant plainly does not feel that he has been properly treated by being rejected from the Approved Lists. That, however, is not what this claim is about. Having been rejected he cannot claim to be entitled to be treated in the same way as those who have not been rejected. Even if they are not on the Lists at the time when the vacancy is under consideration, they can be allowed the opportunity to apply and, if successful, will be on the Lists when certified. That cannot be done with

someone who has already applied and been rejected.

52. For these reasons, I enter summary judgment for the Party on the claim for the Third Declaration under CPR Part 24.2 and strike out the relevant parts of the Particulars of Claim under CPR Part 3.4(2).

The damages claim

53. The claim for damages is only sustainable if the Party has acted in breach of contract. I accept that there is a real prospect of establishing that compensatory damages (and not merely nominal damages) may properly be awarded for a breach of contract which denies an aspiring politician a chance of the congenial employment s/he seeks. However, if there is, as I have held above, no real prospect of establishing that there has been any breach of contract, then obviously no claim for damages is sustainable either.

54. For these reasons, I enter summary judgment for the Party on the claim for damages under CPR Part 24.2 and strike out the relevant parts of the Particulars of Claim under CPR Part 3.4(2).

Conclusion

55. The result of these four decisions is that the claim fails in its entirety and summary judgment is entered on the whole claim for the defendant and the Particulars of Claim are struck out in their entirety. There will be judgment for the defendant on the claim, which is dismissed.
