Neutral Citation Number: [2017] EWHC 2527 (Admin)

Case No: CO/140/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand,
London,
WC2A 2LL.

Date: 12 October 2017

Before :

LADY JUSTICE RAFFERTY DBE
THE HON. MR JUSTICE POPPLEWELL

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Between :

The Queen on the Application of News Media Association	**Claimant**
- and -	
Press Recognition Panel	**Defendant**
IMPRESS: The Independent Monitor for the Press CIC	**Interested Party**

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- -

Lord Pannick QC and Iain Steele (instructed by **Reynolds Porter Chamberlain**) for the **Claimant**
Ben Jaffey QC (instructed by **Press Recognition Panel**) for the **Defendant**
Tom Hickman (instructed by **Bindmans LLP**) for the **Interested Party**

Hearing dates: 29 & 30 June 2017

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Approved Judgment

Judgment Approved by the court for handing down.

This is the Judgment of the Court:

1. The Claimant ("NMA") represents UK news media. The Defendant Press Recognition Panel ("the PRP") established by the Royal Charter on Self-Regulation of the Press 2013 ("the Charter") which itself followed the Leveson Report ("Leveson") published on 29 November 2012 recommending establishment of an independent self-regulatory regime, determines applications from Regulators for recognition.
2. NMA seeks judicial review of the PRP's decision of 25 October 2016 with reasons provided on 21 November 2016 to grant recognition to the Interested Party ("IMPRESS") which regulates a number of small or smaller publishers. NMA argues that the PRP misinterpreted and misapplied the Charter and invites us to quash its decision and to declare that IMPRESS fails to meet the Charter's Recognition Criteria ("Criteria") set out in Schedule 3.
3. The PRP resists the application contending that the decision challenged, taken after three rounds of open consultation during which NMA more than once advanced its views, is unimpugnable.

The legal framework

4. S34 Crime and Courts Act 2013 ("the 2013 Act") reads in part:

> "Awards of exemplary damages
>
> (1) This section applies where—
>
> (a) a relevant claim is made against a person ("the defendant"),
>
> (b) the defendant was a relevant publisher at the material time,
>
> (c) the claim is related to the publication of news-related material, and
>
> (d) the defendant is found liable in respect of the claim.
>
> (2) Exemplary damages may not be awarded against the defendant in respect of the claim if the defendant was a member of an approved regulator at the material time.
>
> (3) But the court may disregard subsection (2) if—
>
> (a) the approved regulator imposed a penalty on the defendant in respect of the defendant's conduct or decided not to do so,
>
> (b) the court considers, in light of the information available to the approved regulator when imposing the penalty or deciding not to impose one, that the regulator was manifestly irrational in imposing the penalty or deciding not to impose one, and

(c) the court is satisfied that, but for subsection (2), it would have made an award of exemplary damages under this section against the defendant.

(4)Where the court is not prevented from making an award of exemplary damages by subsection (2) (whether because that subsection does not apply or the court is permitted to disregard that subsection as a result of subsection (3)), the court—

(a) may make an award of exemplary damages if it considers it appropriate to do so in all the circumstances of the case, but

(b) may do so only under this section.

(5) Exemplary damages may be awarded under this section only if they are claimed.

(6) Exemplary damages may be awarded under this section only if the court is satisfied that—

(a) the defendant's conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights,

(b)the conduct is such that the court should punish the defendant for it, and

(c) other remedies would not be adequate to punish that conduct….."

5. S40 of the 2013 Act reads in part:

"Awards of costs

(1) This section applies where—

(a) a relevant claim is made against a person ("the defendant"),

(b) the defendant was a relevant publisher at the material time, and

(c) the claim is related to the publication of news-related material.

(2) If the defendant was a member of an approved regulator at the time when the claim was commenced (or was unable to be a member at that time for reasons beyond the defendant's control or it would have been unreasonable in the circumstances for the defendant to have been a member at that time), the court must not award costs against the defendant unless satisfied that—

> (a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator, or
>
> (b) it is just and equitable in all the circumstances of the case to award costs against the defendant.
>
> (3) If the defendant was not a member of an approved regulator at the time when the claim was commenced (but would have been able to be a member at that time and it would have been reasonable in the circumstances for the defendant to have been a member at that time), the court must award costs against the defendant unless satisfied that—
>
> (a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator (had the defendant been a member), or
>
> (b) it is just and equitable in all the circumstances of the case to make a different award of costs or make no award of costs……
>
> …
>
> (6) This section does not apply until such time as a body is first recognised as an approved regulator. ”

6. S34, in force, precludes exemplary damages after a relevant claim against a relevant publisher in relation to news-related material if at events generating the claim the defendant were a member of an approved regulator, unless that regulator acted irrationally. "Approved regulator" means a body recognised by the PRP; "relevant claim" is for libel, slander, breach of confidence, misuse of private information, malicious falsehood or harassment; "relevant publisher" a body which in the course of business publishes news-related material written by different authors editorially controlled. For economy of expression we shall omit the adjectives “relevant” “approved” and “appropriate” in the remainder of this judgment.

