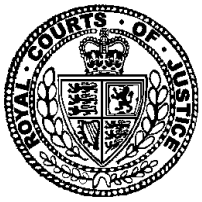

Neutral Citation Number: [2019] EWCA Civ 2150

Case No: A2/2019/2874 & A2/2019/2874(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE SWIFT
[2019] EWHC 3200 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2019

Before:

LORD JUSTICE MALES
LADY JUSTICE SIMLER
and
SIR PATRICK ELIAS

- -

Between:

ROYAL MAIL GROUP LIMITED	**Respondent**
- and -	
COMMUNICATION WORKERS UNION	**Appellant**

- -
- -

Lord Hendy QC & Mr Stuart Brittenden (instructed by **Penningtons Manches Cooper LLP**) for the **Appellant**
Mr Bruce Carr QC (instructed by **DAC Beachcroft LLP & Royal Mail Group Legal**) for the **Respondent**

Hearing date: 28th November 2019

- -

Approved Judgment

Lord Justice Males: Introduction

1. On 13th November 2019 Swift J granted an injunction to restrain the defendant trade union from calling strike action in reliance on the outcome of a ballot of its members employed by the claimant company. The ballot was conducted between 24th September and 15th October 2019 and resulted in an overwhelming vote in favour of industrial action. The claimant, however, contended that it did not comply with the requirements of section 230 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") and that, as a result, if strike action were to be called, the union would not be entitled to the immunity in tort for actions taken in contemplation or furtherance of a trade dispute for which section 219 of the Act provides.

2. As the application before the judge was for an interim injunction, he was required by section 221 of the 1992 Act to (and did) have regard to the likelihood of the union establishing any matter which would afford it a defence to the action. As he said, this meant that the task faced by the claimant was more onerous than in a case outside section 221 to which the *American Cyanamid* principles would apply without that qualification.

3. It was common ground that the proposed action was in contemplation or furtherance of a trade dispute, but the judge concluded that it was not likely that the union would succeed on its argument that there had been compliance with section 230; that damages would not be an adequate remedy for the claimant company in the event of unlawful strike action; and that the balance of convenience favoured an injunction.

4. The union seeks permission to appeal from this decision, the sole ground of challenge being that the judge was wrong to conclude that it was likely that there had been a failure to comply with section 230. A rolled up hearing took place before us on 28th November 2019. We grant permission but, as we informed the parties at the conclusion of the hearing, we dismiss the appeal. This judgment sets out my reasons for doing so.

Background

5. The claimant and the respondent to the appeal, Royal Mail Group Limited ("RMG"), is the national provider of a postal service across the United Kingdom. It provides a range of postal services, which include delivering letters and parcels six days a week to over 30 million addresses across the country. In 2018-19 it handled around 14.7 billion items. Typically it delivers between 20 million and 35 million items a day, but this can more than double during the weeks leading up to Christmas.

6. The defendant and appellant, the Communication Workers Union ("the union" or "the CWU"), is a trade union recognised by RMG for all its non-managerial employees of whom there are more than 124,000 working across the United Kingdom. About 110,000 of those employees are members of the union.

7. It is unnecessary to describe the current dispute in any detail. It is sufficient to say that it arises because the union takes the view that RMG's plans for its business are contrary to both the letter and the spirit of an agreement reached in 2018 which was itself the settlement of a previous dispute in 2017 concerning proposed changes to employees' terms and conditions relating to the regrading and closure of a defined benefit pension

scheme. That settlement was reached following a ballot which voted in favour of industrial action.

8. In September and October 2019 the union conducted a postal ballot of its members employed by RMG seeking support for industrial action. Ballot papers were issued to the relevant membership, a total of 110,292 RMG employees, by Electoral Reform Services, which acted as the independent scrutineer pursuant to section 226B of the 1992 Act, on 24th September 2019. The ballot closed on 15th October 2019, by which time 83,704 CWU members had voted. This represented 75.9% of those to whom ballot papers were issued. Of those who voted, 81,232 (or 97.1%) voted in favour of industrial action, with 2,421 against. The union says that this reflects the strength and depth of members' feelings about the dispute.

9. In reliance upon that ballot, the union wishes, unless the dispute can be resolved by negotiation, to be able to call upon its members to participate in lawful strike action. It takes the view that without a real threat of industrial action, the dispute is unlikely to be resolved to its satisfaction. It wishes to be able to exert maximum but legitimate pressure on RMG by calling for a series of single or multi-day strikes during the Christmas period.

10. At the time of the hearing before the judge the proposed strikes would also have affected postal voting during the general election due to be held on 12th December 2019. This was a factor which affected the judge's assessment of the balance of convenience, but was not relevant to the likelihood or otherwise of the union succeeding in its defence, that being a question which depended on whether there had been compliance with section 230 of the 1992 Act. As matters now stand, the potential impact on the general election has fallen out of consideration. That is because the union would be required to give 14 days' notice of any strike pursuant to section 234A of the 1992 Act, which notice would now expire too late to affect postal voting in the election.

11. Two other ballots were conducted by the union at the same time as the ballot with which we are concerned, both of which concerned employees of Parcelforce, a part of RMG. One of these ballots related to a separate dispute but the other was concerned with effectively the same dispute as the ballot in issue here. There were 4,217 Parcelforce employees entitled to vote in these ballots. In both of them there was a high turnout (67% and 69.4%) and an overwhelming majority in favour of industrial action (95% and 94.7% of those voting). The Parcelforce ballots did not give rise to the conduct of which RMG complains in this action. RMG has not challenged the union's right to call for industrial action in reliance upon them if it wishes to do so.

The statutory framework

12. Section 219 of the 1992 Act provides for immunity from liability in tort for actions undertaken in contemplation or furtherance of a trade dispute. By section 219(4), however, that immunity is subject to compliance with specified provisions in Part V of the Act including sections 226 and 234A which provide for the holding of a ballot and the giving of 14 days' notice of industrial action to the employer.

13. Section 226 provides that industrial action is not protected (i.e. does not have immunity from liability in tort) unless it has the support of a ballot conducted by the trade union; and that it is not to be regarded as having that support unless the ballot has been

conducted in accordance with the requirements of sections 227 to 231 in which at least 50% of those entitled to vote did so, and a majority of those voting voted in favour. Section 234 provides that a ballot which complies with these requirements remains effective to confer immunity for a period of six months or such longer period not exceeding none months as may be agreed.

