ERRORS OF TIPPLES J IN HOWELL V EVANS & MCNICOL HEARD IN THE 2020 LONG VACATION

[ ] Paragraph number in the witness statement of Mark Howell dated 13-9-21 filed at the Court of Appeal on 17-9-21, which in turn refers to, and quotes from the transcripts, grounds of appeal and particulars of claim.

The errors in **bold** were highlighted in the claimant's letter dated 5 January 2022.

1. **Misconstrued the pleadings, failing to recognise that the claimant has either a fiduciary claim against the second defendant (McNicol) as his agent, or a third party claim against the first defendant (Evans), whose agent the second defendant is, concerning the conduct of the second defendant, or both in different areas of responsibility. [53]**

2. **Despite it being common ground that the second defendant on some issues acted as the agent of all the members except the claimant, misstated the claimant's case, denying without explanation that the claimant has a third party claim against the first defendant as representative of the members for any breach of contract on the part of the second defendant with, or for any breach of fiduciary duty owed by the second defendant to, the members. [18]**

3. **Misstated the fundamental pleading of the claimant as alleging a claim against the first defendant personally rather than correctly, as on the face of the claim he plainly does, against all the members other than himself, as represented by the first defendant; this accords with the undisputed approach of *Anderton & Rowland (a firm) v David Rowland* (1998) also adopted in *Foster v McNicol* (2016). [20-21, 52]**

4. **Misapprehended the common position of the parties that in so far as the second defendant acted as agent of the claimant as well as all the other members, the claimant was entitled to place reliance on the good faith requirements of Chapter 2, clause II Rule 7. [23]**

5. **Misstated the restitutional cause of action, which is precisely as set out by Lord Scott in *Cobbe* at 3(v). [55]**

6. **Failed to explain why Lord Scott's exposition of the cause of action relied upon by the Appellant (at paragraph 3(v) of *Cobbe*) was not applicable to the claim. [25]**

7. Proceeded to case manage and hear the strike out application without disclosing recollection of, indeed fixation on, an earlier strike-out of the claimant's Hayward appeal in controversial circumstances, contrary to the duty of a judge to give a reasoned decision for non-recusal where the issue obviously arises. **[49]**

8. Hid from the claimant during the hearing an intention to distribute copies of the earlier appeal strike out order and judgment immediately after delivering the judgment supporting the granting of the defendants' strike-out application, thus preventing the claimant from taking this proposed action into account in his submissions. **[49]**

9. Allowed an uninformed, unexplained and unfairly arrived at earlier decision in a different case to colour the court's approach to, and arrival at, a decision on the defendants' application. **[50]**

10. Improperly viewed the claimant's statement that he had successfully resisted strike out applications in the past as a challenge that she was driven by her pre-conceived attitude dating from 21 January to beat. **[49]**

11. Took charge of the case in the place of the more appropriate urgent applications judge, Cockerill J, or Eady J, who had heard it before. **[12]**

12. Without giving any reasons, on short notice listed the defendants' application in the face of the claimant's written submissions that it would be fair first to restore the leaked internal report on antisemitism, thereby to finalise the further particulars of claim, and to seek permission to refer to additional evidence. **[12]**

13. Delivered a judgment that recited mechanically the defendants' arguments without explaining why the court accepted them in preference to the claimant's. **[12]**

14. In argument, denied that the role of the second defendant is mentioned in the particulars of claim and, when the claimant rises to say "para 30" and clarifies, angrily said: "Let's have a look - you sit down". **[14]**

15. Having pointed out that the particulars had been permitted by Eady J to be added to but not amended, and implied that the court could deal with the strike-out application by permitting them to be amended, unreasonably dismissed the claimant's rider, which effectively reserved the right to amend (because the defendant had been expected promptly to, but did not, cooperate in redacting the report and only consider making a strike out application after reviewing the further particulars), saying only: "you have the rider at the beginning but there we are." **[14]**