7. S40 of the 2013 Act, not in force, in general precludes the award of costs against a defendant if it were a member of a regulator when the claim began, unless the issues were incapable of resolution by arbitration or it is just and equitable to award costs. If the defendant were not a member of a regulator, the court must generally award costs against it even if the claim be unsuccessful, unless the issues would have been incapable of resolution by arbitration or it is just and equitable to make a different or no award. S40 does not apply until recognition.

The Leveson Inquiry and the Charter

8. Sir Brian Leveson wrote:

> "In order to meet the public concern that the organisation by the press of its regulation is by a body which is independent of the press, independent of Parliament and independent of the Government, that fulfils the legitimate requirements of such a body and can provide, by way of benefit to its subscribers, recognition of involvement in the maintenance of high standards of journalism, the law must identify those legitimate requirements and provide a mechanism to recognise and certify that a new body meets them."

9. Recitals to the Charter include:

> "...there should be a body corporate established for the purpose of determining recognition of an independent regulatory body or bodies in pursuance of the recommendations of [Leveson]."
>
> "...[Leveson] recommended that there should be a mechanism to recognize and certify an independent regulatory body or bodies for the press…"

10. The Charter defines "Regulator" in paragraph 1(a) of Schedule 4 as "an independent body formed by or on behalf of relevant publishers for the purpose of conducting regulatory activities in relation to their publications." It defines "relevant publisher", as does the 2013 Act, in terms set out in S41 of that Act and Schedule 15.

11. The PRP is a public body, its Board independent of Government, the press and other interests. Schedule 1 to the Charter sets out protections of its independence in decision-making. In synopsis: amendment to the Charter must be unanimously approved by the Board of the PRP and by affirmative resolution of a two-thirds majority in both Houses of Parliament; each member of the Board of the PRP is appointed by an independent appointments committee without Ministerial involvement; no member of the PRP may be an editor, publisher, member of an elected assembly (or the House of Lords if affiliated in recent years) or Minister. The Commissioner for Public Appointments must certify that selection of a member was fair, open and merit-based; appointments are for 5 years terminable only if in a reasoned decision a two-thirds majority of the Board of the PRP finds the member unwilling, unable or unfit to discharge the functions of a Member.

12. The PRP must grant recognition if the applicant meets 23 Criteria listed in Schedule 3 of the Charter, and must consider effectiveness, fairness and objectivity of standards, independence and transparency of enforcement and compliance, credible powers and remedies, reliable funding and effective accountability as articulated in Part K, Chapter 7, Section 4 of Leveson. ("K/7/4")

13. IMPRESS, when we heard this application, regulated 22 publishers responsible for 37 publications. Some are hyperlocals (operating on a community level) and multi-author blogs. Some multi-author blogs or incidental publishers of news-related material may be exempt from the scope of "relevant publishers" under the micro-business provisions in Schedule 15 to the 2013 Act as having fewer than 10 employees and an annual turnover not exceeding £2 million. Publishers of news-related material within a multi-author blog

or published on an incidental basis are regarded as relevant publishers if a member of a regulator.

14. The Independent Press Standards Organisation ("IPSO"), which uses the Editors' Code of Practice, at the date of this hearing regulated some 2600 newspaper and magazine titles in print and online, approximately 90% by circulation of the UK's national, regional and local press, approximately 80% of the UK's magazine publishers.

15. IPSO does not intend to seek recognition, and publishers it regulates do not intend to join IMPRESS. IPSO's stand, expressly acknowledged by Sir Brian as principled, is opposition to what it describes as the inconsistency between the freedom of the press on the one hand and the PRP approving self-regulatory press bodies on the other. It also suggests deficiencies within IMPRESS.

Recognition of IMPRESS

16. The PRP found IMPRESS relies overwhelmingly on funding from the Independent Press Regulation Trust ("IPRT") and will for the next few years. IPRT was set up so to allow IMPRESS to receive funds from the Alexander Mosley Charitable Trust ("AMCT") whose trustees are Mr Max Mosley, his son Max Patrick, his wife Emma and Horatio Mortimer.