14. The requirements which are relevant in this case are set out in section 230, which provides:

> "**Conduct of ballot**
>
> (1) Every person who is entitled to vote in the ballot must—
>
> (a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees, and
>
> (b) so far as is reasonably practicable, be enabled to do so without incurring any direct cost to himself.
>
> (2) Except as regards persons falling within subsection (2A), so far as is reasonably practicable, every person who is entitled to vote in the ballot must—
>
> (a) have a voting paper sent to him by post at his home address or any other address which he has requested the trade union in writing to treat as his postal address; and
>
> (b) be given a convenient opportunity to vote by post.
>
> …
>
> (4) A ballot shall be conducted so as to secure that—
>
> (a) so far as is reasonably practicable, those voting do so in secret, and
>
> (b) the votes given in the ballot are fairly and accurately counted.
>
> For the purposes of paragraph (b) an inaccuracy in counting shall be disregarded if it is accidental and on a scale which could not affect the result of the ballot."

15. Subsections (2A) and (2B) deal with the special position of merchant seamen who are at sea during the ballot period. It provides for ballot papers to be made available to such seamen on their ship and for them to be given an opportunity to vote while on the ship.

16. For present purposes, therefore, there are three requirements which must be satisfied. First, employees must be allowed to vote without interference or constraint by the union or its officials (subsection (1)(a)). Second, employees must so far as reasonably practicable have a ballot paper sent to them by post at their home address (subsection

(2)(a)). Third, the ballot must be conducted so as to secure that, so far as reasonably practicable, voting is in secret (subsection (4)(a)).

17. The requirement for ballot papers to be sent to employees' home addresses was introduced by amendment in 1993. As initially enacted, the section provided for ballot papers to be provided at the workplace and for employees to be given an opportunity to vote by post or at work. Subsections (2) and (3), now repealed and replaced, provided that:

> "(2) So far as is reasonably practicable, every person who is entitled to vote in the ballot must–
>
> (a) be supplied with a voting paper, or
>
> (b) have one made available to him immediately before, immediately after, or during his working hours, at his place of work or at a place which is more convenient for him.
>
> (3) So far as reasonably practicable, every person who is entitled to vote in the ballot must be given either–
>
> (a) a convenient opportunity to vote by post, or
>
> (b) an opportunity to vote immediately before, immediately after, or during, his working hours at his place of work or at a place which is more convenient for him,
>
> or, as alternatives, both of those opportunities.
>
> No opportunity to vote shall be given except as mentioned above.

18. Section 232B provides for small accidental failures to comply with some of these requirements to be disregarded:

> "**Small accidental failures to be disregarded**
>
> (1) If—
>
> (a) in relation to a ballot there is a failure (or there are failures) to comply with a provision mentioned in subsection (2) or with more than one of those provisions, and
>
> (b) the failure is accidental and on a scale which is unlikely to affect the result of the ballot or, as the case may be, the failures are accidental and taken together are on a scale which is unlikely to affect the result of the ballot,
>
> the failure (or failures) shall be disregarded for all purposes (including, in particular, those of section 232A(c)).

> (2) The provisions are section 227(1), section 230(2) and section 230(2B)."

19. Thus section 232B applies to the requirement that ballot papers are sent to employees' home addresses, but does not apply in the event of interference from or constraint imposed by the union, and does not apply to a failure by the union to secure so far as reasonably practicable that voting is in secret.

20. The general approach to the interpretation of Part V of the 1992 Act been described in two decisions of this court. In *British Airways Plc v Unite the Union (No. 2)* [2010] EWCA Civ 69, [2010] ICR 136 (a case concerned with the provision of information about the result of a ballot, a requirement contained in section 231 of the Act) Smith LJ said.

> "110. Ever since 1906 trade unions have been entitled, with impunity, to organise strikes related to trade disputes. In 1982 Parliament introduced measures designed to curb what was seen as irresponsible and undemocratic behaviour by some trade unions. Those provisions, as slightly amended, are found in Part V of the 1992 Act.
>
> 111. In particular the provisions were designed to prevent wildcat strikes. That is strikes called at such short notice that employers had no warning of what was coming, had no chance to try to persuade their employees not to take part, and no chance to make contingency plans to protect their businesses during the strikes. To that end Part V contains requirements that the Union provides advance information to the employer as to its intention to hold a ballot and identifying the groups of workers who will be involved.
>
> 112. Another major concern at the time of the legislation was that strike ballots often took place in a very informal way, typically in the work's carpark where everyone could see who was voting for and against the strike. There was concern that some workers were not able to take part. Others who could take part were put under pressure, at times even bullied into supporting the strike. The new provisions now found at sections 226 to 232 of the Act were designed to ensure that ballots for industrial action were secret, free and fair. In short they were designed to ensure that a ballot had democratic legitimacy.
>
> 113. These provisions are quite detailed and impose considerable demands on the Union. But it seems to me important to recognise that they are not designed to prevent unions from organising strikes, or even to make it so difficult that it will be impracticable for them to do so. As Lord Justice Millett said in *London Underground Limited v National Union of Railwaymen, Maritime and Transport Staff* [1996] ICR 170, at page 180:

> 'Parliament's object in introducing the democratic requirement of a secret ballot is not to make life more difficult for trade unions by putting further obstacles in their way before they can call for industrial action with impunity but to ensure that such action should have the genuine support of the members who are called upon to take part. The requirement has not been imposed for the protection of the employer or the public but for the protection of the Union's own members. It would be astonishing if a right that was first conferred by Parliament in 1906, which has been enjoyed by trade unions ever since and which is today recognised as encompassing a fundamental human right, should have been removed by Parliament by enacting a series of provisions intended to strengthen industrial democracy and governing the relations between a union and its own members'."

21. Smith LJ went on to say, *obiter*, that in the case of section 231 it would be sufficient for there to be "substantial compliance" with the requirements of the section:

> "152. I consider that the policy of this part of the Act is not to create a series of traps or hurdles for the Union to negotiate. It is to ensure fair dealing between employer and Union and to ensure a fair, open and democratic ballot.
>
> 153. I can see that if there is an infringement which affects some aspect of those important policy requirements, the ballot must be held invalid. But in my view it cannot have been Parliament's intention to allow a minor infringement which has had no adverse effect on anyone's rights or interests to invalidate the ballot. In my view substantial compliance with section 231 will satisfy section 226(a)(ii). If it were not so, the rights of workers to withhold their labour would be seriously undermined."

22. In *National Union of Rail, Maritime & Transport Workers v Serco Ltd* [2011] EWCA Civ 226, [2011] ICR 848 ("*RMT v Serco*") Elias LJ (with whom Mummery and Etherton LJJ agreed) rejected a submission that the provisions of Part V of the 1992 Act should be construed strictly against the union:

> "9. … The statutory immunities are simply the form which the law in this country takes to carve out the ability for unions to take lawful strike action. It is for Parliament to determine how the conflicting interests of employers and unions should be reconciled in the field of industrial relations. But if one starts from the premise that the legislation should be strictly construed against those seeking the benefit of the immunities, the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should hold sway unless the legislation clearly dictates otherwise. I do not think this is now a legitimate approach, if it ever was. In my judgment the legislation should simply be construed in the normal way, without presumptions one way or the other. Indeed,

> as far as the 1992 Act is concerned, the starting point it that it should be given a "likely and workable construction", as Lord Bingham of Cornhill put it in *P v National Association of Schoolmasters/Union of Women Teache*rs [2003] ICR 386, para.7."