16. Held the following to be an abuse of process without any reasoning whatsoever despite Eady J having expressly found them unobjectionable at the previous hearing: provision in the particulars for potential claimant and defendant joinders, the pleading of the claim partly in the claimant's capacity as a voter, and the claimant's reference publicly to seeking a comprehensive judgment (in the context of CPR1.4 (2) (i) which says the court should "deal with as many aspects of the case as it can on the same occasion"). **[14]**

17. Blatantly misrepresented: "seeking a court remedy for the invalidation of the claimant's sacrifices due to the conduct of the party through its officers" as 'litigating due to being unhappy with the election result'**. [14]**

18. Misstated the pleadings, incorrectly declaring that fraud was alleged and that there is no foundation for suspicion that the evidence could lead to an allegation of fraud despite the 900 page internal Labour Party report of material evidence filed at court. **[54]**

19. Having just quoted at length from the unreported case of *Anderton*, misstated the law, incorrectly holding that: "As a matter of law, the rules of the Labour Party do not have, and cannot have direct contractual effect between individual members" when Jack J said the opposite was the case in the event that: "either there is a sufficiently clear expression of that intention in the rule, or it is necessary that it have direct contractual effect between members in order to give effect to the rule." **[56]**

20. Misstated the law, incorrectly holding that: "The benefit and the burden of the contract is for the association to enforce and not the individual contracting members: see Nutting v Baldwin [1995] 1 WLR 201 per Mr Justice Rattee at 208B-D. Once this principle is applied it is evident that there are no

reasonable grounds for the claimant's claim in contract against the second defendant" whereas Rattee J only held that if the member does not share the burden of any collective enforcement they may not share the benefit; unreasonably denying that: "The Court has the jurisdiction to determine the right interpretation of the rules in accordance with the law of contract and the claimant has the right to ask the court to determine whether a rule has been breached - see *Foster v McNicol* [2016] EWHC 1966 (QB) at 57, this being all the more clearly so if the enforcer of the rules is also the alleged contravener of the rule, as was the second defendant during the material period, and the rule in question was as fundamental as Ch1 VIII 2B (win elections)." **[57]**

21. Misrepresented the final paragraph of the judgment of Leggatt LJ on 18-4-18 as confirmation of the fiction that his judgment included a reasoned determination of the claimant's appeal against dismissal of his claim in contract against Hayward. **[44.2]**

22. Struck out, having refused to even touch on, let alone grapple with, grounds of appeal challenging the dismissal at trial of the claim in contract against Hayward, thus erecting an impermissible barrier to access to the court without reasoning or explanation. **[44.5]**

23. Read selectively into the judgment, having not before mentioned it to the claimant, from a letter by the respondent (Hayward), who was not present; the claimant having not therefore been allowed the opportunity to read or answer it. **[46]**

24. Demonstrated no conception of what the appeal to be struck out was about; furnished no explanation, other than a misinterpretation of the appeal out of context, as to the reasoning to justify the purported basis in law of the strike out of this particular appellant's notice, namely abuse of process. **[47]**

25. Misrepresented the position as that CA had given reasons for refusal of PTA against dismissal of both of the claimant's claims against Hayward when the papers clearly showed that CA had only done so in relation to one of them. **[12]**

26. Hid from the claimant a letter from Hayward to the court claiming that he was prevented from enforcing costs in the action that he had been ordered to pay whereas the

situation was the reverse, in that the claimant had an order for the costs of five high court judge orders in his favour against Mr Hayward, which the judge denied the claimant an opportunity to inform the court of at the hearing. **[12]**

27. Selectively quoted from the judgment of Leggatt LJ, leaving out the substance – of unfairness: 'some aspects of the judge's handling of the trial were far from ideal' (paragraph 5), and of fact finding: 'criticisms can validly be made of some of the factual findings made by the judge' (paragraph 24). **[71.5]**