17. Mr Mosley has since 2008 campaigned to strengthen regulation of the Press after the News of the World printed photographs of him which he found unwelcome. He unsuccessfully argued in the European Court of Human Rights for an obligation on newspapers to notify in advance anyone whose privacy would be compromised by publication, thus allowing an opportunity to seek injunctive relief: Mosley v United Kingdom (2011) 53 EHRR 30.

18. In 2016 he gave £200,000 to Tom Watson, Deputy Leader of the Labour Party, linked to the pressure group "Hacked Off" and a critic of Rupert Murdoch and of some of his businesses.

Interpretation of the Charter

19. It is not in issue that there should be a purposive approach to interpretation of statutes: R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687; R (English Bridge Union) v The English Sports Council [2016] 1 WLR 957. In the latter Dove J said that relevant circumstances surrounding the need for the Royal Charter will inform a reasonable person's understanding of its objects and powers.

"Regulator" and "independent self-regulatory body", NMA's point 1

20. The first criterion is that an independent self-regulatory body should be governed by an independent Board.

21. Under the heading "Voluntary independent self-regulation" Sir Brian wrote at K/7/4.11:

> "Ideally the body would attract membership from all news and periodical publishers, including news publishers online. It is important for the credibility of the system, as well as for the promotion of high standards of journalism and the protection of individual rights, that the body should have the widest possible membership among news providers. ….It has been accepted that, although I am very anxious that it remain voluntary, it must involve all the major players in the industry, that is to say, all national newspaper publishers and their online activities, and as many regional and local newspaper publishers, and magazine publishers, as possible. This is not meant to be prescriptive at the very small end of the market: I would not necessarily expect very small publishers to join the body, though it should be open to them to do so on appropriate terms….Ideally it would also include those who provide news and comment online to UK audiences."

At K/7/6.26 and K/7/6.27:

> "….My starting point is that only one regulatory body should be recognised at any one time… However, there are potential difficulties with this approach….."

At K/7/6.28:

> "[One solution] would be …a new requirement that the regulatory body had to have membership of over 50% of the relevant industry. ..."

At K/7/6.30:

> "An approach which required a minimum level of industry membership would be objective. However, too high a level might be too difficult for any industry grouping to achieve. Any proportion over 50% would make it possible for a few of the major publishers between them to ensure that the only proposal going forward was one led by them, irrespective of whether they actually had the support of the majority of the rest of the industry. It is questionable as to whether it would be helpful to put this much power in the hands of any of the large players."

At K/7/6.32:

> "There are also advantages to allowing more than one regulatory body. Different parts of the industry might want to apply different standards. As long as the standards offered meet the requirements set out above, there is no obvious reason to require the whole of the industry to coalesce around the standards acceptable to those who wish to do the least. If parts of the industry wanted to aspire to higher standards it is difficult to see why they should not be encouraged to do that."

22. Sir Brian wrote at K/7/6.37 that though all options had significant disadvantages:

> "it is in the best interests of the industry and the public that a single regulatory body should establish a single set of standards

> on which the public can rely ... it should be possible for the recognition body to recognise more than one regulatory body, should more than one …meet the criteria, but …. I would regard it as a failure on the part of the industry should it be necessary for that step to be taken".

23. NMA argues that implicit - it is certainly not explicit - in Leveson is that a Regulator has the support of a minimum number of or a proportion of the total body of publishers and that Sir Brian envisaged recognition only with substantial industry support, his concern restricted to whether it need be 50%. NMA argues that the Charter did not contemplate recognition of a body with de minimis support since, as we understand the submission, the industry would then endure compulsion rather than enjoy choice.

24. The PRP did not consider the Charter precluded eligibility on the basis of number and size at formation application or determination, nor did it see as a precondition support of more than a de minimis proportion of publishers. It contends that the text of the Royal Charter does not contain any requirement for proof of any particular degree of industry support, and that were such a requirement to have been intended it would have been included in the mandatory criteria articulated in Schedule 3; that there is no such requirement to be discerned in Leveson; that "*on behalf of*" in the definition of Regulator in Schedule 4 of the Charter indicate that a Regulator may be formed by persons other than relevant publishers, for the benefit and support of all relevant publishers; and that the wording makes clear that the Regulator does not need to have been created by particular relevant publishers.