23. Elias LJ considered also what had been said about "substantial compliance" by Smith LJ in *British Airways v Unite*. He observed that he found it "very persuasive" but that, in any event, compliance with the requirements of Part V would not be invalidated by a failure which was within the "*de minimis*" principle:

> "87. It may be that there is a distinction between the concept of substantive compliance referred to by Lady Justice Smith and the *de minimis* principle. The former may be wider in scope than the latter and rest on assumed Parliamentary intention. But we heard no argument about that. Mr Hendy put his case on the *de minimis* exception, and that is as far as he needs to go. In my judgment whatever the justification for applying the principle of substantial compliance (and I find Lady Justice Smith's analysis very persuasive), I am satisfied that the doctrine of *de minimis* at least is available to the union and would apply in the circumstances of this case. It follows that I consider that the judge erred in law in rejecting the application of that doctrine."

24. Strictly speaking neither of these cases holds as a matter of binding decision that substantial compliance with the requirements of Part V is sufficient but clearly these *dicta* are highly persuasive and I proceed on the basis that they are correct, although in the end the union's submissions did not depend on showing that there had been substantial compliance.

25. The employers' challenges to the validity of the ballots conducted in *British Airways v Unite* and in *RMT v Serco* can be regarded as more or less technical in their nature, dependent as they were on allegations of failure to comply with detailed procedural requirements of the legislation. In the present case, in contrast, RMG contends that there has been "interference" by the union with the voting process contrary to section 230. That is by its nature a more substantive matter, at the heart of the statutory scheme for ensuring the validity and legitimacy of a ballot.

26. There is relatively little case law as to section 230. In *RJB Mining (UK) Ltd v National Union of Mineworkers* [1997] IRLR 621 Maurice Kay J held that a failure to send ballot papers to all those who were entitled to receive them rendered the ballot invalid. One of the issues, albeit in the event not decisive, was whether it constituted "interference" within the meaning of section 230 for union officials to tell certain employees not to vote because the ballot did not concern them. Maurice Kay J held that the words "interference" and "constraint" in section 230(1) connoted "improper" interference or constraint. He said that while seeking to persuade union members to cast votes in favour of the union's recommendation was not improper, it was at least arguable that giving them false information (albeit innocently) to the effect that the ballot and the intended action did not involve them was an improper interference. However, on the facts of the case, Maurice Kay J would not have been prepared to grant an injunction on this ground.

The facts

27. Ballot papers were dispatched by post by Electoral Reform Services, the independent scrutineer appointed pursuant to section 226B of the 1992 Act, on 24th September 2019. They were addressed to the home addresses of each CWU member eligible to vote. In the ordinary course of post they would have arrived at RMG's Delivery Offices on the morning of 25th September. Delivery Offices are a part of RMG's mail distribution organisation, there being some 1,250 such offices across the United Kingdom, where mail is sorted to be allocated to the postman who will deliver it door to door. The mail to be delivered by each postman is sorted into what is referred to as a "frame".

28. Many of RMG's employees live in the area served by the Delivery Office at which they work. It is therefore possible for such employees to intercept their mail by collecting it from the frame before it is taken by the postman for delivery to their home. This is recognised by RMG, which has a protocol on "Extraction of Personal Mail by RM Employees". This provides that such extraction requires the written approval of a manager, who must be satisfied that the items extracted are addressed to the individual employee and not, for example, to relatives or neighbours. In practice, however, it appears that this protocol is frequently not complied with and that employees are able to and do collect their own mail directly from the frames. It is this feature, which is likely to be unique to RMG employees, which has given rise to the current application for an injunction.

29. Not surprisingly, having called for a ballot, the union was keen to ensure a high turnout and to encourage its members to vote in favour of industrial action. It is not suggested and could not sensibly be suggested that it was not entitled to campaign for a "yes" vote. It did so, not only in more traditional ways, but also by use of electronic and social media. Such campaigning clearly cannot be regarded as in any way objectionable. What is said to be objectionable, however, is that the union's campaign included instructions to its members working in Delivery Offices serving the area in which they lived (a) to take their voting papers from the frames in the Delivery Offices rather than waiting for them to be delivered to their homes, (b) to complete the voting papers at work immediately, and (c) to return them as soon as possible in "mass posting" exercises, many of which were filmed and posted on social media. RMG's case is that this constituted (a) "interference" by the union within the meaning of section 230(1), (b) a breach of the obligation in section 230(2) to ensure, so far as practicable, that voting papers were sent to the homes of those entitled to vote, and (c) a breach of the obligation contained in section 230(4) to ensure so far as practicable that voting was in secret.

30. CWU accepted during the hearing before the judge that it had encouraged (but not instructed) its members to collect their voting papers from the frames in the Delivery Offices wherever it was possible for them to do so, to complete the voting papers at work immediately, and to return them as soon as possible. A post on CWU's North East Region's Facebook page dated 16th September 2019 gives the flavour:

> "Hi everyone,
>
> Can you ensure every rep and member sees this, please and please share Key North East Divisional Message.

> On the 24th September our Ballot papers are dispatched from the mailing house and due to hit our doormats on the 25th and onwards. Can we ask every rep to hold a quick gate meeting on the 24th and ask our members to do the following:-
>
> If our members live within the vicinity of their delivery office and are at work when the ballot papers arrive in the office on the 25th, 26th, ask our members to get their ballot paper, open it, VOTE YES and seal and return it immediately. If we do this across the Division, we have a great chance of a 100% turnout. If we have a post box attached to the office, then video or take pictures of everyone posting their sealed Vote Yes ballot paper back into the post box, and post this onto social media such as Facebook and Twitter. We want our Mail Centres Distribution hubs, admin units etc to do exactly the same to enhance the turnout of the vote."

31. To the same effect is a film of Mr Bob McGuire, the CWU Divisional Representative for the North East, addressing a gate meeting at the Stockton Delivery Office on 24th September 2019. He said:

> "… Listen guys, I am not going to go over old ground. I think I give you the whole situation last time we had a gate meeting. This morning I want some interaction from yous guys so, initially, what I am here to tell you is this. Today, the ballot papers are dispatched from the mailing warehouse so they're going to be in the post. We are hoping that they'll hit the offices tomorrow morning. If not tomorrow morning, the day after.
>
> Now, the message we want to get to yous today is I would imagine, the vast majority live within the area that Stockton delivery office post to, yeah? What we want you to do is, when that ballot paper arrives, it arrives in the office so you will see it 'cos you'll all have them in your different frames for your mates. Get that ballot paper, tell the boss it's your mail, open that ballot paper, put your big cross where we expect you to put the big cross, which is YES, seal the ballot paper and then your next gate meeting is every one of you walking up to the post box and delivering your actual ballot paper straight back into the post. That way, we won't have ballot papers lost on mantelpieces, in drawers or a glass of pop gets spilled over it 'cos we've left it on the table and the kids are messing up the table. We want you to get those ballot papers, we want you to fill them in as soon as they hit the office and we want you to deliver it. That is the key message of today. That is the key message. But I'm going to ask yous guys literally four questions and I want you to reply with a big fat YES when I ask those questions. …"

32. The fourth question was whether those attending were going to vote "yes", to which there was an enthusiastic response.