28. Misstated the facts, incorrectly stating that Leggatt LJ dealt with the dismissal of the claim in contract against Hayward when in fact despite twelve long paragraphs of the trial judgment and eight pages of the transcript of oral submissions to Leggatt LJ precisely zero words of the Leggatt LJ judgment dealt with the claim in contract, as his reasoning then and subsequently correctly acknowledged. **[71.5]**

29. Secretly accepted false representations from the defendant (Hayward) such that the claimant was unable to correct the record, thus invalidating the appeal strike out order. **[71.6]**

30. Misstated the facts in the Stewart claim, in particular that the defendant had entered in writing on the Purple Bricks website on 8 November 2019 that his house was reserved to the claimant provided he paid the deposit within 14 days of receipt of papers and that up to that point negotiations had been conducted "subject to contract" but subsequently Mr Stewart's solicitor sent the claimant's solicitor the contract not marked "draft" and not covered by "subject to contract. The claimant's application for injunctive relief was returnable on 6 December, pending which date Lewis J on 3 November refused the claimant's request, without notice but after request from the defendant of an undertaking, for a short temporary injunction. On 6 November 2019 in the morning when Charles Bourne QC, sitting as a deputy judge, refused the defendant's strike out application but also refused an injunction under protest from the claimant that despite his receiving the papers by email on the 2nd and in the post on the 3rd the defendant did not instruct solicitors until the afternoon of the 5th, emailing the claimant evidence at around 5pm. **[59-60]**

31. Unreasonably struck out the Stewart claim despite stating that there was potentially a case in misrepresentation,

albeit that it was unlikely to be made out on the facts sufficiently to warrant an award of damages, and despite the fact that hitherto four High Court Judges, a Lord Justice and, four times, a Master had not struck out the claim. **[61]**

32. Misunderstood the Kumar jurisdiction, which empowers a judge to determine, on careful examination, that the judge in question had actually meant to certify TWM but had 'slipped' (as Brooke LJ put it), not that they were wrong to consider such certification inappropriate. **[64]**

33. Persisted after the 30 July 2020 hearing with the hectic, vacation-time pace dictated in July 2020 by the defendants against the claimant's wishes and interest. **[65]**

34. Misstated the facts and the law, incorrectly saying that the claimant, not the defendants, had requested an adjournment, and, in response to the claimant querying the defendants' retraction and the claimant's request for recusal due to the judge's unprecedented, vacation-time, quick-fire hostility, directed him to file an application given that taking care with the facts and consideration of recusal are absolute judicial duties. **[68]**

35. Artificially held that the defendants' skeleton and oral submissions constituted an application as opposed to the court having at its own initiative listed the hearing in the order dated 31-7-20, as was really the case. **[71]**

36. Wasted Justice Department resources improperly searching for vindication of preconceived assumptions in relation to the claimant. **[71.2]**

37. Misstated the fully documented facts in the claimant's note in reply to the judge's e-file note as well as the content of, and attachments to, the claimant's email to the court and parties and of course the content of the e-file itself, incorrectly denying the claimant had a history of litigation success but when unsuccessful had, other than highly exceptionally, readily accepted the outcome, and had also been subject to many failed applications by opponents. **[71.3]**

38. Recognised the cause of action against Stewart but misstated the pleadings, holding incorrectly: 'the claimant has failed to set out . . . details of any misrepresentations' despite paragraphs 1 – 4 of the particulars of claim doing precisely that. **[71.7]**

39. Inadmissibly augmented one legitimate (albeit harsh) TWM order with others that did not validly create a CRO jurisdiction. **[72]**

40. Misstated the facts, wrongly attributing her own written comment (in July 2020 that one barrister was sufficient for the defendant at the forthcoming hearing on the 30th) to the claimant and then, once corrected (in the transcript), still employed the comment in a judgment pointedly not to apply to what she had directed it to (the hearing on 30-7-20) but instead to the hearing on 7 September 2020. **[6]**