Neutral Citation Number: [2023] EWHC 1135 (KB)

Case No: QB-2021-000707

IN THE HIGH COURT OF JUSTICE
KING 'S BENCH DIVISION

Royal Courts of Justice,
Strand,
WC2A 2LL

Date: 12 May 2023

Before :

MR JUSTICE CHOUDHURY

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Between :

(1) DR MOHAMMAD EMRANUL HAQUE

(2) MR MEZANUR RASHID **Claimants**

- and -

(1) MR MUSLEH FARADHI (sued on behalf of himself and all other Members of the Muslim Community Association)

(2) MR HAMID HOSSAIN AZAD (sued on behalf of himself and all other Members of the Muslim Community Association)

(3) MUSLIM COMMUNITY ASSOCIATION LIMITED **Defendants**

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Mr B Cawsey (instructed by **ASR Solicitors**) for the **Claimants**
Mr W McCormick KC (instructed by **Carter Ruck**) for the **Defendants**

Hearing dates: 28 February to 7 March 2023

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APPROVED JUDGMENT

MR JUSTICE CHOUDHURY:

Introduction

1. The Claimants and the named Defendants were members of the Muslim Community Association ("**MCA**"). The MCA was a faith-based community organisation that sought to uphold Islamic principles through education and community service. It had many hundreds of members across the country who met and engaged regularly. Prior to March 2021, the MCA had unincorporated status, but it now exists as an incorporated body. That incorporated body, the Muslim Community Association Limited ("**MCA Limited**"), is the Third Defendant.

2. The Claimants were considered to have engaged in conduct contrary to the MCA's constitution ("**the Constitution**"). In the First Claimant's case, the impugned conduct occurred in the course of a meeting in July 2020 of the MCA's elected governing body, the Shoora (or Consultative) Council ("**the Shoora**") of which he was a member ("**the July 2020 meeting**"). As this was during the COVID-19 pandemic, the meeting was conducted remotely via Teams. The conduct comprised the use of offensive language about other members of the Shoora. In the Second Claimant's case, the conduct comprised the writing of offensive emails in September 2020 to the MCA's Central President, who was at that time the First Defendant. The Claimants were separately suspended from the MCA and each of their memberships subsequently terminated by the Shoora, ostensibly on the grounds of such conduct. The Claimants contend, however, that their suspensions and/or terminations were unlawful and implemented for the improper motive of suppressing complaints by the Claimants about electoral malpractice in breach of the MCA's constitution in respect of the 2019 election of the Shoora. The Claimants say that such malpractice rendered the election of the Shoora invalid and, thus, the decisions to terminate the First Claimant's membership and to suspend that of the Second Claimant void and of no effect. Alternatively, it is said that those decisions were in breach of the Constitution and/or the principles of natural justice. They seek injunctive relief to reinstate them as members. They also seek declaratory relief and damages for breach of contract.

Procedural background

3. Proceedings were first issued in 2021. The Claimants issued an amended Claim Form and Amended Particulars of Claim on 14 March 2022. On 12 April 2022, the Defendants served their Amended Defence and a Part 18 Request for further information. The Claimants served their Reply to the Part 18 Request and the Amended Defence on 10 May 2022. Following standard disclosure, witness statements were exchanged on 16 December 2022.

4. The Defendants applied to have sections of each of the Claimants' witness statements and the entirety of a third party's witness statement served on the Claimants' behalf struck out on the grounds that they amounted to an abuse of process in that they contained information and allegations that were irrelevant to the pleaded case. HHJ Simpkiss acceded to the Defendants' application on 31 January 2023, and struck out the impugned evidence. The Claimants were also ordered to pay the Defendants' cost of the application on the indemnity basis, which were summarily assessed at £40,300. Those costs had not been paid within the default 14-day period or by the first day of trial. In the week before trial, the Claimants applied to vary or set aside HHJ Simpkiss' Order, and the Defendants made an application to strike-out the claim for non-compliance with the Order. I considered both applications at the outset of the trial. The Claimants' application to set aside or vary was refused, there being no change of circumstances since the making of HHJ Simpkiss' Order that would warrant such variation. Upon inquiry, the Claimants indicated through Counsel that the reason for non-payment was their lack of means, although I note that the Claimants had been able to pay a similar sum for legal representation to resist the Defendants' application.

5. In respect of the Defendants' application for immediate strike out for non-compliance, I made an 'unless order' that the claim would be struck out unless the Claimants paid £20,000 to the Defendants' solicitors within two days of the first day of trial and the remaining balance within 14 days. I also ordered that the Claimants provide evidence of their means to the Court, which they did. Those sums have (as I understand it) been duly

paid. Accordingly, the claim was not struck out and the trial proceeded to conclusion. My rulings in respect of those preliminary matters are the subject of a separate transcript.

Witnesses

6. The nature of the dispute is such that there is not much in the way of disputed fact: much of the evidence focused on the interpretation of agreed facts, but there are a few disputed matters on which I must make a finding. The evidence focused on electoral campaigning in the lead up to the October 2019 elections, a report by a committee investigating electoral malpractice that made findings against several Shoora members, and the phone call made by the First Claimant during a break in the course of the July 2020 meeting that was overheard by others and which was recorded. This is set out more fully at paragraphs 22 to 55.

Claimants' Witnesses

7. Both Claimants gave evidence in support of their claims. Their statements were prepared without the assistance of Solicitors, which probably explains why parts of them were considered by HHJ Simpkiss to be irrelevant and struck out. The parts that remained often strayed from assertions of fact to expressions of opinion and the ascribing of motives to the Defendants' actions. Their statements were not therefore as helpful as they might have been. It was clear from the oral evidence given by the First Claimant, Dr Emranul Haque, that he was - and remains - distressed and highly aggrieved by the events that gave rise to this claim and that he perceives his suspension and termination as deeply unfair. Nonetheless, some parts of his evidence were unsatisfactory and contradictory. The Defendants' criticism that he sought to explain documents that contradicted his own account with immaterial semantic distinctions and unsubstantiated allegations of forgery and fabrication is largely fair: e.g. (as will be seen below) he disputed the accuracy of minutes of Shoora meetings for the first time in oral evidence, and he adamantly clung to glosses on his own words that could not withstand scrutiny.

8. The Second Claimant, Mr Mezanur Rashid, was the next witness. Again, I do not doubt the sincerity of the anguish and discontent that he expressed. Yet this same passion often obscured his evidence, which was marked by interpretations of documents that were plainly unwarranted, claims of having no recollection of matters that he had given

evidence on in his witness statement, or, failing that, argumentative and belligerent general assertions about the governance of the MCA. This adversely affected his credibility.

9. The other live witnesses for the Claimants were Mr Mohiuddin Ahmed and Mr Mohammad Malik, who gave evidence on alleged electoral malpractice in the lead up to the 2019 election. Although each claimed to have prepared his own statement without input or assistance from others (save that Mr Malik said that his children may have reviewed his witness statement and corrected some of the language), there were striking similarities between their statements and a near identical paragraph common to both that strongly suggested otherwise. The paragraph common to both statements provided that the Second Claimant's membership was suspended and terminated on a false pretext and that remaining members were threatened with disciplinary proceedings and termination of membership if they were found to be supporting either of the Claimants. It was put to them and to the Second Claimant that they had cooperated to produce the witness statements, which all three denied. Neither Mr Malik nor Mr Ahmed proffered any explanation for the similarities. Mr Ahmed and Mr Malik requested the assistance of a Bengali language interpreter although it was apparent that both witnesses largely appeared to have understood questions put to them in English and were able to answer in English with only occasional recourse to the interpreter for clarification. The Defendants submitted that the circumstances in which their evidence was prepared were deeply suspect and that it should be dismissed altogether as a result. In my judgment, the strong likelihood is that the statements (or at least parts of them) were either prepared jointly with each other or that they were prepared by another and approved by them. It is not plausible that statements containing near-identical paragraphs could have been prepared independently. The witnesses' flat refusal to acknowledge the obvious, namely that the statements were prepared jointly or by or with the assistance of another, does tend to undermine their credibility. However, given that neither witness seeks to give direct testimony relating to the July 2020 meeting and that their evidence largely comprises commentary and opinion, the deficiencies in their evidence have little impact on the key issues that I need to determine.

10. The Claimants also relied upon the witness statement of Mr Abdul Motin, who was ill and unable to attend court. The Defendants were content not to cross-examine him, subject to their submission that much of the evidence within the witness statement was inadmissible. I indicated that I would proceed in the usual way and afford it the appropriate weight, which in this case is very little. In particular, I noted that a paragraph of Mr Motin's witness statement was almost identical to that discussed above in the statements of Mr Malik and Mr Ahmed.

11. In these circumstances (as is so often the case), it is the contemporaneous documentation to which one must turn as being the most reliable guide in ascertaining what happened.

Defendants' Witnesses

12. The First and Second Defendants, Mr Musleh Faradhi and Mr Mohammad Azad, also gave evidence. The First Defendant, for the most part, gave evidence in a considered and straightforward manner, and did not seek to disavow the content of contemporaneous documentation put to him. There was one aspect of his evidence that was less forthcoming and that was on the question of campaigning and his knowledge of it. However, I did not find that that substantially undermined his evidence, which was generally consistent with what is said in contemporaneous documents, such as the minutes of the Shoora's various meetings. The Second Defendant similarly gave evidence in a considered and straightforward manner. He did reject a suggestion that Shoora members who were implicated by the investigation into electoral malpractice (see below) had, by apologising and resigning, effectively accepted the findings of the investigating committee, even though paragraph 57 of his statement could be read as stating just that. However, I did not consider that this one departure from otherwise straightforwardly given evidence undermined his credibility to any significant extent.

13. The Defendants also called the following witnesses to give live evidence: Mr Abdullahil Al-Azami, Mr Abul Dilder Chowdhury, Mr Ayub Khan, Mr Dilowar Khan, Mr Muhammad Rahman, Mr Nessar Ahmed and Mr Mohammad Chowdhury. All were members of the Shoora Council who attended the July 2020 meeting in question.

14. Mr Al-Azami gave evidence about his phone call with the First Claimant during the July 2020 meeting. He appeared to be an honest witness doing his best to provide an accurate account. He was willing to accept inconsistencies between a statement that he wrote soon after the phone call at the request of the Shoora and his witness statement, but those inconsistencies were inconsequential and did not diminish his evidence or credibility.

15. Two witnesses heard part of the conversation between the First Claimant and Mr Al-Azami at the July 2020 meeting as it took place. Mr Dilder Choudhury's evidence was clear and cogent. Mr Ayub Khan made two recordings of the conversation. Mr Khan was confident in his evidence but somewhat more diffident on the circumstances of his recording of the conversation when it was put to him that he was motivated by a desire to implicate the First Claimant.

16. The other witnesses were not at their computers during the break to hear the phone call first-hand but heard the recordings made by Mr Ayub Khan. I found Mr Dilowar Khan and Mr Rahman to be credible witnesses who were direct and measured under cross-examination about the limitations that this placed on their evidence. By contrast, Mr Nessar Ahmed was not as willing to concede that this may have affected the evidence that he could provide. There was also a discrepancy in his evidence: although his statement said that he had seen the Investigation Committee report relating to allegations made against him and exhibited a section thereof, under cross-examination he claimed that he had not previously seen the report. Mr Mohammad Chowdhury provided evidence that was clear, if somewhat combative at times.

17. Based on the evidence heard, I make the following findings of fact on the balance of probabilities.

Factual Background

The Muslim Community Association

18. The Islamic Forum of Europe ("**IFE**") was founded by the First Defendant with others in 1988. The Second Defendant became a member in 1996. The First and Second Claimants joined in 1998 and 2000 respectively. The IFE was renamed the Muslim Community Association in 2015. As of October 2019, the MCA had about 600 members.

19. Each of the parties devoted a great deal of their personal time to the advancement of the IFE/MCA and to its activities. It was a close-knit organisation that played a central role in the parties' personal and social lives. Many of its members, including the protagonists in the present dispute, have known each other for decades and were friends. The spouses of the First Claimant and the First Defendant were members and many other members were related directly or by marriage. There can be little doubt that the MCA played a central role in all of their lives; in that context it is perhaps not difficult to understand why the suspension and/or termination of membership had such a profound effect on the Claimants, to the extent that they were willing to instigate High Court litigation to seek to vindicate their positions.

20. The MCA was an unincorporated association. It was governed by the Constitution, which provided, inter alia, for the election of a consultative council, the Shoora (Clause 9), and a Central President (Clause 10). The First Claimant and the individual Defendants (hereinafter "**the Defendants**") were each elected to the Shoora several times. The First Claimant and the First Defendant had been elected to the leading role of Central President at various stages over the years. The Second Claimant was never elected to the Shoora.

21. Although elections were a regular feature of the MCA's activities, Clause 16 of the Constitution, which dealt with the conduct of elections, expressly prohibited campaigning or canvassing for any position:

> *"16.2 To seek a position or any attempt, directly or indirectly, to be elected into such a position will disqualify the individual for that or other similar posts.*
>
> *16.2.1 Direct and/or indirect canvassing is not allowed for any*

MCA elections.

16.2.2 The creation of any groups in favour or against any person is also not allowed.

16.2.3 Breach of clause 16.2 shall be considered a serious disciplinary matter."

Rather than a nominations process, members were provided with a list of the entire membership and voted for members of their choice to be appointed to the Shoora for a two-year term. The Shoora comprised 19 members. The Central President was then elected from amongst those who had been elected to the Shoora. Most of the witnesses agreed that, contrary to Clause 16.2, some campaigning had taken place in previous (pre-2019) elections, but differed on whether it was such as to be regarded as electoral malpractice warranting the disciplinary action envisaged by the rule, or merely trivial and somewhat inevitable breaches of the Constitution.