25. NMA on the other hand argues that "*on behalf of*" requires the body to be formed on behalf of a substantial proportion of publishers. It submits that the temporal point is not decisive since IMPRESS has never enjoyed the support of more than a de minimis proportion of publishers. The PRP contends that the key date is that of application for recognition.

Discussion and conclusion on NMA's point 1

26. Paragraph 1 of Schedule 2 entitles and requires the PRP to grant recognition to a "Regulator", defined in paragraph 1(a) of Schedule 4 as "*an independent body formed by or on behalf of relevant publishers for the purpose of conducting regulatory activities in relation to their publications*".

27. IMPRESS plainly meets this qualification as formed on behalf of publishers for the purpose of regulating them. Nothing in the language of that defined term or in the Preamble or in Criterion 1 imposes any minimum number or size of publishers. "Self-regulatory" in Criterion 1 is shorthand for that definition: a body formed by or on behalf of publishers for the purposes of regulating them. It is fulfilled if the body is one the publishers choose to regulate them. That is what self-regulation means.

28. There is simply no size requirement in the Charter biting on a Regulator. By contrast where the Charter does impose a requirement relating to numbers of persons or size of group, it makes express provision: an appointments panel must include "a substantial majority" independent of the press (Criterion 3(b); the Board of a Regulator must

comprise "a majority" independent of the press and "a sufficient number" with experience of the industry (Criteria 5(b) and (c). A Regulator on the other hand may be one of multiple approved regulators, the only construction of "*an independent regulatory body or bodies*" in the Preamble to the Charter. Inevitably some will be larger and some smaller. Additionally, a Regulator must be open to all publishers on a fair, reasonable and non-discriminatory basis (Criterion 23) but without a precondition of a particular number of members supporting or joining at inception. The Charter nowhere restricts upper or lower size of the Regulator. Neither does it require proof of a substantial degree of industry support. The obvious place for any such requirement is in the list of Criteria from which it is conspicuously absent.

29. Nor does Leveson extend support to the argument of the NMA. Paragraph 1 of Schedule 2 merely requires the Panel to consider the identified concepts as articulated in Leveson K/7/4 when applying the Criteria. Whilst paragraph 4 of Schedule 2 provides that some identified Leveson recommendations may be taken into account, it provides in terms that they need not be, and that the Panel is precluded from refusing recognition by reason of a failure to comply with them provided the Criteria are met.

30. Whilst Leveson envisaged as the desired outcome self-regulation of the entirety or vast majority of the industry, the fallacy in NMA's submissions includes the assumption that it envisaged a requirement that *any* individual regulator should be regulating the industry as a whole. On the contrary, Leveson recognised that although the starting point was the desirability of a single regulator covering all publishers, that outcome also imported disadvantages. Accordingly, a regulator may regulate less than 50%; there may be a number of regulators; and any regulator may have standards different from those of the others.

31. Once it is recognised that a minority regulator is permissible for the purposes of regulating its own minority there is no logic in imposing a minimum size for that minority, provided the regulator meets the Criteria. Indeed to impose a minimum size would be illogical, where it is envisaged that more publishers can join after recognition (Criterion 23) and that recognition is intended to be an incentive for growth of support after recognition (Leveson and the 2013 Act). Size at recognition is immaterial to the legislative purpose. Rather, size *as a consequence of* recognition is important to the objective of industry-wide self-regulation.

32. NMA's argument is contrary to the scheme and objectives of Leveson and the 2013 Act, that maximum industry participation is to be achieved by incentives. Approval of IMPRESS does not oblige any publisher to join it. It does encourage all publishers to support and to subscribe to an alternative regulator should they wish. No publisher is obliged to do either. If, as is its entitlement, NMA opts to do neither then it does not enjoy the benefits of ss. 34 and 40, and endures the detriments of s.40.

33. This model promotes Leveson's explicit objective of industry-wide self-regulation. Contrary to the scheme would be a large part of the industry enabled to neuter the incentive regime by boycotting any process of which it did not approve or did not choose to support. That would defeat the incentives for reform and, as well as amounting to a veto of reform, has the potential to deprive others of the benefits of reform. This is counter to the "effectiveness" sought by Leveson and to the encouragement of participation through incentives.