33. To a greater or lesser degree at numerous Delivery Offices in widely spread areas of the country, this is what happened. In particular, there is evidence in video form from Swansea, Orpington and Leeds which shows CWU members lining up to post voting papers back on 25th September which must have been collected from the frames at those offices. At Swansea there are two videos showing events in the canteen. CWU members are sitting at tables with their voting papers while Mr Gary Williams, the Branch Secretary, is heard encouraging them to vote. Some CWU members are seen to fill out their papers. There are in addition films or photographs from a large number of Delivery Offices, perhaps as many as 60, which show CWU members holding up voting papers or envelopes containing voting papers and lining up next to post boxes (or in one case, at Croydon, a dummy post box which was used for training purposes).

34. There is no clear evidence of the number of ballot papers which were returned having been collected from the frames instead of being delivered to CWU members' home addresses. However, the number appears to be substantial. In a Facebook thread posted on the CWU Plymouth and East Cornwall page, following a film of an employee removing his ballot paper early in the morning of 25th September, Mr Ralph Ferrett, a CWU representative, stated:

> "Lads literally thousands of postal workers have done this up and down the land. Including me personally and almost every rep the CWU has."

35. Whether or not that is accurate, it gives an idea of the intended scale of this action.

36. There is some evidence, which is disputed, to suggest that in some Delivery Offices CWU members removed not only their own ballot papers from the frames, but also ballot papers addressed to colleagues. There is, however, no basis in the presently available evidence on which to conclude that such ballot papers were not passed on to the colleagues to whom they were addressed and there is no evidence of anything which amounts to bullying or threatening behaviour or which would constitute improper pressure on anyone to cast their vote in a particular way. Not surprisingly perhaps, nothing of the kind is seen in any of the videos in evidence, but it is also a reasonable inference that RMG has so far been unable to find any evidence of this kind on social media. Nor has there been any complaint by an employee, even anonymously, about the procedure for collecting and returning ballot papers promoted by the union.

The judgment

37. The judge said that "interference" in section 230(1) referred to improper interference, adopting the approach of Maurice Kay J in *RJB Mining*, but held that there was improper interference in this case. The essence of his reasoning is set out at [22] and [23] of the judgment:

> "22. … on the facts of this case there was interference that is accurately described as improper. The premise of section 230 of the 1992 Act, as amended by section 17 of the Trade Union Reform and Employment Rights Act 1993, is that strike ballots should be postal ballots. Before that amendment, strike ballots could be either postal ballots, or workplace ballots that took place either before or after working hours. The amendment to

> section 230 removed the option of workplace ballots; postal ballots became the sole method of conducting a strike ballot. The premise of section 230, as it now stands, is that each voter should receive his voting paper at his home address so as to have the chance to decide whether to vote or not, and if so, how to vote, away from the day-to-day routine and environment of his workplace.
>
> 23. What the CWU did in this case was a form of subversion or undermining of the ballot process anticipated by section 230 of the 1992 Act. On its own submission, the CWU took advantage of its members' working duties as postal workers to encourage them to take their own voting papers from the frames in the Delivery Offices and to complete them at work. That amounted to interference with the balloting arrangements established by section 230. It was an interference with voting, contrary to section 230(1). Given that the substance of the CWU's efforts was directed towards securing that its members obtain voting papers at work, and then vote at work, an approach that the 1993 amendment to section 230 ruled out, I see no reason why that interference should not be regarded as an improper interference. …"

38. The judge rejected the submission made on behalf of the union that, even if such conduct could amount to interference, it had done no more than encourage its members to take their voting papers from the frames at the Delivery Offices and that interference would require at least instructions to do so. He said that the difference between a request and an instruction in this context "may well be vanishingly small", giving as an example the language used by Mr McGuire, which could reasonably be understood as a form of instruction to union members, but that in any event encouragement would be sufficient to amount to interference.

39. In addition, as a separate albeit closely related point, the judge found that the union's conduct amounted to a breach of its obligation pursuant to section 230(2) to ensure so far as reasonably practicable that a voting paper was sent to every voter at his or her home address:

> "25. … In the ordinary case, it will be correct that the obligation to send voting papers to members' home addresses, will not be breached if those voting papers, properly addressed, get lost in the post and are not delivered. But in this case, having caused the scrutineer to send voting papers to its members at their home addresses, the CW then took steps to prevent the process anticipated by section 230(2) from taking its course. I do not consider it to be an over-reading of section 230(2), to conclude that it exists to serve the purpose that members should receive their voting papers at home, giving them the opportunity to consider them at home. The steps taken by the CWU, the context of this provision, also had the effect of undermining the purpose of the legislation."

40. Finally, the judge held that while the mass posting events were not in themselves a breach of the obligation in section 230(4) to ensure so far as reasonably practicable that voting took place in secret and while voting at work was not necessarily the same as voting in public, the video evidence from the Swansea Delivery Office did demonstrate a breach of that obligation which could not be disregarded as *de minimis*.

41. However, the judge rejected RMG's case that (a) the encouragement or instruction of union members to vote immediately on opening their ballot papers and (b) organising and filming the "mass posting" events also comprised interference contrary to section 230(1). Those conclusions are the subject of a Respondent's Notice.

The union's submissions

42. For the union, Lord Hendy QC submitted, in outline, that:

(1) The purpose of section 230 was to ensure that every person entitled to vote could exercise that right freely and without improper interference or constraint by the union, either as to which way they voted or whether to vote at all.

(2) That purpose was achieved. Nothing done by the union had any adverse effect on anybody's rights and interests; the union had merely encouraged its members to vote, and to vote yes, which did not amount to improper interference; far from preventing members from being "allowed to vote", the union was positively encouraging them to do so.

(3) There was no interference or constraint within the meaning of section 230(1), which was concerned to ensure that ballots were conducted without intimidation, coercion, fraud and the like; nothing of that kind was even alleged in this case and it was significant that no member of the union made any complaint whatever about the conduct of the ballot; nor was there any evidence that any choice, either whether to vote or how to vote, by any union member was subject to any interference or constraint.

(4) The judge was wrong to have had regard to the terms in which section 230 was originally enacted, which provided for workplace ballots, and to have concluded as a result that the purpose of section 230 in its current form was to prohibit such ballots and to ensure voting at home.