The 2019 Election

22. The First Claimant had been elected Central President for the 2017-2019 term. The Defendants and four of their witnesses were members of the Shoora during that term. An election for a new Shoora and Central President was due to take place on 6 October 2019 at the annual members' conference.

23. On 2 October 2019, an email with an attached letter was circulated amongst the MCA membership ("**the Concerns Letter**"). The author(s) were anonymous but purported to be a "committee" that was seeking to "help all members in their voting decisions." The Concerns Letter clearly sought to malign the First Claimant in the upcoming election, with a comprehensive denouncement that ranged from trivial criticism of how he chaired meetings and his alleged bad temper to serious allegations of financial impropriety and fraud, including charges of abusing the expenses system and misappropriation of MCA funds to pay an associate £3000 a week. "Forget about selecting [the First Claimant] as the Central President," the letter stated, "the committee feels that it is the duty of all members as believers of God to expel [him] from the Shoora…" None of the witnesses before me suggested that they had any reason to believe the allegations, and several (including the Defendants) positively asserted that they considered them to be false.

24. The First Claimant raised the Concerns Letter at the final meeting of the 2017-2019 Shoora on 5 October 2019. At the same meeting, the Shoora also discussed three text messages that had been sent between 1 and 5 October 2019 and were circulating amongst the membership with lists of the names of various members:

a. 1 October 2019: 19 names (i.e. the number to be elected to the Shoora) including the First Claimant (at the head of the list), the Second Defendant and the First Defendant (as the penultimate name).
b. 4 October 2019: 19 names set out in a different format including the First and Second Defendants, but not the First Claimant.
c. 5 October 2019: 19 names set out in the same format as the first text and including the First Claimant (once again at the head of the list, albeit mis-spelt), but omitting the Defendants.

Although there was no explanatory text accompanying the lists, the recipients regarded and understood the lists to be different 'slates' promoting the named list of 19 individuals for appointment to the Shoora in the upcoming election.

25. Although two of the slates appeared to be promoting the First Claimant's election, he did not accept the possibility that the messages that featured his name were produced by persons who wished to see him elected. Instead, he stated that "the second list is to get rid of me and the others are to cause confusion". In other words, he suggested that the texts were all part of a campaign to support the Defendants' election; the inclusion of his name in two of the slates being intended to sow confusion and to lend credibility to the campaigning efforts against him. I found this logic to be somewhat contorted. The format of the various texts suggests that they were sent by more than one person, one of whom at least supported the First Claimant's election. Even if that were not the case, it seems highly improbable, if not utterly implausible, that a person or persons campaigning to exclude the First Claimant would do so by sending three texts, two of which included the First Claimant's name at the head of the list. The ordinary member in receipt of such text messages, devoid as they were of any further explanatory information, would reasonably interpret the two that included his name as being supportive of the First Claimant. Far from sowing confusion, the slates would be seen for what they were: attempts by various unidentified parties to campaign for different individuals or "slates" to be elected to the Shoora.

26. Campaigning activity, although barred by the Constitution, was not new, and had, to some extent, occurred in previous elections. However, the Concerns Letter went far beyond the sort of campaigning evidenced by the texts and contained allegations designed to destroy the First Claimant's reputation and standing in the community. The parties and witnesses held differing views on whether the Concerns Letter was unprecedented in the history of the MCA in the way it sought to malign a member. The First Defendant recalled a letter that had criticised the leadership during a previous term that he was Central President, but accepted that that was not as bad as the Concerns Letter. None of the witnesses could cite any example directly comparable to the Concerns Letter. Based on the evidence before me, it is clear that the Concerns Letter amounted to a far more egregious breach of Clause 16.2 of the Constitution than anything in any previous election. Although there was some reluctance to describe the Concerns Letter as "unprecedented" (perhaps because it was seen as another instance of impermissible campaigning), I do not find that the Defendants sought to downplay the seriousness of the letter's contents and tone. In fact, the Shoora agreed that the Concerns Letter warranted action and passed a resolution: "The problems that have resulted in this are deep seated and this Shoora Council submits the strongest recommendation to the incoming Shoora Council to launch a full and independent investigation into the perpetrators of this letter and also look into other such past cases."

27. The First Defendant confirmed that he received the Concerns Letter and that he was aware of the text messages before the 2019 election. Whilst he was aware that campaigning was going on, he firmly denied knowing who wrote the Concerns Letter or the texts and denied having any involvement in their generation or distribution. That evidence was unshaken in cross-examination. There was no direct contemporaneous evidence to suggest that either Defendant was involved in the preparation or sending of the Concerns Letter. Moreover, as will be seen from further matters described below, even a protracted internal investigation could not identify who authored or sent the letter or the texts. I find that the Defendants were aware that some campaigning was going on in respect of the 2019 election, but until the receipt of the Concerns Letter, regarded this as par for the course. However, neither knew, with any degree of certainty, who had authored these documents and nor were they themselves involved in their authorship. It seems unlikely to me, given the close-knit nature of the MCA, that the Defendants would not have harboured some

suspicion or inkling as to who might have been involved. However, such an inkling would fall far short of knowledge or involvement. The Concerns Letter was considered to be a serious development and action was recommended to identify the perpetrators. It seems unlikely that such action would have been supported by the Defendants if they had been responsible for, or party to, the writing of the letter and wished to maintain the deceit that they were not.

28. The election proceeded on 5 October 2019 as planned. A new Shoora of 19 members was elected. This included the First Claimant and the Defendants. The election of the First Claimant to the Shoora suggests that the content of the Concerns Letter was not taken seriously by the majority of the membership and did not have the desired effect of excluding the First Claimant from the Shoora. It also rather suggests that, contrary to the First Claimant's theory, the three text messages did not confuse the membership or have any effect in preventing his election. The First Defendant was subsequently elected as Central President and he later selected the Second Defendant to be the General Secretary. The First Defendant stated (and I accept) that he was surprised to have been elected, as he had already been Central President for several previous terms and felt that it was now time for younger members to fill the role. However, out of respect for the members' wishes, he accepted the role.

29. The Constitution required Shoora members to take an oath which commenced: "I […] who has [sic] been elected/taken as a member of the Central Shoora Council of the Muslim Community Association declare that …" The declarations in the oath were as follows:

- *"I will give priority to obeying and following the commands of Allah and His prophet (pbuh) above everything.*
- *I will be vigilant as to whether the Central President, central Shoora Council members and central secretaries are following the aqeeda, aims, objectives and Islamic principles described in this Constitution.*
- *I shall not be absent from any Shoora Council session without any reason validated by Shariah.*
- *I shall express my own opinion on all matters clearly and consciously to the best of my knowledge and belief.*
- *I shall refrain from creating any independent group within this organisation and try to prevent others from doing so.*
- *I will abide by the guidelines and discipline of this organisation*

- *I will do my utmost to rectify any mistake that I notice in the work/activities of this organisation."*

30. Upon being elected, the First Claimant took that oath, unlike three other members who declined to do so at that point. The First Claimant took the oath without caveat or qualification, unlike another who stated that he was taking the oath subject to the Shoora's response to the report by the committee that would investigate electoral malpractice.

31. Although he took the oath, thereby implying an acceptance of the election result and his appointment, the First Claimant gave evidence that he believed that the election results had been rendered invalid by the Concerns Letter, text messages and canvassing by members. In the course of his evidence, he suggested that he had been claiming since the October 2019 election that the Shoora would have no validity until any recommendations made in the report by the investigating committee had been implemented. The Defendants say that the First Claimant first raised invalidity almost a year later in August 2020.

32. The First Claimant was questioned about this in cross-examination:

Counsel *Do you accept that it was only on 29 August 2020 that you first told anybody that your belief was that the 2019 Shoora Council had no validity?*

C1 *That was the last point of my patience [that] I had been observing.*

Counsel *Just answer the question – do you accept that that is the first occasion upon which you told anybody that your belief was that the 2019 Shoora Council had no validity?*

C1 *No, I confirmed that there would be no validity of this Shoora Council until the independent Investigation Committee with independent results and implementation to be done by the Shoora Council. So obviously, according to my understanding I had been claiming this even before the election took place on 6 October 2019.*

Counsel *To whom did you make your position clear?*

C1 *To the whole Shoora Council on 5 October 2019.*

Counsel *Just so we are clear. Your evidence is that on 5 October 2019 at the Shoora Council, you said: 'The incoming Shoora will have*

no validity until after the IC report has been provided?' Is that your evidence? You told the Shoora Council those words?

C1 *That is number one –*

Counsel *Sorry, is it your evidence that you actually said that to the Shoora Council on 5 October?*

C1 *Also –*

Counsel *Sorry, is it your evidence that you said that to the Shoora Council on 5 October?*

C1 *I am not hearing your question clearly.*

Counsel *I thought you had given an answer in response to my question that 'This is what I said to the Shoora Council on 5 October.' I just wanted to be clear – before we look at the minutes of that meeting – whether or not it is your evidence that on 5 October you said to the Shoora Council that the new Shoora Council – that will be elected tomorrow – will have no validity until after the IC has been delivered? Did you say that to them? Yes or no?*

C1 *Not the way you are saying it.*

Counsel *Do you want to look at the minutes to see if they will help?*

C1 *May I say? So, by making this – by agreeing to go for an independent investigation committee where the outgoing Shoora Council and incoming Shoora Council – none of them, including Central Presidents, including myself – should not be outside of question until the independent investigation committee is done and [the Shoora Council] consults with [them] about their independent results and implementation… that is how I did [it].*

…

Counsel *We looked at the resolution of the Shoora Council that was read out in English and in Bengali to the AGM on 6 October. It did not say that the incoming Shoora should not take any decisions. It gave no suggestion that the election would not result in a validly elected Shoora Council. If you had said to the Shoora Council members that 'My belief is the election tomorrow will be invalid because of the electoral malpractice in the Concerns Letter' it would be there. There would be a record of it. You didn't do that, did you?*

C1 *No.*

33. In my judgment, the evidence is clear: the First Claimant did not articulate to any Shoora member at any stage prior to his suspension that he considered the 2019 election to be invalid. Not only did he not articulate this view, he did not act like someone who held this view. It was not in dispute that he was an active member of the 2019 Shoora Council,

participating in decision-making and accepting his appointment by the First Defendant as leader of the Shoora's Research, Policy and Strategy Committee. This appears to contradict his assertion that he took up his elected post on the Shoora merely to ensure that it implemented any recommendations of an investigating committee. The suggestion that the First Claimant effectively went along with these activities so as not to cause disruption cannot be accepted. There were numerous ways in which he could have made his concerns clear without jeopardising either the investigating committee's or the Shoora's activities, the stance taken (at least initially) by three colleagues who did not take the oath being but one example. I find that the First Claimant was quite content to accept the validity of the 2019 elections results and conducted himself accordingly up to the point of his suspension in July 2020. Insofar as he held any view that the 2019 election was invalid, that was a view likely to have been formed in hindsight after his suspension.

34. On 9th November 2019, an MCA member called Mr Nasir Uddin sent an open letter by mass email to the First Defendant in his capacity as Central President and to the wider MCA membership ("**the Uddin letter**"). The Uddin letter recounted a meeting that Mr Uddin had with the First Defendant on 26 October 2019 at which (he claimed) the First Defendant had accused him of campaigning and barred him from being eligible for election in a regional MCA poll. The First Defendant did not dispute this. The Uddin letter also contained a series of allegations of campaigning within the organisation, including by members of the 2019-2021 Shoora against the First Claimant. It was put to the First Defendant that he did not investigate these allegations or take any action against those accused of electoral malpractice by Mr Uddin as the allegations were against the First Defendant's friends and supporters within the MCA. The First Defendant responded that no evidence was provided for many of the allegations made in the Uddin letter, and, in any case, he had later forwarded the letter to the investigating committee that was in contemplation at the time. The minutes of a Shoora meeting on 14 December 2019 record a decision to terminate Mr Uddin's membership for campaigning for his own election in a regional poll and for the:

> *"mass email to all Shoora Council members on 9 Nov'19 with 16 pages attachment. He included allegations against some Shoora Council members as well as some Regional Exco members. […] [H]e also mentioned details a sister's family affairs. This itself made [him] deserve for [sic] immediate membership termination."*

35. Another meeting, described as a Special Members Conference, took place on 15 December 2019 for members to vote on the form that an investigation into electoral malpractice would take.

36. The First Claimant referred to these meetings in his statement as follows:

> *"16. In the shoora meetings between 6 October 2019 and 15 December 2019, I single-handedly fought with Mr Musleh Faradhi for further Members Conference to form the Independent Investigation Committee, instead of forming such a committee by the Shoora Council or by Regional Members meetings (that have not constitutional authority). He was also proposing not to have any investigation, as I believe, he was in fear of being caught about his relation with the campaigners. As a result, a Member's Conference took place on 15 December 2019. In that Members Conference Mr Musleh Faradhi, abusing his position of Central President, tried his best to persuade Members to vote for "No Investigation", which should not be there as an option, since the AGM approved to have an Investigation by an Independent Investigation Committee. However, with an overwhelming majority, Members Conference voted for an investigation as everybody was sure that there was an illegal campaign, and formed an Investigation Committee, independent of the current and the immediate past Shoora Council Members, and current and immediate past Regional Incharges."*

37. In other words, it was the First Claimant's case that the First Defendant had actively resisted an investigation for fear of being the subject of adverse findings. The minutes paint a rather different picture. They record, amongst other things, the First Defendant stating his view that it was an "absolute necessity" for the nature of the investigation to be determined, and that he had "categorically mention[ed]" that the Shoora should not take forward an option to vote for no investigation at all. They also show that the First Defendant only acceded to the request that there be a "no investigation" option after a "reasonabl[y] long debate" and consultation with the other Shoora members. In the event, 280 members voted against the proposition to abandon the plans for an investigation and 91 voted in favour of it.