34. A further test of the flaw in NMA's argument was evident during oral submissions to us when various ill-defined, and by no means synonymous, expressions aimed to categorise size, volume, percentage, or other noun of measurement were used to identify the quantity of support which NMA contended was required. Their number and variety without more illustrated that (a) nothing in the Charter imposes a size criterion and (b) the improbability of such an uncertain criterion being introduced other than by express language, especially where disparate parts of the industry have different roles and interests. NMA before us relied variously upon the following formulations:

> "…..no power to appoint a body which lacks support from a *substantial proportion* of publishers but enjoys it from *a de minimis proportion";*
>
> "….IMPRESS enjoys minimal support;"
>
> "….IMPRESS is not independent because it regulates *a tiny minority* of publishers";
>
> "…… a body must be of a *sufficiently large number of publishers* to serve as an *effective* industry self-regulator";
>
> "……. a regulator must command support of *at least a significant proportion* of the industry";
>
> "…….even where a regulator for a majority is in place, any other must have support from *a significant part of the industry*; *a small proportion* is insufficient."

35. The same is true of a criterion to define minimum size qualification. Should it be measured by circulation? Why not number of publishers? NMA appeared to accept the majority of a defined class of particular type of publishers as adequate. But what classes? What majority? Why a majority if a minority will do for the whole?

36. The practical consequences of NMA's argument are unattractive. We put two hypothetical examples which illustrate the point. Were two or three national newspapers to wish to form a regulator without support of the remainder of the press or publishing world, they would, on NMA's case, be unable to do so. In the other example in which all relevant publishers were members of an approved Regulator (say IPSO) save for a handful who wished to be members of an alternative Regulator in order to adopt higher standards, the latter would be unable to do so. In neither case would the inability to belong to an approved Regulator serve the purposes underpinning Leveson and the 2013 Act. In the latter case it would be directly contrary to K/7/6.32 of Leveson.

37. It is plain that the Charter means what it says and does not mean what it does not say. This is not contrary to the concept of self-regulation set out in Leveson or to the scheme Sir Brian recommended, rather it provides support for it.

38. In any event one must be cautious about reading parts of Leveson as legislative language. They are not. Their limited effect is plain by reference to the Charter

which in Schedule 2 paragraph 1 requires the PRP when addressing Criteria to "consider" the "concepts" of "… effectiveness …. [and] …. credible powers" articulated in Leveson. That requirement must be read as a whole and in the light of the balance of Leveson. References in the Preamble to the Charter do not alter this. Leveson is a legitimate aid to construction and application of the Criteria in the limited respect we have identified but it is not a tool for implying into the Charter an unarticulated additional criterion. The short answer to NMA's first point is that the Charter does not impose any such restriction, and the references in the Charter to Leveson are incapable of introducing legislative language which is not there.

39. There is nothing in this head of complaint.

Funding in agreement between industry and Board, NMA's point 2

40. Criterion 6 specifies:

> "Funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry ... (which are not as great for a number of the larger publishers as they are for the smaller, regional press) …".

41. NMA relied on Criterion 6 as obliging an applicant to have substantial support from relevant publishers but in any event submits that IMPRESS fails to satisfy the criterion since its funding is derived overwhelmingly from third party sources, IPRT. The PRP reasoned that the Charter did not preclude third-party funding.

42. Leveson includes at K/7/4.14:

> "The industry….has made a principled point that the industry should fund self-regulation without requiring input from the public purse. Certainly, I agree that any industry established independent regulatory body must be funded by its members. ....."

At K/7/4.16:

> "I recognise that it is not appropriate that the regulator should have a blank cheque, any more than that the industry should have a strangle-hold on the regulator's budget. In practice, if the regulator is too expensive, publishers will not join. I recommend that funding for the system should be settled in agreement between the industry and the Board, taking into account the cost of fulfilling the obligations of the regulator and the commercial pressures on the industry...."

At K/7/4.17:

> "I recognize that the start-up costs of such a body may be significant and those putting together such a proposal may need to look for sources of funding to help cover some of those costs. In this context I do not believe it to be unreasonable for

> some public funding to be made available to facilitate the establishment of a …..regulatory body."

43. The PRP suggests IMPRESS's membership fees are consistent with Criterion 23 that membership of a regulatory body should be open to all publishers on fair, reasonable and non-discriminatory terms, including making membership potentially available on different terms for different types of publisher.

44. NMA argues that this is to miss the point: Criterion 6 bites on the source of the funding which must come from those regulated and that IMPRESS does not so qualify.