(5) In any event the union's conduct complained of had no material effect on the overwhelming mandate for industrial action in the outcome of the ballot. In such circumstances an injunction would be an unnecessary and disproportionate interference with the right to strike which is protected by Article 11 of the European Convention on Human Rights.

(6) There was no breach of section 230(2); the purpose of the subsection was to ensure that each relevant member received a voting paper and could return his or her vote, which is what happened; while it was implicit that the union should not take steps to prevent the member from receiving the voting paper, that had not happened and there was no obligation to ensure that the voting paper was received at the member's home address.

(7) Section 230 does not stipulate where voting must take place and, having received their voting papers, members were free to vote anywhere they wished and to discuss their voting intentions with fellow employees; the fact that a tiny number of union members at Swansea or elsewhere had chosen to vote in company with others and to wave their completed ballot papers showing (presumably) that they had voted "yes" was not a breach of the requirement for a secret ballot; at Swansea it was not orchestrated by Mr Williams who is not seen to say or do anything to promote public voting; but even if it were a breach, it was *de minimis*.

RMG's submissions

43. For RMG Mr Bruce Carr QC submitted, again in outline, that:

(1) There was ample evidence to show that the union had devised and implemented a plan pursuant to which it told its members to intercept ballot papers at their place of work and to vote at the workplace, rather than allowing the ballot papers to be delivered in the ordinary course of post to their home addresses.

(2) The intention of section 230 was that voting should be by postal ballot, with ballot papers delivered to voters at home, who would then be able to decide on their vote away from the workplace.

(3) The union's plan to promote *de facto* workplace balloting subverted this intention and constituted interference with the voting process within the meaning of section 230(1).

(4) It was also contrary to section 230(2) which was intended to ensure, so far as reasonably practicable, that ballot papers are distributed using the normal course of post pursuant to which items committed to the post will be received by way of delivery to the recipient's stated address.

(5) By encouraging a process of voting in the workplace, the union had created circumstances in which voting might not be (and in some cases was not) secret, in breach of section 230(4).

(6) The breaches by the union were neither insubstantial nor *de minimis*.

Discussion

44. The role of this court on an appeal from a decision whether to grant an interim injunction in a trade dispute case was described by Elias LJ in *RMT v Serco* at [14]:

> "The function is one of review, and in the absence of further material evidence invalidating the exercise of discretion by the first instance judge, the Court of Appeal should only interfere where the judge had misdirected himself or reached a conclusion which is unsustainable on the evidence before him. Mr Béar submits, and I accept, that this means that we should not interfere with the decision of the judge below unless we are satisfied that the judge's assessment of the likelihood of the trade dispute defence succeeding was plainly wrong."

45. Lord Hendy submitted that the result of the ballot shows that there was an overwhelming democratic mandate in favour of strike action. That is a submission which can, no doubt, be made in many cases, as it is only where there has been a ballot in favour of strike action that proceedings for an injunction are likely to arise. The question for us, however, as Mr Carr pointed out, is whether that mandate was secured in accordance with the statutory requirements.

46. I would accept that there was ample evidence to show that the union had devised and implemented a plan pursuant to which it told its members to intercept ballot papers at their place of work, to open them immediately and to vote at the workplace, and to take part in filmed "mass posting" events, rather than allowing the ballot papers to be delivered in the ordinary course of post to their home addresses. Although it will be necessary for the purpose of analysis to consider the different elements of this plan separately, to some extent it is artificial to do so. Mr Carr described these separate elements as a "continuum" and there is force in that description. The plan and its implementation need to be viewed as a whole.

47. Whether the union's conduct is to be characterised as encouragement rather than instruction makes no real difference. If it was encouragement, it was clearly strong encouragement, creating an environment in which there was a high expectation that members would do as they were asked. If it purported to be an instruction or order, nobody can have thought that it was an instruction which union members were under any duty to obey and there was no suggestion that members who did not do so would be disciplined in some way. In these circumstances the difference between encouragement and instruction may be, as the judge said, "vanishingly small". To the extent that it matters, I would prefer to regard the union's conduct as strong encouragement, in an environment in which it may not have been easy for anyone to stand out against the course which was being proposed.

Interference – section 230(1)

48. The principal question arising on this appeal is whether what the union did amounted to interference. To answer that question, the elements of the union's plan must be viewed as a whole. For my part, and with respect, I do not find it helpful in answering that question to apply a test of impropriety, asking whether what the union did was improper. That might suggest that there are two kinds of interference, proper interference and improper interference, but the concept of proper interference strikes me as elusive. While Maurice Kay J was undoubtedly right to say in *RJB Mining* that it was not improper to seek to persuade union members to cast their votes in favour of strike action, I would not regard that as "interference" at all, so that a question whether it might amount to improper interference could not arise. "Improper" is a somewhat loaded word and to say that conduct either is or is not improper will usually require elaboration and explanation, as well as a standard by reference to which the propriety of the conduct can be assessed. Section 230 is more straightforward. If the ballot is to be effective to confer immunity, those entitled to vote must be allowed to cast their votes without interference of any kind by the union.

49. Rather, the word "interference" in section 230(1) must be seen in its context as part of the phrase "without interference from or constraint imposed by" the union or its members, officials or employees. In that context it is directed to conduct, whether by words or action, which has the effect of preventing or hindering the ordinary course of

events with which the section is concerned, that is to say, the process of voting in a ballot for industrial action. It is not in my judgment limited to conduct which amounts to intimidation, coercion, fraud or the like.

50. The concept of interference by a union is also found in section 226B of the 1992 Act, dealing with the role of the independent scrutineer. This provides for the trade union to ensure that the scrutineer carries out his statutory functions "and that there is no interference with the carrying out of those functions from the union or any of its members, officials or employees". The concept is the same, namely conduct which has the effect of preventing or hindering the scrutineer from doing what he would do in the ordinary course of events to carry out his functions.

51. To my mind, therefore, the critical question is whether the judge was right to conclude that Parliament's intention in enacting section 230 was to ensure that employees would receive their voting papers at home, so as to have an opportunity to decide whether and how to vote away from the environment of the workplace with all its actual or perceived pressures. If so, the union's conduct undoubtedly subverted that intention, albeit it no doubt believed that it was doing nothing wrong and was merely taking advantage of the existing practice of RMG employees collecting their own mail from the frames at the Delivery Offices.

52. The purpose of section 230 is to ensure that a person entitled to vote is free to choose whether to do so, which way to cast his or her vote, and where and when to do so. As Smith LJ said in the passages from *British Airways v Unite* cited above, its purpose is to ensure fair dealing between the employer and the union and to ensure a fair, open and democratic ballot so that industrial action is seen to have the genuine support of the union's members. The section was "designed to ensure that ballots for industrial action were secret, free and fair", those being essential components of democratic legitimacy. Evidently Parliament's view was that fulfilment of this objective required voting papers to be sent to those entitled to vote at their home addresses.