38. Faced with this diametrically opposed contemporaneous record of what the First Defendant sought to do, the First Claimant suggested for the first time under cross-examination that the minutes of the meeting were inaccurate in that they did not accord with his recollection. He even went as far as to suggest that, because minutes were

formally approved long after the meeting, they were not a genuine record. He partially retreated from this assertion, but maintained that he had heard the First Defendant resist an investigation as alleged. In my judgment, the First Claimant's recollection of this meeting is seriously deficient and/or has been corrupted by his desire to believe the worst about the First Defendant's motives. The minutes could not be clearer and I accept them as an accurate record of what was discussed and voted upon. The minutes of the 14 December 2019 meeting at which it was stated that the Shoora "will not entertain the option of "no investigation"" were approved at a meeting on 11 April 2020, which the First Claimant attended, and those of the 15 December 2019 meeting were approved at a meeting in 2021 after his suspension. It appears to have been not unusual at this time (during the pandemic) for minutes to be approved some time after the relevant meeting. There is nothing in that fact that lends any support to the First Claimant's contentions about their accuracy.

39. The majority of members then voted to establish an investigation committee comprising five MCA members, excluding any member who sat on the 2017-2019 or 2019-2021 Shoora ("**the IC**"). The IC and the parts of its report that are relevant to these proceedings are discussed at paragraphs 80 – 85.

The July 2020 Meeting

40. The newly elected Shoora proceeded with its activities and nothing of note or concern has been raised by the Claimants or the Defendants about the period after December 2019 until 25 July 2020. It was on 25 July 2020 - during the pandemic - that a remote meeting of the Shoora took place via Teams. The meeting began at 10.30am and was due to end at 6.30pm with breaks scheduled for lunch and prayer at 1.00pm and a further break at 4.00pm. The minutes record various agenda items, including the MCA's social media policy, a finance and compliance policy, and incorporation of the organisation.

41. The minutes record a scheduled half-hour discussion at 2.30pm on 'Regional Mapping', a plan to alter the MCA's regional boundaries under which members and activities were organised across the country. The First Defendant's evidence was that the reforms were

intended to make it more readily apparent to members which region they belonged to and to ease the management of the different areas. He considered it "uncontroversial and constructive". The minutes record a brief discussion that concluded with the Shoora agreeing to adopt six regions for London and eight regions for areas outside of London and to review whether Stoke on Trent had been rightly categorised.

42. At 4.00pm, there was a fifteen-minute scheduled break during which some members stepped away from their computers and others remained but turned their devices' cameras and microphones off. During this break, the First Claimant rang Mr Al-Azami on his mobile and spoke to him on speakerphone for approximately three to five minutes. Unbeknownst to them, the First Claimant had not disabled his computer microphone, and the conversation could be heard by others logged onto the meeting. The parties disputed both the content and meaning of that conversation, which I set out below.

43. There were no witnesses before the Court who overheard the conversation in its entirety. Mr Khan returned to his computer as the phone call was underway and, rather than intervene to inform his colleagues that their conversation could be overheard, began to record the conversation. Transcripts in Bengali and English were produced of these recordings and copies provided to the Court. It is apparent that there were two recordings, with the length of time between them being unclear. I shall refer to both compendiously as "the recording". The recording provides the most reliable guide to parts of the conversation, so it seems sensible to begin with the transcript before setting out the various accounts and interpretations suggested in evidence. The conversation took place in Bengali, the first language of those involved. No issue is taken by either side with the Bengali transcript. The Claimants and Defendants provided their own English translations of that transcript, but the differences between them were relatively minor. The Claimants' version omitted to translate the Bengali word for "all" which appears on the initial Bengali transcript. That alone persuades me that, insofar as there are differences between the two, the Defendants' English translation is the more complete one, and references to the transcript below are to that version.

44. The English translation of the conversation transcript provides:

First Recording

C1: *On top of that is our '<u>Jonoakhankar'</u> group. They can read the situation in the field very well. In the field are the <u>mastan (thugs)</u> group, and they are all '<u>Sylheti</u>'. By using them, they have divided our conservative group.*

Mr Al-Azami: *(unclear) I told them about the organisational policies that at least you try for structural unity.*

Second Recording

C1: *There are … some people*

Mr Al-Azami: *Who are they?*

C1: *Atiqur Rahman Zilu, Nurul Matin, Nessar, Abul Hussain Khan. I took them two, I thought they would be appeased, but they didn't.*

Mr Al-Azami: *Is Abul <u>Bhai</u> the same too?*

C1: *Same. That Nurul Matin is their main instigator from the background. And Sirajul Islam Hira, Abdul Mumin same group.*

Mr Al-Azami: *Not Hira*

C1: *Including Hira, they gathered round.* (Emphasis added)

45. The highlighted word, "Jonoakhankar", has not been translated in this version. The Claimant's translation suggests that it means "public interest" and no issue is taken with that. The word "thugs" in parentheses after the Bengali word "mastan" appears to be the translator's attempt to venture a translation for that word. There is some debate about the meaning of that word to which I return below. The term "Sylheti" means a person from the Sylhet region of North Eastern Bangladesh, from which the majority of those of Bangladeshi origin in the UK originate. The First Claimant is not from Sylhet and nor is either of the Defendants. The only other word not translated here is the word "Bhai",

which literally translates as "Brother", and is used here as a term of respect when referring to another male colleague by name.

46. The First Claimant's account was that he suspected the regional mapping exercise was an effort by the same faction that sought to undermine him when he was Central President and which he suspected was responsible for the Concerns Letter to secure an electoral advantage for themselves. The First Claimant suggested that by making certain regions larger, it would become easier to manipulate the election outcome. Precisely how this would be achieved in a one-member-one-vote scenario was not made at all clear. At any rate, he was "not happy" about the proposed reorganisation and rang Mr Al-Azami "to express [his] resentment" and for advice on how to raise his concerns after the break. As Mr Al-Azami had lived outside the UK for several years and had not been a member of the Shoora in that time, he was unfamiliar with the existence of factions hence he spoke about different groups in the organisation: a conservative group and another 'Jono Akankha Group' (spelt in this way in a statement he provided during the initial investigation). The First Claimant maintained that he was not seeking to align himself with either group and that it was only in response to Mr Al-Azami's inquiry that the First Claimant listed the individuals in a faction that he viewed as hostile to him.

47. Mr Al-Azami initially gave evidence that the First Claimant began the phone call on the topic of divisions within the MCA but accepted under cross-examination that in his earlier statement he had recounted that the First Claimant did begin by speaking about regional mapping. The differences as to how the conversation commenced were largely immaterial, as the relevant part of the conversation was the First Claimant's use of the words 'mastan' and 'Sylheti' to refer to the people he considered to be hostile towards him.

48. The meeting resumed at 4.15pm. A member of the Shoora, a Mr Zilu, raised a point of order and indicated that it related to a matter that had arisen during the break. The First Defendant (who had not been present during or heard the conversation) asked if it could be dealt with under 'Any Other Business' and Mr Zilu agreed. Mr Zilu was not a witness in these proceedings. The First Claimant felt that there was particular animosity between himself and Mr Zilu. He considered Mr Zilu to be a main instigator in the faction opposed to him. The Defendants' witnesses differed on whether they were aware of any conflict

between the two, but it is my impression that there was some tension between the two which did not escape the attention of other Shoora members.

49. At the end of the meeting, Mr Zilu informed the Shoora of the phone call and several other members indicated that they had also heard all or part of the conversation. According to the minutes of this part of the meeting, Mr Zilu told the others that the First Claimant had talked about "conservative groups" within the MCA that had created divisions within the conservative grouping in the organisation. He said that the First Claimant had made "racist and divisive comments about Sylheti[s] and said they are united against [the First Claimant]". Mr Zilu also referred to the First Claimant's use of the word "mastan" to describe those who were against him, of whom there was a group of 25, and went on to name some of them. Mr Zilu said that the First Claimant had named Abul Hussain Khan and Nessar Ahmed as two of those he had taken on to the Central EXCO (executive committee) during the previous session (when the First Claimant was Central President) but that "those two did not serve his purposes". Finally, he said that the First Claimant had mentioned that Nurul Matin Chowdhury was the main instigator of all this.

50. The First Claimant was then given an opportunity to respond. The minutes record the First Claimant acknowledging the incident and trying to "justify that he did it out of frustration". He denied making racist comments about Sylhetis. At that point, Mr Ayub Khan said that had managed to record part of the conversation. After taking the advice of the Shoora, the First Defendant asked Mr Khan to play the recording. Having heard the recording, the First Defendant said that the First Claimant "was not truthful in one of his major statement (sic), as clearly heard in the recording".

51. The evidence of other witnesses for the Defendants was largely and materially consistent with the account in the minutes.

52. The Claimant describes other members "howling" at him after the recording was played in such a manner that he felt scared for his safety, and that had the meeting been face-to-face he would have been physically attacked. I accept that several of those present expressed real enmity towards the First Claimant at the meeting, but it seems unlikely that

such enmity could have been perceived through the medium of a Teams call as anything more.

53. The Defendants and their witnesses interpret ‘mastan’ to mean ‘thugs’. They regarded the tone and context in which the First Claimant used the term ‘Sylheti’ to be a derogatory way of referring to people from the Sylhet region of Bangladesh and that he was referring to the same group that he had described as ‘mastan’. It was put to the Defendants’ witnesses that that their assessments of the conversation were based on a misleading account by Mr Zilu and two partial recordings that did not capture an intervening period and thus incorrectly implied that the First Claimant had referred to all Shoora members as ‘mastan’. The witnesses were all clear that the context of the conversation was that the First Claimant referred to other MCA members in deeply offensive and possibly racist terms and they maintained that belief.

54. The First Claimant, in his evidence, stated that ‘Sylheti’ is simply a non-pejorative descriptive term for those from that region. He also said that, in the context in which he used the term ‘mastan’, he meant people who “run around different cities and branches to convince people not to vote for [him]”; the First Claimant appeared therefore to disagree that ‘mastan’ meant ‘thug’. This is in contrast to the First Claimant’s pleaded case as set out in the Claimants’ Amended Reply. This states:

> “10…The word “Mastan” was used separately from the word “Syhleti”. It has a similar meaning to the English word “thugs”, and the First Claimant used it to indicate that certain members of the MCA had been acting in an intimidating and threatening manner towards other members, trying to turn those members against the First Claimant on behalf of the First and Second Defendants.”

55. The translation of ‘mastan’ as ‘thugs’ is not therefore in dispute. As to the behaviour which the First Claimant associated with these mastan, the First Claimant said in an email sent to the First Defendant shortly after the incident:

> “You claimed that I degraded some of the Shoora members by calling them Mastans. I stand by my claims. The brothers that I mentioned in the conversation have been doing [‘]Mastani[‘] meaning terrorising our beloved [members] in

> the field for quite a long time, and they have intensified their effort of character assassination and slandering in the last session [2017-2019]…".

It would appear therefore from this note prepared by the First Claimant himself shortly after the event, that he was indeed intending to use the term "mastan" to mean persons engaged in "terrorising" members, character assassination and slander, and certainly not someone who merely attempts to dissuade another from voting for a candidate. The First Claimant is a highly regarded Professor of Economics with an excellent command of English. I have no doubt that in describing "mastani" (i.e. the behaviour of a "mastan") as amounting to the "terrorising" of members, he was accurately describing what he intended by the use of that term. That is certainly how those who heard the First Claimant use that term understood it at the time. As such, the offence they took at being described thus is readily understood.

56. As for the term, 'Sylheti' I accept that that is not necessarily an inherently derogatory or abusive term, any more so than describing someone from Cornwall as "Cornish" would be. It is nonetheless clear that the First Claimant was employing it in a pejorative way and not in the neutral descriptive way he claimed in his evidence. The Bangladeshi regional origin of an MCA member is, on the face of it, wholly irrelevant to MCA membership or electoral activity; the First Claimant's use of the term 'Sylheti' to describe those perceived by him to be in hostile faction speaks, at the very least, to a belief that Sylhetis within the MCA are involved in factional activity. That in itself is pejorative in this context. However, any reasonable listener would understand that the First Claimant, by juxtaposing the words "and they are all Sylheti" with the term "mastan", was saying something to the effect of: 'Of course those thuggish/terrorising people are from Sylhet', or 'Those 'mastan', it's not surprising they are from Sylhet'. It is unsurprising that that sort of blanket negative characterisation of a people from a district could be regarded as offensive. The First Claimant denied that the transcript is to the effect that mastan are Sylhetis, and claims to have referred to Sylhetis because people of that origin would be required "to access members in the field". In my judgment, however, the transcript is reasonably clear and speaks for itself.

The Suspension and Termination of the First Claimant's Membership

57. It was not in dispute that the First Claimant was deeply distressed by the turn of events and he apologised to the other members of the Shoora. He recalled the First Defendant saying: "You cannot be forgiven." The First Defendant accepted that he may have said this. His view was that the First Claimant was apologising for being overheard, rather than for the substance of the conversation.