Discussion and conclusion on NMA's point 2

45. Criterion 6 mirrors Leveson. The Charter's plain language shows that funding **by** the members of a Regulator is not required, only **agreement as to** funding from that section of the industry which agrees to be regulated by it. Members of IMPRESS so agree when signing up. It is not without interest that NMA made just this submission to the PRP in its submission of 4 March 2016 at paragraph 25: "The Charter criteria explicitly envisage a system of funding that is "settled in agreement between the industry and the Board", in other words a funding system whereby the industry to be (self-) regulated pays for the regulatory structure or at least agrees to the means by which it is to be funded." NMA's submissions to this court are a *volte face* and the criticism of PRP unattractive.

46. Giving effect to that plain language is not contrary to Leveson, which addresses a dichotomy between public funding and private funding, but not between membership funding and third party private funding, the assumption being that if the Board of a regulator and its members be content that third parties put up the money that does not constitute a problem.

47. Alternatively, even if one could construe the Charter as requiring member funding albeit not saying so, Leveson K/7/4.17 envisages non-member funding at least for start-up costs. That can only mean such costs as are necessary for a regulator otherwise satisfying the Criteria so as to gain sufficient members to enable it to fund itself from those and future members. That is not time limited. Given the incentive structure of the scheme, and that an initially recognised regulator might for a considerable period have a small actual or prospective membership whilst incentives bite, there is no requirement for IMPRESS in the first four years to be funded by members. The more the incentives kick in, the more likely IMPRESS could fund itself from members before the end of that period. It would not be irrational or contrary to Criterion 6 to treat the full four years as potentially within what Leveson contemplated as a start-up period.

48. Concepts required by Schedule 2 Article 1, effectiveness and credible powers (the two heads led in submissions by NMA), lead to the same result. Nothing in the funding by AMCT diminishes IMPRESS'S credibility or effectiveness by comparison with the posited alternative of funding by members. Rather, the opposite is arguable. NMA's rationale that if members pay they are more committed makes no sense, nor is it

articulated by Leveson. If they sign up to the scheme they are bound by it, whoever pays.

49. There is nothing in this head of complaint.

Funding and an independent self-regulatory body; NMA's point 3

50. NMA submits that Criterion 1 requires a body recognized to be independent and that the additional Criterion 6 appearance of independence is not achieved since IMPRESS is dependent on funding from Mr Mosley. IMPRESS recognizes that it was and is vital it should be free of influence from Mr Mosley or his family.

51. The PRP Executive advised the PRP Board that in context the risks would be plain were a funder enabled to influence the regulator or to compromise its credibility by withdrawal (or threat thereof) of funding. A finding on this topic would be on the facts and depend upon safeguards, for example the terms of the agreement between funder and regulator and the latter's governance terms. The PRP Executive was clear: IPRT was set up primarily if not exclusively as the vehicle for AMCT funding - £3 million on deposit at the date of this hearing - to reach IMPRESS. The funding deed gives the IPRT's Trustees the right to terminate or reduce the grant or any payment to IMPRESS on 10 days' notice if any part of the grant is in the reasonable opinion of the IPRT Trustees no longer required or it is no longer practicable for IPRT to continue funding IMPRESS.

52. The PRP decided the agreements were sufficiently robust to protect against material influence. Formal processes provide a sufficient degree of confidence.

53. NMA submits that funding of IMPRESS remains vulnerable to decisions by the IPRT given IMPRESS's dependence on funding from IPRT, IPRT's dependence on Mr Mosley's family trust, and his strong views on press regulation. It suggests that at the very least IMPRESS lacks the appearance of independence.

Discussion and conclusion on NMA's point 3

54. There was before us no suggestion that the PRP applied the wrong approach. The ground of challenge merely suggests that the directors of IMPRESS would subconsciously have had in the back of their minds a desire to please the ultimate funder so as to secure continuity of funding after 4 years or so as to avoid what would be a breach of the contractual and trustee duties before then. This comes nowhere near meeting the familiar test in Porter v McGill [2002] 2 AC 357 HL and Helow v SSHD [2008] UKHL 62, where the fair minded independent observer posits the objective test for bias.

55. The argument once unpicked can be seen not to depend on Mr Mosley having strong views. It would bite on any individual or organisation able to provide funding, almost inevitably a potential target for press criticism or comment. If the *Porter v McGill* test were satisfied, it would bar from recognition almost any applicant or at the very least the overwhelming proportion of applicants whether the source of funding were membership of the industry, the government or another avenue.

56. In our view the PRP scrupulously considered the robustness of the structures and satisfied itself that they did not permit Mr Mosley to exert influence.

57. There is nothing in this head of complaint.

Impartiality in members of the IMPRESS Board, NMA's point 4

58. The Charter requires an independent self-regulatory body to be governed by an independent Board and any member of the Board should be a person who can act fairly and impartially in decision-making. The PRP must consider the impartiality of Board members of a body seeking recognition: Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014.