53. There is nothing to prevent an employee who has received a ballot paper at home from taking it into work in order to discuss with colleagues which way to vote, or indeed from taking it (as Lord Hendy submitted) to a public house or social club. Equally, there is nothing to prevent an employee from telling others which way he or she intends to vote or has voted, or from urging others to vote the same way. Nevertheless, section 230 undoubtedly contemplates, and in my judgment requires, that (with the sole exception of merchant seamen) the ballot paper will be received by the employee at his or her home address. That is the consequence, in the ordinary course of events, of committing the ballot papers to the post, addressed to employees at their home addresses. Postal workers are in the unique position of being able to intercept their mail in the manner described above, but I doubt very much whether Parliament would have contemplated this possibility when enacting section 230. It would have expected that ballot papers posted to employees' home addresses would be delivered there.

54. Accordingly I agree with the judge that, giving the section its natural and ordinary meaning, it is clear that Parliament intended that each voter should receive their ballot paper at their home address, and that the conduct of the union, by encouraging voters to intercept ballot papers at their workplace and to vote there immediately, had the effect of subverting that legislative intention and, as a result, amounted to interference. While the union's conduct did not interfere with the fact that persons entitled to vote

were allowed to do so, it did interfere with the process by which Parliament intended that such ballots should be conducted.

55. The judge appears to have reached this conclusion, in part at least, because of the amendment in 1993 to section 230(2) as originally enacted, the effect of which was to remove the union's option for workplace ballots. Lord Hendy criticised this reasoning, insisting that legislation must be interpreted as it stands without reference to provisions which have been repealed, which should be treated as if they had never been there. He cited *R v Brown* [2013] UKSC 43 at [34] where Lord Kerr, giving the judgment of the Supreme Court, said:

> "It would be a curious, indeed anomalous, outcome of the removal of the defence from sections 5 and 6 that it should be implied into section 4 to which it had not previously applied. At a technical or theoretical level, it can be argued that such a result is feasible because, as the appellant has submitted, the 1885–1923 Acts are to be construed as a whole in their amended form. *Bennion on Statutory Interpretation*, 5th ed (2008) describes the effect of textual amendment of a statute at p 290 as follows:
>
> > '…under modern practice the intention of Parliament when effecting textual amendment of an Act is usually to produce a revised text of the Act which is thereafter to be construed as a whole. Any repealed provisions are to be treated as never having been there, so far as concerns the application of the amended Act for the future'."

56. However, Lord Kerr went on almost immediately to add, at [36], that:

> "… while the amended legislation is to be construed as a whole in its revised form, it does not follow that its antecedent history be left entirely out of account."

57. In the present context it is clear from *RMT v Serco* at [63] and from *British Airways Plc v British Airline Pilots' Association* [2019] EWCA Civ 1633 (a case concerned with the requirement on the union in section 226A to give notice of the categories of employees entitled to vote in a proposed ballot which was introduced into Part V of the 1992 Act by the Employment Relations Act 1999) that it is legitimate to have regard to the terms in which Part V of the 1992 Act was originally enacted in order to ascertain the purpose of legislative changes and the mischief at which they were aimed. In the latter case at [56] to [61] Simler LJ analysed the legislative history, contrasting the current and previous versions and attaching significance to the deletion of a provision in the previous version of wording which had made clear that one purpose of giving the notification in question was to enable the employer to make plans to minimise the effect of a strike.

58. Indeed the same approach was adopted by Smith LJ at [112] of her judgment in *British Airways v Unite* set out above, where she referred to the "major concern" which existed about the fairness of workplace ballots, which prompted the enactment of section 230 in its current form. It would be unrealistic for us to ignore this.

59. I have in fact reached my conclusion as to the purpose and intention of section 230 by reference to the terms of the section as it currently stands, without needing to consider the contrast between this and the section as originally enacted. But if it is legitimate, as I would hold that it is, to have regard to the terms in which section 230 was originally enacted, that conclusion becomes overwhelming.

60. While it appears that the concern which led to the 1993 amendment arose out of what were considered to have been abuses which had sometimes occurred at workplace ballots, the solution adopted by Parliament was to insist that ballot papers should be sent to employees' homes. That avoided the need to explore in individual cases whether abuses such as intimidation had in fact occurred, a matter which would inevitably be disputed and which might, particularly on an application for interim relief, be difficult to ascertain.

61. Having concluded that, on the natural meaning of the section, there was an interference by the union, it remains to consider whether "interference" must be given a more restricted meaning in order to comply with Article 11 of the ECHR.

Article 11 ECHR

62. I can see no justification for giving "interference" a restricted meaning. While the right to strike is an element of the right to freedom of association conferred by Article 11 which is given effect by the Human Rights Act 1998, as Elias LJ explained in *RMT v Serco* at [8], he also pointed out in the same paragraph that the impact of Article 11 on the provisions contained in Part V of the 1992 Act had been considered in *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173.

63. In that case Lloyd LJ identified the question for the court as follows:

> "101. On the basis that conventional principles of construction under domestic law lead to the conclusions adverse to the union that I have identified, on the points under sections 231A, 226A(2)(c) and 234A(3)(a), the next question is whether the legislation needs to be read differently in order to comply with the Convention and with section 3(1) of the Human Rights Act 1998. The test is whether the restrictions on a trade union's ability to call a lawful strike which these provisions impose are disproportionate. They are imposed in an area in which a balance needs to be struck between the rights and interests of workers and their trade unions, on the one hand, and those of employers (including their rights under article 1 of the First Protocol) on the other. As has been seen, as they stand now they are the latest stage in a series of detailed changes within an overall legislative structure which has been in place for a considerable time.
>
> 102. Mr Hendy submitted that these and the other restrictions imposed by the legislation present obstacles so numerous and so complex that errors become almost inevitable on the part of trade unions, and that for this reason the rights under article 11 are so constrained as not to be effectively exercisable in respect of industrial action. He prayed in aid of that argument the

> comments of the Committee of Experts under the European Social Charter to which I have referred at paragraph [49(ii)] above, and other passages in the texts which he showed us emanating from that source and other international sources including the ILO.
>
> 103. It seems to me that the task for this court requires that the present state of the legislation as a whole should be considered, so far as it is relevant to the restrictions imposed on trade unions and to the balance struck between the various interests affected, though of course the decision has to relate to the particular issues raised. Among other things, the Code of Practice published under the statute is relevant. I regard it as permissible, for this purpose, to take account of the process by which the present legislation has come into its present form, including not only the previous legislative history but also the Government's consultation process."

64. Having identified the court's task in this way, Lloyd LJ gave the following answer:

> "113. For those reasons, in my judgment, the provisions with which this appeal is concerned are not disproportionate restrictions on rights under article 11, and do not, therefore, need to be interpreted differently from the readings which I have set out above, in order to comply with the Convention and with section 3 of the Human Rights Act 1998. Neither on that ground, therefore, nor applying ordinary domestic principles of interpretation, do I disagree with the judge's conclusions as regards section 231A or as regards the need for, and the effect of the lack of, an explanation under section 226A(2)(c)(ii) or section 234A(3)(a)(ii)."