58. The First Defendant considered referring the First Claimant to a disciplinary committee but was persuaded by other Shoora members that no investigation was required as there had been several witnesses and a recording that corroborated their account. The First Claimant's evidence was that some members said words to the effect of 'he goes or we go'. The minutes state: "It is a 'proven beyond any doubt' incident […] [that] does not require any further investigation to suspend him…". It was agreed that the First Defendant should act in accordance with the power to suspend under Clause 18.2 of the Constitution.

59. Clause 18 of the Constitution stated:

> "[…]
>
> *18.2 The Central President may suspend a Member for a period of no less than one (1) month and no more than three (3) months for any one of the following reasons:*
>
> *a) Conduct or activities contrary to the principles and policies of the MCA;*
>
> *b) Conduct or activities which may bring the organisation into disrepute;*
>
> *c) Loss of interest in the activities of MCA;*
>
> *d) Attempt to create subgroups within the organisation;*
>
> *e) If found to be in violation of the conditions of Membership, either partially or in full;*
>
> *f) Absent from the UK for a period of more than twelve (12) consecutive months.*
>
> *18.3 The following procedure must be followed by the Central President to terminate the membership of a Member:*
>
> *a) If the problem is not rectified within the period, the suspension period may be extended for a further three (3) months.*
>
> *b) If the suspended Member has not rectified the problem, during this additional suspension period, the Central President may terminate his/her membership in consultation with the Shoora Council.*
>
> *c) In exceptional circumstances, a person's membership may be terminated with immediate effect by the Central President in consultation with the Shoora Council.*

> *18.4 A Member shall be given the opportunity to defend himself/herself prior to the termination of their membership, before the Shoora Council or a body appointed by the Shoora Council.*
>
> *18.5 The Shoora may review its decision of termination upon the request of the relevant Member."*

60. The First Defendant had power under Clause 18.2 to suspend the First Claimant without the approval of the Shoora, but, nonetheless, sought a vote on the matter in which the First Claimant did not participate. The First Defendant, following "unanimous advices (sic) of Shoora Council" then declared his decision which was noted in the minutes as follows:

- *"Due to serious misconduct and proven gross violation of Constitution and clear violation of the conditions of the membership Dr. Emranul Haque's membership has been suspended for 3 months.*
- *CP will give directions about how to deal with any potential queries. Until then all Shoora members are requested not to contact any members. Dr. Emran is barred from contacting any manpower during this period. CP will issue further direction for Dr. Emran as to how to conduct himself during the suspension period."*

61. The First Claimant was thus suspended for three months with immediate effect at the end of the July 2020 meeting.

62. A series of emails between the First Claimant and the First Defendant followed. The First Claimant emailed the First Defendant later that evening apologising for "let[ting] you all down" and asking for "unreserved forgiveness."

63. The following day, 26 July 2020, the First Defendant sent an email to "confirm the decisions the MCA Shoora took in the meeting yesterday (25 July 2020) in your presence due to your serious misconduct, violation of the constitution and breach of your oath of MCA membership." He instructed the First Claimant not to contact any other member of the MCA and to delete contact details of other members from his mobile phone and all other devices.

64. On 29 July 2020, the First Defendant wrote to the First Claimant informing him that the Shoora requested a full written statement of his account of the conversation by 6.00pm on the following day. The First Claimant replied shortly before that time, explaining that he could not presently deal with the request as he felt "traumatised" by the speed of events and that he felt "this is going to the level of mentally torturing" him. He asked the First

Defendant to allow him to spend uninterrupted time with his family during Eid and indicated that he would be in touch with him when he was "ready to do so".

65. The First Defendant replied on 3 August and explained that he had postponed the date for responding until after the period of Eid. He informed the First Claimant that the Shoora would be meeting on 8 August and requested a statement from him by 6 August. On 6 August, the First Claimant responded that he was "feeling depressed about this issue" and therefore could not provide a statement as requested. He ended the email: "I'm sorry."

66. The Shoora met on 8 August. The minutes record a discussion on a review of the First Claimant's suspension:

> *"After detailed discussion all Shoora members agreed that the offences were terminable, but we should give him an opportunity to defend his case before the Shoora Council. […] Considering the gravity of the misconducts and damaging nature of activities, with heavy heart, following a unanimous agreement of the Shoora Council, as per Clause 18.3 (c) of the Constitution, CP, as he concluded, has no option but to terminate [the First Claimant's] membership. As per Clause 18.4 of the Constitution of MCA he will be given an opportunity to defend his case before the Shoora within 14 days of notification of the Shoora Council decision about his termination of membership. If he wishes to defend himself with a written statement CP will call a special Shoora Council meeting to hear his defence."*

The Shoora had also agreed in the same meeting to suspend the membership of Mr Al-Azami for a month for his part in the conversation. It was the First Defendant's evidence that there were relevant mitigating factors to distinguish Mr Al-Azami from the First Claimant, namely his lesser role in the conversation, the likelihood that he was unaware of the factionalism issues and that he had apologised and offered to resign from the Shoora.

67. The First Defendant informed the First Claimant of the Shoora's decision in an email of 15 August 2020:

> *"Considering the gravity and the damaging nature of the incident and following a unanimous agreement of the Shoora Council as per Clause 18.3 (c) of the Constitution, I, with a heavy heart have no option but to terminate your membership with immediate effect. However, the terms and condition imposed during the suspension of your membership will remain unchanged until the*

> *process mentioned in the next paragraph, with an exception of contacting your family and relatives who are with MCA, for family and personal matters. Please keep in mind you are not allowed to discuss details of your membership termination with anyone inside or outside of MCA. You were not able to submit your statement in two opportunities, therefore, I would like to allow you to submit your defence (explanation statement) in writing within 14 days by 29 August 2020 to ensure justice and fairness. I will then call an emergency Shoora where you will get an opportunity to present your case before the Shoora."*

68. On 29 August 2020, the First Claimant provided a lengthy written statement, in which he set out his account of campaigning and hostilities against him and stated that he stood by many of the statements he made in the phone call and elsewhere challenged the characterisation of them by the First Defendant. He also asserted, for the first time, that the 2019 Shoora was invalidly elected due to the campaigning that had taken place and further wrote:

> *"You should have referred this incidence [sic] to another third party as the whole conversation was regarding allegations about campaigning and character assassination, and it was about you […] and your GROUP. How can you judge someone who is alleging you to be the perpetrators? […] ONLY a THIRD PARTY neutral to this Shoora can hear my appeal. Otherwise I am happy to be heard by all Members of the organisation."* (Emphasis in original)

The First Defendant acknowledged receipt on 3 September 2020 and invited the First Claimant to a meeting with the Shoora on 6 September for a hearing. The First Claimant declined this invitation in an email of 5 September on the basis that he did not recognise the legitimacy of the Shoora or its decision and he requested that an independent body – "*a THIRD PARTY, independent of you and your CAMPAIGN GROUP, and the current Shoora while the investigation is underway"* (emphasis in original) - be appointed to investigate the matter.

69. The Shoora met on 6 September, and the minutes record an "overwhelming majority" of Shoora members voting in favour of terminating the First Claimant's membership. The First Defendant wrote to the First Claimant on 8 September to inform him of this decision and to indicate that he may request a review by the Shoora. He also criticised the statements provided by the First Claimant as containing "unsubstantiated claims and accusations against the organisation and some of its members" and warned him that he would "be held to account" if he shared the documents with anyone else.

70. In an email response of 15 September, the First Claimant repeated his request for an independent body – "a third-party neutral to me and the current Shoora" - to be appointed to investigate the matter and posed over thirty questions to the First Defendant about his suspension and termination. The First Defendant replied on 17 September acknowledging that the First Claimant declined to request a review of his termination and expressed his view that that was the end of the manner.

71. A message had been circulated via WhatsApp to the MCA membership announcing the suspension of the First Claimant on 25 July 2020. The Shoora also informed the heads of the MCA's affiliate organisations in Europe that the First Claimant had been suspended. It read: "It is unfortunate that due to serious misconduct and proven gross violation of the Constitution and conditions of membership[,] the [Central President], with the unanimous agreement of the Shoora Council of 25th of July 2020, has suspended [the First Claimant's] membership for 3 months with immediate effect." It instructed recipients not to contact the First Claimant or to discuss the matter amongst themselves or with anyone outside of the MCA. The First Defendant's evidence was that it was important to publicise the First Claimant's suspension to make the Shoora's position "on factionalism clear […] [and] hopefully avoid future indiscipline of a similar nature" and that the membership had also been notified of the suspension of Mr Al-Azami. He indicated that the additional step of informing the heads of the affiliate organisations was to explain his absence given his recent prominence in the MCA as the Central President, which did not apply to Mr Al-Azami. The First Claimant viewed the announcements as an unnecessary and vindictive effort to vilify him and to damage his reputation. I have some sympathy for the First Claimant in this regard. It is clear that since the decision to refer a host of allegations about campaigning and factionalism within the ranks to the IC, the organisation was adopting a firmer stance against such conduct than it had done hitherto. In that context, notifying the membership and affiliates of the action taken against a Shoora member (and indeed former CP) might have served to reinforce that stance and act as a deterrent against future such conduct. However, the text circular to the membership did not identify the conduct that led to the suspension. It is difficult to see what deterrent effect there would be other than deterring any breach of the constitution. If the First Claimant had been alone in having his suspension publicised in this way, it might well have been reasonable to

regard it as an unnecessary and vindictive act. However, the membership was also notified of Mr Al-Azami's suspension. That suggests that the First Claimant was not being singled out for such treatment. I find therefore that the publication of the suspensions, whilst not a necessary step to take, was not vindictive or for an improper purpose.

72. The First Claimant believed that the faction that had been responsible for the campaign against him leapt on the conversation with Mr Al-Azami as a false pretext for achieving the desired aim of removing him from the MCA and to frustrate his efforts to expose their electoral malpractice. The First Claimant's view that the First Defendant was somewhat heavy-handed and the sanction disproportionate is not irrational. I also have no difficulty in finding that some Shoora members, who (perhaps without justification) were critical of the First Claimant's leadership style, felt that the First Claimant got his comeuppance, so to speak, and did not regret that the situation had led to his removal. However, I do not find that the conversation was seized upon as a way of realising an extant plot to remove him. There was no evidence that any member of the Shoora, and not least the Defendants, had at any point since the First Claimant's election to the Shoora in October 2019 until the July 2020 meeting sought to undermine him in any way or take any steps designed to marginalise him. In fact, the First Defendant offered him the (as I understand it) respected position of Head of the Research, Policy and Strategy Committee. If there had been any plot to remove him, it was ineffectual in the extreme if its realisation depended solely on an event that occurred by accident and which no one could have foreseen. It is simply not plausible that those Shoora members were waiting for an opportunity that may never arise to further a plot to be rid of him. The more likely scenario is that, whilst there may have been some animosity between certain individuals, the First Claimant was largely a respected figure within the organisation, and the unfortunate incident on 25 July 2020 was viewed (not without some justification) as a serious matter worthy of censure.

The Suspension and Termination of the Second Claimant's Membership

73. The Second Claimant emailed the First Defendant and other members of the Shoora on 21 September 2020. He raised concerns about the MCA and asked the Shoora to refrain from making major decisions such as regional remapping, reforming social media

policies, and terminating memberships, including that of the First Claimant, until the publication of the IC's report.

74. One of the issues raised by the Second Claimant was the recent revision of the MCA's 'Muhasaba' policy. The Muhasaba policy set out rules of etiquette and conduct for MCA members' interactions with one another. It was revised in December 2019 by Mr Matin Chowdhury at the First Defendant's request. The addition that is relevant for these proceedings was as follows:

> *"No Member of MCA should ever get involved in sending any emails, text or any other form of communication by name or anonymous about complains or grievances to anyone or group or in general. Such an act will be considered a serious violation of trust and gross misconduct and it will be considered a straight termination offence."*

The Second Claimant viewed this amendment as an effort to suppress dissent and to limit members' criticism of the organisation. The Defendants' case was that the policy had not been reviewed since 2013 and required an update to reflect the prevalence of social media use.

75. The First Defendant and the Second Claimant spoke by phone the following day on 22 September. The First Defendant gave evidence that he had been informed of the Second Claimant expressing similar views in other MCA forums and that he viewed his language and conduct as inappropriate. He advised him to await the outcome of the IC report and to moderate his language. The Second Claimant gave evidence that the First Defendant said words to the effect of: "That is the end of this, I will not be taking it any further." The First Defendant's evidence on whether he did say such words was somewhat vague, but he was clear that, if he did say them, he would not have meant them to convey that he would be precluded from taking action against any further breaches in the future. He then emailed the Second Claimant on 23 September as "a reminder and for your action." He set out several points, including that the Second Claimant had breached protocol by copying other Shoora members into the email of 21 September; that he shared some of his concerns; that the membership had not voted in favour of the Shoora resigning whilst the IC undertook its investigation and that such action was not provided for in the Constitution. He instructed the Second Claimant to write to him directly in future if he

wished to raise concerns and not to speak to other members about any issues he had with the MCA without clear evidence.

76. On 25 September, the Second Claimant replied to the First Defendant:

> *"… with greatest respect I disagree with your reasoning, it is clear that you are trying to cover the track which you know it and other knows [sic] it as well. Anyway I don't want to carry on with discussion as I'm convinced there is no sincerity from your responds [sic]. Let's wait for investigation report and hope that all the perpetrators are exposed by that report. I hope that no one will play dirty with the report…"*

77. The First Defendant considered this email to constitute several breaches of the Constitution, and, after consultation with the Shoora, decided to suspend the Second Claimant's membership on 29 September 2020 for two months. He emailed the Second Claimant that same day to inform him of the decision and instructed him not to contact any members of the MCA during the suspension and to apologise to the First Defendant and the Shoora. He advised him that his membership would be reinstated at the end of the suspension period if the issues he had identified had been satisfactorily resolved.