59. NMA during the consultation process argued and before us repeated that the IMPRESS Board would be seen as lacking partiality [sc impartiality] because of the views and connections of some members. Martin Hickman has with the Labour Party deputy leader Tom Watson co-written a book highly critical of News International. The complaint about Mr Hickman is not that he has opinions but that those he holds on the Press are so strong, and his campaigning activities so pointed, as to give rise to an appearance of bias to which IMPRESS's processes provide no answer. NMA has also raised concerns about the lack of impartiality of other Board and Code Committee members of IMPRESS. It acknowledges, as it must, that such submission was not before the PRP when the latter made its decision.

60. Criterion 1 provides that the Regulator should be governed by an independent Board and Criterion 5(f) provides that a member of the Board should "in the view of the appointment panel, be a person who can act fairly and impartially in the decision-making of the Board."

61. Criterion 23 requires membership to be open to all publishers on fair, reasonable and non-discriminatory terms, potentially different for different types of publisher.

62. The PRP Board considered that the involvement of Mr Hickman did not prevent the appointment panel having fulfilled Criterion 5(f) and fell short of non-compliance with Criterion 23. It felt it likely any regulator's Board members would have opinions on the Press, so it had reassured itself that the satisfaction of the appointment panel which appointed the IMPRESS Board as to the independence and impartiality of the Board members satisfied the only requirement upon the PRP.

63. NMA complains that the PRP has not explained what if any steps it took to assess whether individuals met Criterion 5(f). NMA argues that implicit in Criterion 5(f) is the PRP's duty to refuse recognition if it considers the appointment panel has appointed persons not impartial or who lack the appearance of impartiality. The PRP's answer is that its only role is to consider whether the appointment panel considered the persons concerned impartial.

Discussion and conclusion on NMA's point 4

64. In our view the PRP's function is not to appoint, or approve appointment of, members of the Board. That is for the appointment panel. Criteria 5(f) does no more than require the PRP to be satisfied that an applicant has an appointment panel capable of

fulfilling the function set out, namely appointing Board members who in its view meet the impartiality criterion. Whilst no doubt an egregiously inappropriate Board appointment or proposed appointment might leave the PRP unsatisfied about the existence of a qualifying appointment panel, refusal of recognition would not be justified unless that panel were thought incapable of fulfilling its proper functions. The test is thus whether it were irrational for the PRP to find that any competent appointment panel might rationally conclude that Mr Hickman (and others) could act without actual or apparent bias.

65. NMA's argument is hopeless on the facts. Mr Hickman's sole publication potentially giving rise to a conflict of interest concerned News International, which has disavowed joining IMPRESS. Were News International to become involved Mr Hickman could detach from any consequent decision.

66. The Panel dealt with this issue properly. It noted as to Criterion 5(f) that recruitment operated in accordance with a protocol and advertisement with published criteria that included fairness, independence and integrity applied by the appointment panel. It was satisfied that IMPRESS' appointment panel had satisfied itself of the Board's ability to act fairly and impartially. NMA does not take issue with that conclusion, rather, upon analysis its arguments import an extra requirement, that the Panel was required to form its own view. The hopelessness of this is plain when one understands that Criterion 5(f), alone within Criterion 5, operates "in the view of the appointment panel" of the Regulator. It does not operate in the view of the PRP.

67. Applying Criterion 23, the Panel found mechanisms in place dealt with any risk of perceived bias by individual board members. That analysis is unimpugnable. Not every Board member may be equipped to handle a complaint by every potential member but such does not compromise the independence of IMPRESS as a whole. Nor is there any reason to assume the universality of Mr Hickman's involvement in regulation. Potential conflicts of interest could be identified, declared and managed.

68. As to the other directors there is even less of a factual basis for an irrationality challenge. Nicol J granting permission pointed out that the Court will ordinarily take into account only facts known to the decision maker at decision. Since no concerns were raised at that time criticism can be advanced only on the recently formulated grounds that the PRP should have made further inquiries. The flaw in that argument is readily apparent: none of the extensive objections filed by NMA raised it, and NMA disavowed any procedural ground of challenge.

69. We reject this head of complaint.

Responsibility for and adoption of the Standards Code, NMA's point 5

70. Criteria 7 and 8 read:

> "7 The standards code must ultimately be the responsibility of, and adopted by, the Board, advised by a Code Committee which may comprise both independent members of the Board and serving editors. Serving editors have an important part to play although not one that is decisive. "

> 8 The code must take into account the importance of freedom of speech, the interests of the public ... the need for journalists to protect confidential sources of information, and the rights of individuals. ..."