65. Although *Metrobus* was not directly concerned with section 230, I see no reason to suppose that a different approach should be adopted so far as that section is concerned. On the contrary, in comparison with some of the other provisions of Part V, its terms are not particularly complicated or legalistic, while the proper conduct of a ballot in accordance with section 230 is fundamental to the scheme of the legislation. To hold that a union must not interfere with the process by which Parliament has determined that ballots must be conducted does not in any way set a "trap" for the union so as to require the natural meaning of the section to be toned down. I conclude therefore that Article 11 does not require section 230 be given anything other than its natural meaning.

66. Lord Hendy also advanced a slightly different argument in reliance on Article 11. This was that in view of the overwhelming mandate for industrial action in the outcome of the ballot, an injunction would be an unnecessary and disproportionate interference with the right to strike which is protected by Article 11. I do not accept this argument. It is inherent in the nature of interference in the conduct of a ballot that it may be impossible to measure with any precision the effect of the interference in question. If it is right that "literally thousands of postal workers have done this up and down the land", that would mean that a substantial number of the votes cast were cast as the result of a process contrary to that required by Parliament. It would be unacceptable reasoning,

where there has been interference in voting, to say that the interference does not matter because it made no difference and the votes would probably have been cast in the same way without it. But even if that is so, as it may be, an injunction to restrain reliance on this ballot which has been affected by interference is not disproportionate. There is nothing to prevent the union from calling a new ballot which can be carried out without interference. If the union has the strong support from its membership which it believes it has, and which (albeit on a much smaller scale) the outcome of the Parcelforce ballots tends to confirm, a new ballot will cause it some expense but otherwise no real prejudice save that it loses the opportunity to take strike action during the Christmas period when RMG is most vulnerable. But that is merely the consequence of the union having interfered in the conduct of the previous ballot.

Substantial compliance

67. It is unnecessary to consider the principle of substantial compliance in connection with section 230(1). Lord Hendy accepted, rightly in my judgment, that if (contrary to his submission) there had been interference, the principle of substantial compliance could not save the ballot. Nor did he suggest that the *de minimis* principle had any role to play in relation to section 230(1).

A voting paper sent to him by post at his home address – section 230(2)

68. If, as I have concluded, there was interference by the union contrary to section 230(1) when its conduct is viewed as a whole, the question whether there was in addition a failure to ensure that, so far as practicable, voters had a voting paper sent to them at their home address as required by section 230(2) may be of relatively little further significance. Lord Hendy submitted that the subsection is satisfied if the ballot papers were posted and correctly addressed, and that there is no requirement that they should be received at home. He accepted that the union would not satisfy this requirement if it took steps to prevent voters from receiving their ballot papers but said that this is not what happened. On the contrary, the union's actions were intended to and did ensure that the ballot papers were received by their members.

69. I would accept that, in some contexts, an item of mail is sent once it is put in the post correctly addressed. If I post a birthday card to a friend, I would say that I had sent it as soon as I had put it in the post box. If it does not arrive, I would say that I have nevertheless sent it, but it got lost in the post. But that is not the context of section 230(2). Here the union took steps to ensure so far as possible that the ballot papers did not arrive at the home addresses of its members to which they were addressed. That was contrary to section 230(2) which contemplates that ballot papers will be delivered to voters' home addresses in the ordinary course of post.

70. I agree with the judge, therefore, that there was in addition a failure by the union to comply with section 230(2).

Voting in secret – section 230(4)

71. Section 230(4) imposes an obligation on the union to secure that the ballot is conducted so that, so far as reasonably practicable, those voting do so in secret. I would accept that the encouragement given by the union to its members did not expressly call for voting to be otherwise than in secret and that voting at the workplace is not necessarily

inconsistent with a secret ballot. However, by encouraging what were in effect workplace ballots, characterised as they sometimes are by the informality, openness and risk that voters would feel themselves under pressure to which Smith LJ referred in *British Airways v Unite* at [112], the union ran the risk that voting would not be in secret. So far as the evidence before us shows, the union took no steps to secure that voting would be in secret and in some cases, such as at Swansea, at least to some extent it was not, albeit that a number of those seen filling in their ballot papers in the canteen at Swansea have given witness statements to make clear that they did so of their own free will and that those positively seen to have voted otherwise than in secret represent a tiny proportion, some 0.024%, of the total who voted.

72. In view of the conclusions which I have already reached that there was interference contrary to section 230(1) together with a failure by the union to comply with section 230(2), it is unnecessary to consider separately whether there was in addition a failure to ensure secret voting such as to amount to a breach of section 230(4). Such open voting as occurred is probably best regarded as the natural and unsurprising consequence of the union's interference with the voting process by calling on its members to intercept their ballot papers from the frames and to vote immediately at work.

73. I would add, however, that the judge's conclusion that there was a breach of the secret voting requirement in section 230(4) appears to have been based exclusively on the evidence contained in the films taken in the Swansea canteen. If this incident had occurred in isolation from the matters already discussed, I would have been inclined to regard it as *de minimis* in view of the tiny numbers involved.

The Respondent's Notice

74. RMG contends by way of Respondent's Notice there was also a failure by the union to comply with section 230 by reason of the "instructions" given to its members to cast their votes immediately after removing them from the frames and its arrangement and filming of "mass postings" in some of which union members held up their completed ballot papers to the camera. I would agree that these events can be seen as part of the "continuum" of events of which RMG complains, but like the judge I would be inclined not to regard them as objectionable if considered in isolation from what had gone before. It is, however, unnecessary to reach any final view about this.

Disposal

75. For the reasons I have given I conclude that the judge was right, and in any event was not "plainly wrong", in his conclusion that the union was not likely to succeed in its claim to immunity under section 219 of the 1992 Act. I would therefore dismiss the appeal.

Lady Justice Simler:

76. I agree with Males LJ that the appeal should be dismissed for the reasons he gives. I also agree with the observations of Sir Patrick Elias. I too have found the question whether what the union did amounted to "interference" with the right to vote in breach of section 230(1) difficult in circumstances where nobody doubts the union's right to encourage members to vote and to do so in support of strike action. In the end however,

I agree that the word "interference" must be read in its statutory context as Males LJ has explained. In context it is directed at conduct by the union that interferes with the ordinary course of voting contemplated by section 230. Here, the plan adopted by the union subverted the fully postal ballot contemplated by section 230 by promoting or encouraging immediate workplace voting. This was interference in breach of section 230(1).

Sir Patrick Elias:

77. I agree with Males LJ that the appeal should be dismissed, essentially for the reasons he gives. I add a few short observations of my own.