78. On 14 October 2020, the Second Claimant sent an email to the First Defendant saying the decision to suspend him was not "suited for a Muslim, let alone for a Sheikh or a leader of an Islamic movement" and asked for his full membership to be reinstated. The First Defendant replied on 16 October 2020, declining to lift to suspension.

79. On 6 November 2020, the Second Claimant wrote to the First Defendant to inform him that he intended to take legal action against him concerning his suspension. The Shoora sought legal advice at this point. A few days later, on 10 November, the Second Claimant published a post on his Facebook page (partly in Bengali) in which he appeared to describe members of the Shoora as "thieves" and "election manipulators [who] must be named [and] shamed and eradicated." Under cross-examination, he did not dispute that he was responsible for the post but characterised it as 'satirical'. As I understand it, the post makes a pun of the term "Shoora members" by saying they are in fact "thieving members", the Bengali word for "thieves" or "thieving" sounding somewhat similar to 'Shoora'. It is more accurate to describe this as insulting than satirical and it was certainly not unreasonable for members of the Shoora to regard it as such. On 24 November 2020,

the Shoora extended his suspension until 29 December 2020. On 28 December 2020, the Shoora decided to extend it by another three months.

80. On 11 January 2021, the Second Claimant posted sections of the IC report that had been published the previous October on his Facebook page. He subsequently removed those posts. On 29 January 2021, solicitors representing the MCA invited the Second Claimant via his solicitors to appear before the Shoora for a hearing about his membership. He declined. At this meeting on 6 February 2021, the Shoora voted to terminate his membership.

The Report by the Investigation Committee

81. The IC established to look into electoral malpractice had been underway since December 2019 and continued in its work as the events outlined above unfolded. The IC comprised five members, one of whom was a barrister. None of them had served on the 2017-2019 or 2019-2021 Shooras. Its remit was to: (i) investigate the Concerns Letter, the texts, and "all available such communication [sic] from the past"; (ii) identify the author(s) of the Concerns Letter; (iii) identify the author(s) of the texts; (iv) recommend appropriate action and sanctions as a result of the aforementioned findings; and (v) recommend steps to eradicate electoral malpractice from the MCA. The Shoora would thereafter be responsible for implementing any action and sanctions recommended by the IC.

82. The IC circulated a call to the membership to report incidents of electoral malpractice. Based on the responses that it received, it determined which members to interview. The panel interviewed a total of 94 members. The interviews took the form of one set of questions to members who had made complaints (also referred to as 'whistle blowers' in the report) and 'witnesses' and another set of questions to those members accused of campaigning and other breaches. The whistle blowers were anonymised and, as such, there was no opportunity for the accused to cross-examine them. The standard of proof that the IC applied was the balance of probabilities.

83. The IC published its 226-page report in October 2020, after the termination of the First Claimant's membership and during the Second Claimant's first period of suspension. It

set out a detailed description of its understanding of its remit, the methodology that it employed, the guiding principles that it applied, and its findings.

84. The IC concluded that, due to technical limitations, it could not identify the sources of the Concerns Letter or the three text messages, but it did investigate other allegations of campaigning and breaches of the Constitution. It was clear which allegations it deemed to be unsubstantiated and which merited further investigation. Whistle blowers and witnesses were assigned an anonymous number that ran alongside a summary of their allegation, the accused's response, and one of three recommendations: (i) formal action; (ii) informal action; and (iii) no further action. The report also made recommendations on organisational structure and governance, including the need for an MCA disciplinary policy. The IC concluded that the First Claimant had "spoken ill" of Shoora colleagues and had "spied" on other members. It recommended formal action against him. The First Claimant rejected these findings as being beyond the IC's remit. The IC also recommended formal action against six other members of the 2019-2021 Shoora in respect of the following findings:

- Mr Abdul Mumin: Breach of his membership oath to follow Islamic principles and to maintain organisational discipline and breach of Clause 16 by direct and indirect campaigning
- Mr Zilu: Breach of his membership oath to follow Islamic principles and to maintain organisational discipline and breach of Clause 16 by directly canvassing in the election
- Mr Hira: Use of his power and authority as a Shoora member to campaign for his own re-election.
- Mr Qayum: Breach of his membership oath to follow Islamic principles and to maintain organisational discipline and breach of Clause 16 by directly campaigning in the election.
- Mr Ahmed: Breach of his membership oath to follow Islamic principles and to maintain organisational discipline and breach of Clause 16 by directly campaigning in the election and potentially creating groups in favour or against another member.
- Mr Abul Khan: Breach of his membership oath to follow Islamic principles and

to maintain organisational discipline and breach of Clause 16 by directly campaigning in the election.

85. The IC recommended that the Shoora conduct disciplinary hearings. However, the Shoora did not consider that to be appropriate or desirable. It agreed with the IC that the six Shoora members could either submit themselves to a disciplinary hearing or apologise and resign from the Shoora for the remainder of the 2019-2021 term. The First and Second Defendants both gave evidence that the latter course of apology and resignation was in the interests of organisational harmony and pragmatism, as a disciplinary procedure could take months or even years to complete and they wished to move forward. The six Shoora members resigned for the remainder of the 2019-2021 term.

86. Although the IC report framed its conclusions in terms of "findings", the absence of any testing of the complainant's accounts, the IC's express view on sanctions being beyond its remit and the option given to the Shoora members of a further disciplinary hearing, affects the status of those conclusions. In my judgment, the effect of the IC's conclusions was that the named individuals had a case to answer rather than amounting to definitive findings of culpability against them.

The Incorporation of the Muslim Community Association

87. Incorporation had been considered by successive Shooras for several years, and the minutes of a Shoora meeting on 14 December 2019 record a decision to incorporate the MCA, subject to legal advice. The First Claimant attended this meeting. The MCA was incorporated on 19 March 2021 and, on 28 March 2021, a majority of MCA members voted at a Special Members Conference to dissolve the MCA. The members of the MCA were automatically recognised as members of MCA Limited. The First Claimant's complaint was that incorporation was originally mooted simply for the purposes of facilitating the running of an organisational bank account and did not necessitate the dissolution of the MCA. It was suggested that the steps taken to incorporate the MCA at this time (after legal action had been threatened) were part of a design to avoid liability. This claim was not pursued at trial and it is not necessary to deal with it further. Even if it had been pursued, the long-standing and regular consideration being given to

incorporation would have militated against the conclusion that this was done in order to avoid liability.

Pleadings

88. The pleadings are extensive. What follows is a brief summary of the Claimants' Amended Particulars of Claim (which were, I should add, settled by previous Counsel) and the Defendants' Amended Defence.

Breaches of electoral rules: Clause 16

89. The relevant sections of Clause 16 have already been set out above at [21].

90. The Claimants pleaded that the following were implied terms of Clause 16:

(i) If and to the extent that any person acted in material breach of the electoral rules set out in Clause 16.2 and was subsequently elected to the Shoora Council or to the position of Central President, their election would be void and of no effect, and any decisions made by them or in which they took part would likewise be void and of no effect; and

(ii) If and to the extent that the Electoral Commission failed to conduct any election, or to ensure that the election was conducted, materially in accordance with the Constitution, to any material extent, the results of that election would be invalid, and any decisions made by the Central President or Shoora Council elected pursuant to that election would be void and of no effect.

In the alternative, it was an implied term that:

(iii) If a member of the Shoora Council or the Central President was elected materially in breach of the electoral rules in Clause 16.2 they would (i) submit themselves to re-election and (ii) refrain from taking any significant decisions.

91. They pleaded that the two named Defendants and the six Shoora members that the IC made findings against (set out at [83]) breached Clause 16.2 by campaigning or authorising others to campaign on their behalf in the 2019 elections and, consequently,

that the elections were therefore void and of no effect or that they were wrongly elected and were required to submit themselves to re-election. Consequently, any decision or significant or material decision taken by them was void and of no effect, including the suspension and termination of any membership.

92. The Defendants denied that the terms asserted by the Claimants should be implied into the Constitution. They highlighted that the Claimants did not set out the basis upon which any of the terms were to be implied i.e. that they were obvious or necessary, and, that, on the contrary, implying such terms would result in intolerable uncertainty.

Breaches as regards the Claimants

Clause 18

93. The relevant provisions of Clause 18 of the Constitution have already been set out at [59].

94. The Claimants pleaded that it was an implied term of the Constitution that the Central President and other Shoora members who were forming any decisions and/or exercising any powers under the Constitution, particularly the powers under Clause 18 were required:

(i) To act in accordance with the principles of natural justice, including by:
   a. Providing fair notice of any disciplinary decision and a proper opportunity for the relevant member to defend themselves;
   b. Ensuring that the decision maker was free from any bias or apparent bias; and
   c. Providing proper reasons for their decisions.

(ii) To take account of relevant matters and not take account of irrelevant matters;

(iii) To act in good faith and for a proper purpose; and/or

(iv) Not to act capriciously arbitrarily or irrationally.

Further, a related implied term was that any purported suspension or termination of membership in breach of the express and implied terms of Clause 18 would be void and that the relevant member would be entitled to have their membership reinstated upon request.

95. The Defendants concurred that principles of natural justice were incorporated into the Constitution but disagreed that they were in the terms set out by the Claimants. They averred that any powers conferred by Clause 18 must be exercised:

(i) In good faith and for proper purpose (which in this case was the protection and promotion of the MCA);

(ii) With proper regard to the rules of natural justice including allowing a member an opportunity to respond to relevant matters and to know why decisions have been taken concerning him;

(iii) Not capriciously, arbitrarily or irrationality (by taking into account only what is relevant).

The Defendants denied that the related implied term (which would have the effect of nullifying any suspension or termination in breach of natural justice) was either necessary or obvious and instead asserted that the correct remedy would be damages.

Breaches as regards the First Claimant

96. It was the Claimants' case that the Defendants breached the express and implied terms of the Constitution as regards the First Claimant in the following ways:

(i) Acted in bad faith and/or for an improper purpose in circulating news of his suspension;

(ii) Purported summarily to terminate his membership unfairly as follows:

a. By giving him no warning of the decision and no opportunity to defend himself;

b. The decision-making body – the Shoora - was biased or apparently biased and took no steps to identify, mitigate or remove the (apparent) bias, which also breached the Conflict of Interest policy;

c. The Shoora gave no adequate reasons and/or details of any purported exceptional grounds to the First Claimant

d. The First Claimant was not given an opportunity to rectify the alleged improper conduct after his suspension

e. There were no exceptional grounds on which to terminate his membership as required by Clauses 18.3 (c).

(iii) Terminated his membership in breach of natural justice in that termination was:

a. For an improper purpose:

i. To suppress and discredit his complaints about the legitimacy of the 2019 elections and/or the 2019-2021 Shoora and the decisions that it had made or sought to make;

ii. To remove him from the MCA because of his actual or perceived opposition to the policies of the Defendants and their supporters;

iii. Personal animosity against him.

b. Irrational, in that no reasonable Central President or Shoora acting reasonably would have suspended and then terminated his membership in the circumstances and required him to delete the contact details that he had for other MCA members and to refrain from contacting anyone in the organisation; further that this was beyond the powers afforded in the First Defendant by the Constitution;

c. In bad faith;

d. Took into account irrelevant considerations, particularly ultimatums by other Shoora members at the virtual meeting on 25 July 2020 and the First Claimant's efforts to expose electoral malpractice by the Defendants and their supporters; and

e. Failed to take the IC report into account.

Consequently, the decision to terminate the First Claimant's membership was void.

97. The Defendants denied any breach. They say that the First Claimant was given ample opportunity to respond to the charges properly brought against him and that his membership was terminated for proper reasons, which were notified to him. The Defendants also highlight that the IC report was not available until October 2020, after the decision to terminate his membership had been made and therefore could not be a factor in the decision.

Breaches as regards the Second Claimant

98. The Claimants pleaded that the Defendants breached the explicit and implied terms of the Constitution as regards the Second Claimant in the following ways:

(i) Suspended him and threatened to terminate his membership unfairly as follows:

a. Without warning and without an opportunity to defend himself;

b. The First Defendant was biased or apparently biased and took no steps to identify, mitigate or remove said (apparent) bias

c. The Second Claimant was not provided with adequate reasons and/or details of any purported exceptional grounds;

d. He was not given an opportunity to rectify the alleged improper conduct after his suspension, as required by Clause 18.3; and

e. There were no exceptional grounds on which to terminate his membership, as required by Clause 18.3 (c);

(ii) In breach of natural justice in the following ways:

a. For an improper purpose, namely:

i. To suppress and discredit his complaints about the legitimacy of the 2019 election and the 2019-2021 Shoora Council and the decisions they had made or sought to make; and

ii. To remove him from the MCA because of his actual or perceived opposition to the policies of the Defendants and their supporters;

b. Irrationally;

c. In bad faith, for the same reasons as the improper purpose:

d. Taking into account irrelevant considerations, particularly the revised Muhasaba Policy, which was improperly enacted to prevent members questioning the legitimacy of the 2019 elections and the First Defendant's efforts to expose the 2019-2021's illegitimacy; and

e. Failing to take into account the IC Report;

(iii) Failed to reinstate his membership upon his request of 13 October 2020.