71. IMPRESS began consultation on a Code on 12 May 2016. Its own Code has been in use since 24 July 2017. The PRP decided that in context the decision to adopt the Editors' Code until it identified its own fulfilled the requirement in the Criteria. NMA submits that that analysis is wrong in law since it is insufficient for an applicant to draw attention to a Code adopted by a third party and the PRP could not assess whether IMPRESS satisfied the Criteria.

72. Criterion 7 it suggests imposes the discipline of an applicant settling on the contents of its intended Code and of this the PRP unlawfully absolved it. It also unlawfully absolved itself of the concomitant duty to assess. It is no answer for the PRP post-adoption to consider IMPRESS' new code. Recognition has important legal consequences. Paragraph 7 of Schedule 3 to the Charter cannot have intended recognition granted by reference to a Code the applicant did not intend to apply, a deduction evident since it was consulting on its own Code and necessarily that task was inchoate. NMA submits that both Charter and Act require completion of the task pre-recognition, so that the PRP's decision is based on the Code the applicant intends to apply.

73. Sir Brian wrote:

> "…….. it is essential that it should be the regulator who approves a code of standards to which members must adhere. ..."
>
> I recommend that the standards code must ultimately be the responsibility of, and adopted by, the Board advised by a Code Committee which may comprise both independent members of the Board and serving editors."

74. The Preamble to the Charter includes:

> "AND WHEREAS the independent regulatory body which is intended to be the successor to the Press Complaints Commission should put forward the Editors' Code of Practice as its initial code of standards."

Discussion and conclusion on NMA's point 5

75. As the Preamble suggests, there was no requirement to adopt the Editor's code save as an initial code. That is what IMPRESS did: the members signed up to it and it was and remains in force for them. That IMPRESS said it would consult on and replace it with a new code is what the legislative regime envisages. The PRP will review the new code; if that code passes muster the PRP need do nothing. If it does not, the PRP can put in place an ad hoc recognition review, as Schedule 2 contemplates. But as a reading of Criteria 7 and of Leveson make plain, it is the Regulator, not the PRP, which determines the contents of the Code.

76. We reject this head of complaint.

Serving Editors, NMA's point 6

77. NMA submits that IMPRESS was required to have a serving editor on its code committee and failed to do so.

78. Criterion 7 provides that the Code Committee "may comprise both independent members of the Board and serving editors" and that serving editors have an important though not decisive part to play.

79. The PRP reasoned that this did not refer only to the regulator's code committee but to the process overall of formulating and adopting a Code.

80. NMA submits that correctly interpreted Criterion 7 requires the Code Committee to include serving editors, as the second sentence underlines.

81. Sir Brian recognized that it is essential editors, thoroughly grounded in real world current experience of the industry, should take pride in their Code, but the standards to which the industry are to be held cannot be set without independent oversight. He went on at K/7/4.21:

> "The Board could well be advised by a Code Committee including serving editors and journalists, but with independent members as well……I recommend that the standards code must ultimately be the responsibility of, and adopted by, the Board advised by a Code Committee which may comprise both independent members of the Board and serving editors."

82. NMA submits that whilst Sir Brian advised a careful balance of interests and experience the PRP impermissibly allowed exclusion from the Code Committee of the experience of serving editors and that its view that their role is met by IMPRESS consulting on its Code is flawed.

83. IMPRESS says that in any event, albeit not part of the Reasons of the PRP, Mary Fitzgerald, serving editor of the news publication Open Democracy, not a member of IMPRESS, is a member of the Code Committee.

Discussion and conclusion on NMA's point 6

84. The requirement for which NMA argues is simply not found within Criteria 7: "may" means may. The views of serving editors may achieve an important role through the consultation process. In any event and on any analysis Mary Fitzgerald qualifies as a serving editor. Schedule 4, para. 2(e) defines an editor as including "any person who acts in an editorial capacity in relation to the publication". Nothing in the Charter requires the editor's publication to be by a "relevant publisher" or to be a member of IMPRESS.

85. We reject this head of complaint.

86. We have not found it necessary, for the resolution of this application, to rehearse and announce a view on the arguments of IMPRESS, the interested party, save by one or two references. That economy should not be taken as conveying any view of the merits of its submissions, rather that our conclusions on all heads of complaint by NMA is dispositive of this application. We would reject it.