78. The issue in this case is whether the union has conducted a ballot in accordance with the provisions set down in the Trade Union and Labour Relations (Consolidation) Act 1992. The particular section under consideration is section 230 which is concerned with the conduct of the ballot itself. In that section, Parliament has stipulated with some precision how the ballot should take place: voting papers are to be sent to the member's home address (or such other address as is notified by the member); the member must have a convenient opportunity to consider away from the workplace which way to vote; then to be able to cast a vote in secret; and finally to return the vote by post to the relevant officer for counting. The purpose is clear: to enable the member to exercise the right to vote in his or her own time and in the privacy of his or her own home, free from any pressure from the union, its officers or members.

79. What makes this case unique is that because of the nature of their occupation as postmen, some of the workers balloted were able lawfully to extract their own ballot paper from the delivery frame at their place of work before it was delivered to their home. No other group of workers would be able to intercept the post in that way. The union sought to take advantage of that opportunity by devising a plan which involved the relevant workers being asked to exercise that right, then vote immediately in an environment where there was strong pressure to vote in favour, and then to return the vote by posting the voting paper, preferably in a mass exercise with other workers. It is not disputed that the purpose of the plan was twofold: first, to ensure that 50% of the membership voted (since without this the strike will not be lawful, whatever the majority in favour); and second, to reinforce the "yes" vote by creating an atmosphere which generated a momentum for a strong affirmative vote. One union official described the aim as being to "whip the membership into a frenzy".

80. The ballot process envisaged by the plan was therefore at odds with the Parliamentary scheme in numerous ways. This was so at least with respect to those members who delivered the mail and were able to extract their own ballot paper from their frames – a not inconsiderable number, although no very precise figure was available. First, for those workers acting in accordance with the plan, the ballot paper was received at the workplace; second, there was very limited time to reflect on the decision how to vote; third, there was a risk that the vote would not be exercised in secret (and video evidence suggested that the risk became a reality in a few cases); and fourth, the vote was cast in a more highly-charged atmosphere than would be the case if it were cast in the privacy of the member's home.

81. Lord Hendy asserted that any member could choose of his own motion to do exactly what the plan envisaged. The member could extract the ballot paper from the frame;

vote wherever he or she chose, which could include the workplace; vote immediately and without taking advantage of the opportunity to reflect on the decision; and vote openly in full view of others and even, if the member wished, trumpet the fact that he or she had voted in favour of the strike. The plan was therefore simply seeking to do what these workers were lawfully entitled to do.

82. I accept that it was, but it does not follow that because the workers are entitled to act in that way, the plan is lawful. Individual members can of course always choose when they vote not to take advantage of the privacy and freedom from pressure which the statutory balloting arrangements permit. The issue in my view is whether the union could lawfully conduct the ballot so as to seek to encourage or persuade the members to forego those advantages.

83. In my judgment they could not. The ballot conducted, at least with respect to the not insubstantial group of workers able to extract their ballot papers from the frame, was fundamentally at odds with the ballot which Parliament has established. That is clear from a fair reading of section 230 and it is reinforced by the consideration that the legislation had been amended specifically to remove the right to hold workplace ballots. I would accept that the union did not formally instruct their members to act in this way, but I agree with Males LJ that it was an encouragement or exhortation made in the confident expectation that, at the very least, a significant number of the relevant members would act accordingly; and the evidence is that they did. In my judgment, for those workers the ballot was not conducted lawfully even though they were personally doing what they were legally entitled to do.

84. I agree with Males LJ that the plan adopted by the union infringed the statutory principle in section 230(2) that the ballot papers should be delivered to the members' homes. Lord Hendy had two responses, neither in my view convincing. The first was that nothing prevented the member from voting at work, but for reasons I have given, that is not to the point. The second was that the union has fulfilled its obligations under the statute once it has posted the ballot papers; it cannot be expected to ensure that the voting paper is received at the member's home. That is true; but the question is whether it can deliberately plan to prevent the ballot paper reaching members' homes. In my view it is plainly inconsistent with the statutory scheme for the union to take that step. Moreover, as Mr Bruce Carr QC pointed out, if this argument were right the union could instruct the members to extract their ballot papers without infringing the provision.

85. A more difficult question in my view is whether there is a breach of section 230(1) on the grounds that the plan amounted to an interference with the right to vote. Lord Hendy says that concepts of interference and constraint in that provision must involve improper pressure such as intimidation, bribery or physical constraint. Here there was no more than encouragement. That cannot possibly be interference, he submits; any union must be entitled to seek to persuade its members to support the strike without infringing the law and it is absurd to suggest otherwise.

86. I see the force of that submission; that is I think the usual understanding of what interference in voting means. But I am persuaded by the analysis of Males LJ that the concept of interference must take its colour from the statutory context in which the term is used. Here the purpose of the legislation is to allow the worker to be free from any interference, whether from the union, its officials or its members, in how and when he exercises his vote (as long as it is within the time-frame allowed for voting). In my

view the plan adopted by the union in this case interfered with that freedom and falls foul of section 230(1).

87. Lord Hendy pointed out that there is no hint of a complaint from any member about the process adopted, and no evidence to support a charge that the union or any of its officials or members had brought unwanted pressure of any kind on anyone. In my view this fact does not help him. The lack of any complaint would not be surprising even if some members had felt pressured. Those who, against their better judgment, succumbed to the pressure would be unlikely to want to admit to having done so; and in any event there is an understandable reluctance for union members to criticise the union, particularly in the course of a heated dispute with the employer. Having said that, I can well imagine that there would be few, if any, members who felt unduly pressured to vote in favour given the obvious support for this strike from other groups, although it is not possible to know definitively whether that is so or not. But even if that were so, and even if no-one in fact voted any differently than he or she would otherwise have done, that does not demonstrate a lack of interference; it merely shows that the interference was unsuccessful or unnecessary.

88. Nor is it open to the court to refuse an injunction on the grounds that the legal error made no difference to the result; that is not a factor which can influence the court in this context. Lord Hendy properly conceded that the concept of *de minimis* cannot apply if the plan adopted by the union does amount to interference within the meaning of section 230(1). Such interference, carried out across the country, will taint the ballot and render the strike illegal. The integrity of the ballot itself has been undermined, in the sense that it is not the ballot which Parliament has sanctioned. The ballot is invalid and the effect on the result is immaterial.

89. I have sympathy for the union. The ballot result is so overwhelming that it is difficult to believe that it would have been any different even had this plan not been adopted. I have no doubt that the union acted in the belief, or at least on the assumption, that the plan was lawful; there was no deliberate manipulation of the balloting arrangements designed to distort the democratic process. The question in law, however, is whether, objectively viewed, the plan was consistent with the statutory arrangements. In my view, it was not; it plainly subverted them.

90. It follows that I too would dismiss the appeal. Swift J in my view reached the right answer below, substantially for the right reasons.