99. Notably, the Second Claimant's claims are confined to his suspension and threatened termination; there is no claim in respect of the termination of his membership itself. The Defendants noted that the Second Claimant did not seek to rely upon any breach of Clause 16; in other words, he did not plead that the suspension of his membership was invalid on the basis that the Shoora was invalidly elected and thus any decisions that it made were void.

100. The Defendants denied any breach as regards the Second Claimant and assert that his membership was suspended for proper reasons without bad faith or irrationality and those reasons were notified to him.

Equitable Relief

101. The Claimants sought the following equitable relief:

(i) Declarations that:

a. The First Defendant and his supporters were engaged in electoral malpractice in breach of the Constitution;

b. The 2019 election of the Shoora Council and of the First Defendant as Central President were void and of no effect;

c. The suspension and termination of their memberships were void and of no effect;

d. The First Defendant had no power under the Constitution to order the First Claimant to delete the contact details of other MCA members and to refrain from contacting them;

(ii) Injunctions (or orders for specific performance) requiring the Defendants, the 2019-2021 Shoora Council, and the other MCA members at the time of the events that gave rise to these proceedings to take steps to give effect to or to reinstate the memberships of both Claimants, including steps to make them both members of the Third Defendant, MCA Limited.

102. The Claimants did not pursue in closing those parts of their claim relating to the Third Defendant.

Loss and Damage

103. The Claimants averred that they suffered loss and damage as a result of the breaches in the form of loss of access to the MCA organisations, injury to feelings and damage to their reputations. The Claim Form noted that the value of the claim did not exceed £10,000.

104. The Defendants denied that either Claimant may recover damages for the injury to feelings. They further asserted that even if the First Claimant's membership had not been suspended and terminated as a result of his conduct in the July 2020 meeting, there was a

chance he would have faced disciplinary proceedings (including suspension and termination) as a result of the IC's recommendation to take formal action against him. As regards the Second Claimant, the Defendants asserted that any damages he could recover were limited to the period prior to the termination of his membership.

Issues

105. The parties have agreed a list of issues, which seeks to distil the numerous issues raised by the statements of case down to nine key issues. These are:

(a) What is the true construction of Clause 16 of the Constitution?
(b) What breaches of Clause 16 have been proven?
(c) What are the consequences (if any) of such breaches for the validity of any of the actions of the Shoora Council and/or the First Defendant?
(d) Is the First Claimant estopped by convention from relying upon any invalidity that might otherwise be established?
(e) Was the termination of the First Claimant's membership in breach of the Constitution and, if so, in what respect(s)?
(f) To what relief (if any) is the First Claimant entitled against each Defendant?
(g) Was the suspension of the Second Claimant's membership in breach of the Constitution and, if so, to what relief (if any) is the Second Claimant entitled against each Defendant?
(h) Is the Third Defendant liable for any breach of the Constitution that either Claimant may establish?
(i) Is either Claimant entitled to any relief under s. 423 of the Insolvency Act 1986?

I shall deal with each issue in turn in light of the findings of fact made above and having regard to the further findings and inferences to which I refer below.

(a) What is the true construction of Clause 16 of the Constitution?

106. As with the constitution or rules of any unincorporated association, the Constitution had contractual effect between the members and is to be interpreted according to the ordinary rules of contractual construction. The relevant principles were summarised by the Court of Appeal in *Evangelou v McNicol* [2016] EWCA Civ 817, where the relevant unincorporated association was a political party:

> "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 Triesman* [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 1619 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 1304 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." (Emphasis added)

107. As the highlighted passages make clear, in construing the Constitution, the context, and, in particular the readership (in this case, the members of the MCA) to which the Constitution is addressed, may be taken into account.

108. The Claimants contend that the terms identified above at [90] are to be implied as forming part of Clause 16 of the Constitution. A term may be implied in a contract if specific conditions are satisfied: it is trite law that the basis of finding an implied term is that it is necessary for business efficacy and/or obvious. The law was recently restated by Lord Hughes in the Privy Council case of *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 at [5]:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

109. The Claimants did not plead a basis upon which the terms are to be implied e.g. that they are necessary and/or obvious. Mr Cawsey for the Claimants did not elaborate on this aspect of the case in his submissions, instead focusing his fire on the breach of natural justice aspect, which I come to below. The claim for these implied terms was not, however, abandoned. This somewhat lukewarm approach to this aspect of the claim is perhaps not surprising: there is considerable force in Mr McCormick KC's submission that these terms are neither necessary nor obvious and, on the contrary, would make the Shoora and the MCA ungovernable.

110. On a plain reading, Clause 16.2 primarily provides for consequences where it is determined before an election that an individual has been campaigning to be elected to the Shoora, rather than cases where a breach is detected post-election. The language is prospective: "[t]o seek" and "attempt" rather than "to obtain"; and "will disqualify" rather than "will invalidate". However, where it was established retrospectively that a Shoora member engaged in campaigning, it could be dealt with under Clause 16.2.3 as a serious disciplinary matter. The nature and extent of a breach may attract different sanctions. Can it be said in the light of these provisions that it is necessary for business efficacy and/or obvious that the terms asserted be implied? In my judgment, it cannot. The consequence of implying the first term contended for by the Claimants is not simply that the culpable individual's election would be rendered void and of no effect, but that every decision that they took part in, even if their role was minor, would be void and of no effect. There is no need for such a provision. The election of a person committing electoral breaches can be dealt with as a disciplinary matter. The retrospective negation of all decisions in which that individual participated would have extreme consequences. The Shoora is a large body comprising 19 members which is quorate when at least half of those eligible to attend and vote are present (Clause 17). In many cases, the vote of a single person, whilst important, will not be decisive. To negate the decision-making of the entire Shoora when only one member is found to be in breach would have a disastrous effect on the governance of the MCA. No reasonable member of the MCA expecting the organisation to govern itself on a stable basis, would expect that every decision should be unravelled because of the conduct of one member. Disciplinary action would enable the Shoora/MCA to take proportionate action. If it were found that the impugned member's involvement in a

particular decision had been decisive or critical then no doubt the Shoora could revisit that decision if it wished.

111. The second implied term contended for would have the same effect, but would not even require a breach or knowledge of breach by a Shoora member. All decisions made by the Shoora could be unravelled due to conduct amounting to a material breach by the Electoral Commission. For the same reasons, such an extreme consequence is far from necessary to make the Constitution work. In fact, it would be likely to have the opposite effect and bring the entire organisation to a grinding halt.

112. The total negation of the election and of all decisions taken – however uncontroversial or critical to the functioning of the MCA they were, whether or not any legal consequences flowed from them - is such an extreme outcome that it is implausible they would not be set out explicitly if intended by the contracting parties.

113. The third implied term, contended for in the alternative, does not seek to unravel all prior decision-making but provides instead that the member in breach would submit themselves to re-election and refrain from taking any "significant" decisions. In other words, the consequences under this implied term are prospective rather than retrospective. The mere fact that this alternative term does not seek to negate all prior decision-making undermines the Claimants' contention that such a consequence is necessary for business efficacy as per the first two implied terms. In any event, the third implied term lacks the exactitude necessary to make it capable of amounting to a contractual term. It does not clarify what distinguishes a significant decision from an insignificant or minor one. Furthermore, the ordinary MCA member would not expect an organisation that eschewed a nominations process for elected posts to hold an election recall for a culpable Shoora member.

114. For the reasons set out, none of the terms pleaded by the Claimants as being part of Clause 16 fall to be implied.

(b) What breaches of Clause 16 have been proven?

115. The Claimants rely on three categories of breach: (i) the Concerns Letter; (ii) the text messages; and (iii) a campaign against the First Claimant as described in the Uddin letter.

It was not in dispute between the parties that campaigning took place in the run-up to the 2019 election. Indeed, the Concerns Letter and the text messages render that self-evident. The witnesses provided further evidence that campaigning contrary to Clause 16 had occurred before the 2019 election and ranged from soft canvassing to more forceful demands. The question is whether either of the Defendants can be said to be responsible for such breaches as alleged.

116. Whilst it is probable that the First Defendant harboured some suspicions about who was behind the Concerns Letter and the texts, I find that he did not know who was actually responsible. I also find that he was not involved in drafting or circulating the Concerns Letter or the text messages, and nor did he direct anyone else to do so, tacitly or otherwise. It seems to me that the First Defendant regarded himself as somewhat 'above the fray' and did not engage in campaigning for his own election, directly or indirectly. As for the Second Defendant, whilst it was not directly put to him that he was behind these documents, I also accept his evidence that he had no knowledge of the Concerns Letter until the 2019 members' conference. It follows that, insofar as there was any failure on the part of any member to comply with Clause 16.2, neither Defendant was responsible for such failure.

117. Breaches are also alleged on the part of the six Shoora members in respect of whom the IC made adverse findings ("**the six**"). The six are not named Defendants in the action. However, as the claim is brought against the Defendants on behalf of themselves and "all other members" of the MCA, it is relevant to consider the allegation that these six were responsible for the breaches identified. The Claimants relied principally on the conclusions of the IC to support their allegations against the six. However, none of the authors of the IC report gave evidence as to its contents and it cannot be treated as evidence of the truth of what it contains. Moreover, Mr Ahmed, who is one of the six, gave evidence (which I accept) that he was simply asked by the IC whether he had campaigned and had told the IC that he had not done so. There was no evidence that Mr Ahmed had been given the details of the allegations of campaigning made against him and which were considered by the IC in coming to its conclusions. If (as appears to be the case) Mr Ahmed was not notified of the allegations and had no opportunity to question or challenge the evidential basis for the IC's conclusions then that is all the more reason to resist treating the IC report as evidence of the truth of its contents.

118. There was an attempt, during Mr Chowdhury's cross-examination, to elicit from him some acceptance of wrongdoing in light of one of the IC's recommendations, namely that Mr Chowdhury be given "words of advice" about complying with the Constitution. However, that appeared to me to ignore the fact that the finding to which that recommendation related was that the IC "did not find any credible evidence to substantiate the claims [of breaching the constitution] made against him".

119. The upshot of all this is that there was little evidence, and certainly none that crosses the threshold of probability, to establish that any of the six were directly involved in writing the Concerns Letter or the texts. As with the Defendants, however, it seems to me that Mr Ahmed and other witnesses for the Defendants probably harboured suspicions as to who was responsible. Some of the content of the Concerns Letter was such as to suggest that at least one fairly senior member of the Shoora was involved to some extent. It might even be the case that one or more of the witnesses at the trial were not, despite their oaths, as candid about this issue as they ought to have been. However, I must be guided by the evidence, and of that there is very little to indicate actual knowledge of authorship of the impugned items.

120. It was put to the Second Defendant that, by apologising and resigning their positions on the Shoora in the light of the IC report, the six had accepted those findings. That was denied. Although the Second Defendant's evidence was somewhat equivocal in that his statement could be read as implying such acceptance, in light of the limited evidence referred to above, I accept that none of the six did in fact accept the truth of the case against them. The resignations that were offered and accepted amounted to a compromise, reached in the wider interests of the organisation, between dealing with the allegations against each of the six with a full disciplinary process, with all the disruption that that would entail, and taking no action at all, which would have been to disregard the IC report altogether and undermined the purported firmer stance against electoral malpractice. It was, as Mr McCormick put it, a "fudge", but not one that established that there was any established breach of the Constitution by the Defendants (or the six).

(c) What are the consequences (if any) of such breaches for the validity of any of the actions of the Shoora Council and/or the First Defendant?

121. I have found none of the alleged breaches of Clause 16.2 proven against any particular Defendant. Even if there had been, for reasons already discussed, such breaches would not invalidate the election of a Shoora member or the Shoora Council, nor would it invalidate any actions taken by them.

(d) Is the First Claimant estopped by convention from relying upon any invalidity that might otherwise be established?

122. Invalidity has not been established, but I will briefly address the question of estoppel for completeness.

123. The Defendants submitted that even if the Court did hold that a breach of Clause 16 invalidated the election of the Shoora and any decisions taken by it, the First Claimant would still be estopped by convention from relying upon that invalidity. Estoppel by convention binds parties to their shared understanding of the terms and facts of a contract. In this case, the shared understanding would be the validity of the 2019 election.

124. There are five elements to estoppel by convention. The Supreme Court in *Tinkler v Commissioner for Her Majesty's Revenue and Customs* [2021] UKSC 39 [45] cited with approval Briggs J in *Her Majesty's Revenue and Customs v Benchdollar Ltd* [2009] EWHC 1310 (Ch) [52]:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit

> thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

125. The communication can be made by conduct (see *Dixon v Blindley Health Investments Ltd* [2015] EWCA Civ 1023 at [92]), and silence in the face of a duty to speak can amount to a communication (see *Process Component Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) [129] – [132])

126. In the present case, the communication made by the First Claimant that he had no reservations or doubts about the validity of the election could comprise: (i) the oath that he took before the membership; (ii) his conduct in participating in Shoora meetings and accepting the position to lead the Policy and Research Committee; and/or (iii) his lack of disclosure to the contrary prior to August 2020. The Defendants (as well as the other Shoora members and the wider MCA membership) relied upon the communication by proceeding on the basis that the concerns about electoral misconduct would be addressed through the establishment of the IC. The detriment to the Defendants would have been the invalidity of the election and the negation of decisions and action taken by the Shoora in that period. The Defendants add that the First Claimant was in an unusual position in that he had sworn to "express [his] own opinion on all matters clearly and consciously to the best of [his] knowledge and belief" and to "do [his] utmost to rectify any mistake that [he] notice[s] in the work/activities of [the MCA]". They submitted that it would have been unconscionable for the First Claimant, in the light of that oath, not to raise the issue and thus deny the Shoora the opportunity to deal with it. All of these matters point to the estoppel arising.

127. As I have stated above, the First Claimant did not form his view on the invalidity of the election until after his membership was terminated. However, if I had made contrary findings, I am satisfied that he would be estopped by convention from relying upon the invalidity.

(e) Was the termination of the First Claimant's membership in breach of the Constitution (and if so in what respect(s))?

128. Clause 18. 4 of the Constitution provides:

> *"18.4 A Member shall be given the opportunity to defend himself/herself prior to the termination of their membership, before the Shoora Council or a body appointed by the Shoora Council."*

129. This must mean that a hearing would take place before a decision was taken on the termination; were that not so, any hearing before the Shoora or some other body would be redundant.

130. The parties agreed that terms to ensure 'natural justice' are to be implied into Clause 18 but they differ on the precise form those terms would take and whether they have been breached in this case.

Applicable Law

131. Lord Mustill summarised the components of natural justice in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560D-560G:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer." (Emphasis added)

He added at 560H-561A:

> "[I]t is not enough for [the party claiming unfairness] to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather they must show that the procedure is actually unfair."

132. *Nelson v Evans* [2021] EWHC 1909 (QB) concerned member disciplinary proceedings conducted by the Labour Party, which is an unincorporated association. Part of the claim was that the process breached natural justice. Butcher J held at [11]:

> "… where a power or discretion is conferred upon the [unincorporated association], that power or discretion must be exercised in good faith, and the Party must not act arbitrarily, capriciously or irrationally"

133. In *Dymoke v Association for Dance Movemnet Psychotherapy UK Ltd* [2019] EWHC 94 (QB), Popplewell J (as he then was) stated at [56]:

> "So for example in *Ridge v Baldwin* [1964] AC 40, 132 Lord Hodson identified the three principle features of the requirement of natural justice as being the right to an unbiased decision maker, notice of the charges and a right to be heard in answer to the charges."

What terms are to be implied to accord with natural justice?

134. The difference between the parties as to the terms to be implied is that the Claimants' proposed terms are slightly more exacting. Applying the principles set out above, and having regard to the context, which is that of a community association without recourse to substantial administrative support or multiple layers of management, it seems to me that the appropriate terms to be implied are as follows:

> The powers of termination conferred by Clause 18:
>
> (i) Must be exercised in good faith and not for any improper purpose;
>
> (ii) Must not be exercised capriciously, arbitrarily or irrationally;
>
> (iii) Must be exercised with regard to the rules of natural justice,
>
> including:
>
> a. giving notice of the gist of any allegations against a member

b. giving that member a fair opportunity to respond to them;

c. the right to an unbiased decision maker;

d. the right to a brief explanation as to the reason for termination.

135. This is not fundamentally different from the Claimants' formulation save that there is no reference to being given a "proper" opportunity to defend and the provision of "proper" reasons. The word "proper" in this context might give rise to argument as to the extent of such opportunity or reasons. Clearly, in an organisation such as the MCA, the procedures will not be elaborate and the reasons for acting may be brief. However, so long as the opportunity to defend is fair, having regard to that context, there is an unbiased decision-maker and some explanation for any decision is provided, then the requirements of natural justice are likely to be met.

Application to the termination of the First Claimant's membership

136. The First Claimant did not plead that his suspension amounted to a breach of the Constitution or of natural justice, but, for completeness, I would not find that there was any such breach. The circumstances of the incident and the strength of feeling amongst Shoora members about it were readily apparent to the First Claimant by the end of the July 2020 meeting. The First Claimant's conduct on that occasion, albeit in the course of what he thought was a private conversation, could amount to conduct contrary to the principles and policies of the MCA within the meaning of Clause 18.2 of the Constitution. Compliance with the Constitution required abiding by Islamic principles. The members believed that one such principle was that against "backbiting", in respect of which the privacy of the conversation afforded no protection. The First Defendant, being the Central President, was therefore entitled to suspend the Claimant for three months in accordance with Clause 18.2.

137. The First Claimant does, however, make complaint about the steps taken subsequent to his suspension. The alleged breaches are summarised above at [96]. The majority of the alleged breaches have not been made out.

138. The circulation of the news of his suspension was not necessary but neither was it vindictive or done for any improper purpose. The news of Mr Al-Azami's suspension was similarly circulated. In any event, it is not alleged that this act influenced his subsequent termination, and so its relevance to the exercise of the power to terminate under Clause 18 is unclear.

139. I accept that the circumstances were considered 'exceptional' to justify the exercise of the power to terminate under Clause 18.3 (c). The First Claimant was given an opportunity to give his account on two occasions and declined to do so. The reasons for his termination were not particularised until the email of 15 August 2020, but, despite the suggestion of finality that the use of the term 'termination' in that email denotes, there was an opportunity for a further hearing. Having sent the lengthy email on 29 August 2020 after being informed of the termination and his right to request a review, he also declined to attend a hearing before the Shoora. As stated above at [137], I did not find that the termination was for the improper purpose contended.

140. However, although he was given an opportunity to state his account at a hearing, there is a question as to whether such opportunity was a fair one in the circumstances. If the proposed hearing is before a panel that could be said to be biased or not suitably independent then it may not be fair. In the email of 29 August, the First Claimant expressly asked the First Defendant to appoint an independent body to conduct a hearing. I bear in mind that what fairness demands is dependent on the context of the decision, which was that of an unincorporated community organisation. However, this does not mean that it eschewed all formalities or procedural fairness. Whilst this is a question about the breach of an implied term, it is relevant that Clause 18.4 provides for a member to be given the opportunity to defend him or herself before a body appointed by the Shoora. Thus the Constitution itself envisages that there may be circumstances where a body separate from the Shoora ought to preside over the hearing at which the member may state his case.

141. The MCA may not have had much administrative support or multiple layers of management, but it was not a small organisation. There were over 600 members spread across the country. It had been possible to appoint five members who had not served on the 2017-2019 or 2019-2021 Shoora to the IC. In these circumstances, the First Claimant's

demand for an adjudicator who was sufficiently independent and accepted as such by both the Shoora and the First Claimant was not unreasonable and far from impractical to accommodate. The Defendants submit that the nature of the conduct that the Shoora members observed did not create bias or the appearance of bias, and the fact that they had observed that conduct was a reason for them to be involved in the process. I accept that being a direct witness to an event does not necessarily preclude involvement in an adjudication about that event. Here, however, several members of the Shoora were not only witnesses to, but were also the *subject* of, the impugned conduct. The First Claimant had mentioned several Shoora members by name in the course of the conversation on 25 July 2020 and did so in ostensibly insulting terms. That formed the basis of the charges against him. Such members, by deciding upon action against the First Claimant, could be said to be judges in their own cause and therefore lacking in independence.

142. The potential for conflict was raised by at least one Shoora member at the relevant meeting itself. The minutes of 8 August 2020 record an agenda item: "Review of [the First Claimant's] suspension". The First Defendant informed the Shoora members that receipt of statements from members who had heard the conversation and a review of the recording led him to conclude that there were other issues that required discussion. He had also received messages from Shoora members who felt there had been insufficient time to consider the matter "with full justice and fairness" and requested a review. A discussion took place, and the minutes record that an unidentified Shoora member:

> *"raised an issue if brothers or sisters who heard the conversation between [the First Claimant] and [Mr Al-Azami] and the names he mentioned in the conversation were conflicted. [The First Defendant] asked [Mr Ayub Khan] to read out the [Conflict of Interests] policy, which he did. It was agreed and decided that Conflict of Interest is not relevant here as per the definition stated in the policy."*

143. Although that query was more about the perspective of witnesses to the conversation rather than those who were the subject of it, the potential for a conflict of interest was clearly within the Shoora's contemplation. The minutes do not record any consideration of the matter beyond adherence with the Conflict of Interests Policy. That policy, so far as relevant, provides:

> '5.4 As a rule, those with financial interests should withdraw from the meeting and those with non-financial interests could be allowed to stay,

> depending upon the circumstances. The meeting needs to determine whether there could be a matter of bias (any unfair regard with favour, or disfavour) in the matter. Members allowed to stay in the meeting are not allowed to vote on the subject matter
> 5.5 The Chair of the meeting must take a decision as to the need for the member of the meeting to withdraw or not from the proceedings.'

144. Whilst primarily directed at those with financial interests in a decision, clause 5.4 of the Conflict of Interests Policy is broad enough to encompass any matter which could give rise to bias. Clearly, being a decision-maker in one's own cause could give rise to a potential conflict. However, it seems that this was not considered sufficient by the Shoora to engage the policy. No other reason is recorded as to why those named in the conversation and those who heard the conversation were part of the decision-making panel. It was put to the First Defendant that an independent panel should have been appointed:

Counsel: *So you've taken the decision to terminate him and you're offering him the opportunity to make representations before the Shoora – comprising the same people who have terminated his membership already?*

D1 *Yes*

Counsel *Right, so that is not an independent or impartial tribunal, is it?*

D1 *We just followed the Constitution.*

Counsel *Did you think you should have had an independent impartial tribunal to determine whether or not [the First Claimant] was guilty of offences alleged against him and to consider what was a suitable punishment? You're shaking your head, no?*

D1 *What I'm saying is –*

Counsel *Did you consider appointing an independent and impartial tribunal –*

D1 *No. Because this is against the Constitution. Even [the First Claimant] terminated two members in his time. Okay, there is no third party involved in it. It's in our Constitution. The Shoora gives the authority and power. The Shoora – actually, suspension is done by the Central President, he doesn't need any consultation with the Shoora but [for] termination he needs consultation with the Shoora. And, then if [there is] any review [it] has to be done by the Shoora as well. This is all by the Shoora and [inaudible] Constitution.*

Counsel *Right, but if I ask you to turn to page 70 of the bundle, clause 5 of the Constitution says:*

> *"Principles. When taking decisions and formulating policies and procedures, Muslim Community Association shall always comply with – shall always comply with – Islamic principles based on Qur'an, Sunnah and Islamic teachings, UK and European law, as applicable."*

So it is not just Islamic principles, it is UK law. Your Shoora should have been considering English law when deciding whether or not [the First Claimant] was guilty and imposing a proportionate punishment if they found him guilty. [D1 – Okay] And what I'm saying to you is your Shoora Council acted unlawfully?

D1 *These two principles – Islamic principles based on Qur'an, Sunnah and Islamic teachings, and UK and European law, as applicable – these two principles are embedded in our Constitution and I followed the Constitution. So we didn't actually – we never did consult UK law independently in a particular case, we thought that everything was in our Constitution. We know our Constitution. If we follow our Constitution, we follow Islamic principles. If we follow our Constitution, we follow UK and European law. These things are the same. We may need to revise our Constitution, I don't know, but so far it has been our practice.*

…

Counsel *… And again, the Shoora who will decide whether or not to review are the same Shoora who have made a determination of guilt and the punishment in the first place?*

D1 *That is oath I took to abide by.*

Counsel *And I say to you that that system that you in place was unfair to [the First Claimant]?*

D1 *My responsibility is to uphold Constitution. If the Constitution was wrong then we'll see that we have to change it*

Counsel *But you didn't, didn't you … let's do the Second Claimant's case.*

145. The First Defendant's evidence appears to be that the Constitution was consistent with the law (notwithstanding the Defendants' acceptance that terms are to be implied to accord with natural justice) and that as the Constitution did not require there to be an independent panel, there was no breach in not having one. The Defendants pleaded that "the First Claimant did not seek any measures to exclude individual members of the Shoora from any hearing he did wish to have." That overlooks his repeated requests for an independent panel to be appointed. Counsel for the Defendants rightly submitted that it is not sufficient to show another process would have been fairer: it must be shown that the process used was unfair (as per *Doody*, cited at [131] above). In that sense, it is not sufficient for the First Claimant to establish that an independent panel with no Shoora members on it (or with none of those whose independence was in question) adjudicating would have been fairer; he must show that the procedure adopted was in fact unfair. I am satisfied that the inclusion of the members who were named by the First Claimant in the conversation that formed the basis of the allegations against him in the decision about terminating his membership *was* unfair. A critical part of the Defendants' case was that the terms used by the First Claimant to refer to members of the Shoora were deeply offensive and pejorative. I have accepted that the terms were likely to be regarded as insulting or offensive. In my judgment, at the very least, fairness required those members named by the First Claimant in the course of the impugned conversation to recuse

themselves. Quorum would have been maintained had they been excluded, but, had it not, I would have found fairness demanded that the power to co-opt (clause 9.1.3) be exercised or an independent panel be appointed, as had been the case with the IC.

146. I find, therefore, that the First Claimant's termination was the result of a breach of natural justice in that the decision to terminate was not that of an unbiased or impartial body.

(f) To what reliefs (if any) is the First Claimant entitled against the First and Second Defendants?

147. The First and Second Defendants breached the requirements of natural justice by failing to ensure that any final hearing relating to the allegations made against the First Claimant would be before an unbiased body.

148. Does that breach give rise to any remedy? The First Claimant contends that his termination ought to be declared null and void and injunctive relief be granted requiring the Defendants to reinstate his membership. The Defendants contend that if proper allowance is made for the relative informality of the organisation (so called "play in the joints"), then the breach may be viewed as a technical failure to follow the rules that ought not to give rise to any substantive remedy. Reliance is placed on the Court of Appeal's judgment in *Speechley v Allott* [2014] EWCA Civ 230, which concerned a dispute amongst the members of the Blakeborough Social and Sports Club about proposals to sell the club's bowling green. The trial judge, relying on the judgment of Megarry V-C in *GKN Bolts and Nuts Ltd* [1982] 1 WLR 774, had found that there had been a failure to comply strictly with the club's rules on holding elections but that such failure did not invalidate the election as a whole as the breaches fell into the category of 'play in the joints'. The Court of Appeal in *Speechley* quoted Megarry V-C, who said at 776 of *GKN*:

> "As is common in club cases, there are many obscurities and uncertainties, and some difficulty in the law. In such cases, the court usually has to take a broad sword to the problems, and eschew an unduly meticulous examination of the rules and resolutions. I am not, of course, saying that these should be ignored; but usually there is a considerable degree of informality in the conduct of the affairs of such clubs, and I think that the courts have to be ready to allow general concepts of reasonableness, fairness and common sense to be given more than their usual weight when confronted by claims to the contrary which appear to be based on any strict interpretation and rigid application of the letter of the

> rules. In other words, allowance must be made for some play in the joints." (Emphasis added.)

The Court in *Speechley* summarised the pertinent aspects of GKN as follows:

> "26. … The main issue in the case was whether the club had ceased to exist. But one subsidiary issue was whether a meeting had been validly convened. The club rules required 14 days' notice to be given, but in fact only three days' notice were given. Notice of the meeting was posted in the company's canteen, to which all the members had access. However, the requirement of 14 days' notice had hardly ever been followed. Seven or three days' notice were not unusual and there was no evidence that anyone had ever objected to short notice. The subject matter of the meeting was to discuss the sale of the club's sports ground, and Megarry V-C found that "with the prospect that a sale would bring some money to each member of the club, it seems obvious that news of the meeting would speedily reach all, if not quite all, of the members of the club." It was in those circumstances that he held that despite short notice, the resolution to sell the sports ground was validly passed. However, the same meeting (convened by the same notice) also passed resolutions altering the way in which the proceeds of sale of the sports ground would be distributed among the members, and Megarry V-C held that insufficient notice of that business had been given, with the consequence that those resolutions were invalid."

149. The Court of Appeal disagreed with the trial judge that the requirement for a notice of any general meeting to be posted "in" the club house was satisfied by a post on the notice board and on the front door whilst the club house was closed to members. It also found that the election that occurred at that same meeting by show of hands rather than by a ballot, as stipulated by the club rules, was a failure of substance rather than of form. It overturned the lower court's finding that these defects amounted to 'play in the joints' and held that the meeting at which the election took place had not been validly convened, rendering the business that was purportedly transacted in it ineffective [53]. Clearly, the application of the 'play in the joints' principle will depend on the particular facts.

150. In my judgment, the failure by the Defendants to provide an opportunity for the First Claimant to defend himself before a panel that did not include the individuals that he had referred to in the phone call was not a mere failure of form that can be dismissed as falling within the 'play in the joints' principle. It was a substantive defect in the process that resulted in the First Claimant being denied a meaningful opportunity to give an account of himself and the events in question, or to highlight any potentially mitigating features,

such as, for example, that the conversation was never intended to be heard by others. An unbiased panel might have taken a less antagonistic approach to the incident than did those who, understandably, took great offence at the words they had heard said and which they believed were directed at them.

151. The Defendants submitted that non-compliance with any of the express or implied terms of the Constitution would not have made a difference to the outcome because neither Claimant was interested in reconciling himself to what the Shoora Council had advised or to what the First Defendant required in his capacity as Central President as both were fixated with promulgating conspiracy theories about the invalidity of the 2019 election. However, that does not appear to me to answer the essential question of unfairness raised by the absence of an impartial panel. It is also no answer to say that there was a realistic prospect that his membership would have been terminated in any event as a result of the IC's finding against him. The six, facing a case to answer in respect of far more serious allegations of breach than those laid by the IC against the First Claimant, were permitted simply to resign for the remainder of the 2019-2021 term without being expelled. No reason was proffered as to why a similar privilege would not have been granted to the First Claimant in the interests of organisational harmony had his membership not been terminated.

152. There has therefore been a breach of natural justice / an implied term of the Constitution which is more than merely technical and in respect of which some remedy is due. The question is what remedy? The primary relief sought by the Claimants was that of injunctive relief. As they state in their skeleton argument (which was not prepared by Counsel), "[t]he main thrust of the [Claimants'] claim is for an injunction. Damages are small, negligible and not the [Claimants'] main purpose which is to retrieve their membership of the association where they have many friends and where an important purpose of their life is fulfilled." The difficulty for the First Claimant, however, is that the organisation of which he was a member, namely the MCA, no longer exists in the unincorporated form it held for most of its history. Faced with this obstacle, the Amended Particulars of Claim sought to construct a case for injunctive relief:

> "…requiring the [Central President], Shoora Council and the other members of the MCA at the time of the events set out above to take steps to give effect to

> and/or reinstate the memberships of both Claimants, including by taking steps to make both Claimants members of MCA Limited as the current embodiment of the association formerly constituted as the MCA."

153. The legal basis on which such injunctive relief could be ordered remains unclear, as are the "steps" that the Defendants could legitimately be required to take to effect the First Claimant's membership of MCA Limited. Furthermore, the Claimant has abandoned those parts of the claim that related to MCA Limited rendering it even more difficult to chart any route into that organisation. Even if such a route could be found (and this was, unsurprisingly, not a remedy pursued with any vigour at all by Mr Cawsey), I must bear in mind that the remedy of injunctive relief is a discretionary one, where one of the relevant factors would be the breakdown in relations between the parties. Without going into the matter in any detail, as the remedy was not pursued, it would be inappropriate in such circumstances to compel the Defendants to effect the First Claimant's membership of MCA Ltd. Whether or not relations are restored to a sufficient degree in future to enable the Claimants to re-enter the fold, as it were, is a matter between the parties.

154. As injunctive relief is not a realistic option in the circumstances of this case, the remaining potential remedies are a declaration and/or damages.

155. The relevant declaration sought is that the "suspension and termination of their memberships as the case were void and of no effect ….". As the Defendants rightly highlighted, declaratory relief is also discretionary. In *Bank of New York Mellon v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), Marcus Smith J summarised the position thus:

> "21. The power to grant declaratory relief is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration."

156. It is difficult to see in this case that declaratory relief would serve any useful purpose, particularly as the organisation of which the Claimants were members no longer exists. The findings above establish a contractual breach on a single ground. That finding itself (in conjunction with any associated damages – as to which see below) says enough about

the position between the parties without the need for further declaratory relief. I heard no submissions on the Claimants' behalf as to why such relief was necessary over and above any finding of breach.

157. That just leaves damages. The damages claimed on the Claim Form were "limited to £10,000". However, the Claimants have acknowledged, most clearly in their skeleton argument, that damages are likely to be "small [and] negligible". The Defendants submitted that the absence of pecuniary loss meant that damages would be nominal.

158. In oral submissions, however, Mr Cawsey drew the Court's attention to *Chitty on Contracts* (34th ed.), Chapter 29, Part 8 on non-pecuniary losses and the categories of such loss recognised where they were within the contemplation of the parties as not unlikely to result from the breach (29-158). He suggested that the case could be considered akin to the class of 'holiday cases' (*Jarvis v Swans Tours Ltd* [1973] Q.B. 233, *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468 etc) whereby "a failure, in breach of contract, to provide a holiday of the advertised standard or some other form of entertainment or enjoyment, damages may be awarded for the disappointment and mental distress caused by the breach of contract." (29-162) The footnotes to "other form of entertainment or enjoyment" cite the non-attendance of a photographer at a wedding he had been booked for (*Diesen v Samson (1971) S.L.T. (Sh.Ct.) 49*) and aggravated damages for deceit in a case of inducement to enter into a contract by fraud (*Archer v Brown* [1985] Q.B. 401). Mr Cawsey sought to extend that principle to the present case on the basis that the First Claimant derived great enjoyment from his membership of the MCA and the company of other members in pursuit of shared ideals, such that both contracting parties would contemplate that a breach would result in vexation and loss of the enjoyment provided by the association with other members and involvement in the organisation. He invited the Court to award damages beyond the nominal but still modest to compensate for the mental distress experienced by the First Claimant as a result of the breach.

159. Valiantly though that submission was made, I can see no basis for acceding to it. This is not like the holiday cases at all. Membership of the MCA was not advertised on the basis of particular enjoyment levels being achieved, and it is highly unlikely that those who joined did so for purposes other than a desire to do something for their communities. In

any event, the claim was not pleaded on the basis that it was within the reasonable contemplation of the parties when they entered into the contract, i.e. when the First Claimant became a member of the MCA, that such enjoyment would be derived from it. As such, there was no evidence before the Court on that issue. I have no doubt that the Claimants did gain real satisfaction from their membership of the MCA. However, their loss upon the termination of their membership was strictly non-pecuniary. The case does not fall into any of categories of exception to the general principle that damages cannot be recovered for distress or injury to feelings resulting from a breach of contract.

160. Accordingly, I award nominal damages of £100 to the First Claimant.

(g) Was the suspension of the Second Claimant's membership in breach of the Constitution (and if so in what respect(s))?

161. The Second Claimant pleaded a breach of natural justice as he was not given prior warning of his suspension or afforded an opportunity to defend himself, the First Defendant made the decision even though the complaints that form the basis of the allegations of breach against the Second Claimant were about the First Defendant i.e. that he was biased or at least had the appearance of being biased, and no proper reasons were given for the decision. He further contends that the real reason for his suspension was to suppress his efforts to expose electoral malpractice and the illegitimacy of the Shoora.

162. I do not accept that fairness demanded that which the Second Claimant contends was denied to him. There was, under the terms of the constitution, no need for any procedure involving, e.g. the giving of prior warning or notice, before the First Defendant suspended the Second Claimant's membership pursuant to Clause 18 of the Constitution. The First Defendant had a credible belief based on reasonable grounds that the email of 25 September 2020 amounted to misconduct and a breach of the Constitution. Having sought to deal with the Second Claimant's concerns and given him advice on how to conduct himself, the Second Claimant responded by writing to the First Defendant in terms that were offensive in that they sought to impugn the First Defendant's sincerity, accused him of concealing the true state of affairs and suggested that the First Defendant might "play dirty" with the IC's report or might not challenge others who sought to do so. The power to suspend was not therefore exercised in bad faith, irrationally or for some improper

purpose as alleged. I do not find that the email was a pretext for his suspension. As to the reasons for the suspension, these may not have been separately particularised but the context of the email correspondence made the basis of the decision clear, in my view.

163. Although the content of the Second Claimant's communications were critical of the First Defendant, I do not find that that precluded the First Defendant from deciding upon the suspension. Suspension is a temporary measure pending a final decision on membership status, or some improvement in conduct that obviates the need for continued suspension. The membership would expect that the Central President is empowered to make a decision on suspension even if the impugned conduct related to that person. This is a situation where, having regard to the MCA's status as an unincorporated community organisation, it would not be reasonable to expect the Central President or the Shoora to have to refer every question of suspension to some independent body merely because the conduct in question relates to or is critical of them. To do so would be to impose an unreasonable burden on the management of the organisation faced with a challenge to its authority. This is, in other words, one of those situations where "allowance must be made for some play in the joints": see *Speechley* cited at [148] above. The position might differ in relation to any final decision on membership status, as I have found was the case for the First Defendant. However, the Second Claimant pleads no case in respect of his termination.

164. Separately, the Second Claimant submits that Clause 18.3 was breached as he was not given an opportunity to rectify the alleged improper conduct after his initial suspension before the three-month extension. However, this clause relates to termination, about which no complaint is made by the Second Claimant. But in any event, the Second Claimant had ample opportunity, should he wished to have taken it, to rectify his conduct by raising his concerns in a reasonable and temperate manner. Instead, the Second Defendant continued to raise matters, including by posting insulting messages on social media, in a manner considered by the Defendants (not unreasonably) to be unacceptable.

165. I find therefore that the Second Claimant's suspension did not give rise to any breach on the part of the Defendants.

(h) Is the Third Defendant liable for any breach of the Constitution that either Claimant may establish?

166. Unsurprisingly, this was not pursued by the Claimants in closing submissions. The Third Defendant was incorporated after the Claimants' membership was terminated and has a legal personality distinct from the MCA.

(i) Is either Claimant entitled to any relief under section 423 of the Insolvency Act 1986?

167. The Claimants pleaded that it should be inferred from the timing of the incorporation of MCA and the transfer of its assets to the Third Defendant that incorporation was an attempt by the First and Second Defendants to evade liability in this claim and that the Court should exercise its powers under Section 423 of the *Insolvency Act 1986*.

168. Section 423 of the 1986 Act concerns transactions entered into at an undervalue. If a court is satisfied that a person, A, entered into the transaction in order to put assets beyond the reach of someone who is making, or may at some time make, a claim against A or otherwise to prejudice the interests of such a person in relation to such a claim, it can restore the position to what it would have been if the transaction have not been entered into. It is difficult to see what assets would be put beyond the reach of the Claimants by incorporation: the MCA was not a proprietary body and the claim for damages has always been minimal. In the event, this ground was also not pursued by the Claimants at trial and I need say no more about it.

Conclusion

169. The only aspect of the claim to be established is the First Claimant's claim that his termination was in breach of natural justice in that he did not have the opportunity to present his case to an unbiased decision-maker. For that breach, I award nominal damages in the sum of £100. All other claims are dismissed.

170. As I stated in open court and reiterate here, it is lamentable that a dispute between members of a community organisation should ever have reached this stage. The Claimants, the named Defendants, and all of the witnesses have devoted enormous amounts of time and energy to the MCA, and it should be a matter of deep regret for all involved that their differences could not be resolved without resorting to litigation.