Ancillary Template 271 – OCT16 - Order Form (CIV:GS:25.05.17)

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2 2020/1067 and 2020/1223**

MARK HOWELL –v– DAVID EVANS AND IAIN MCNICOL

ORDER made by the Rt. Hon. Lord Justice HENDERSON

On consideration of the application for a stay of the orders made by Eady J on 22 June 2020 ("the Eady Order") and by Tipples J on 30 July 2020 ("the Tipples Order")
And on consideration of the papers and without an oral hearing

Decision:

1. A stay is granted of the costs orders in paragraph 7 of the Eady Order and paragraph 5 of the Tipples Order until the applications by Mr Howell for permission to appeal against those Orders are determined.
2. Any further stay of the Eady and Tipples Orders is refused, and in particular no stay is granted of the pending hearing to consider the making of a Civil Restraint Order ("CRO") against Mr Howell which is due to take place before Tipples J on 7 September 2020.
3. Permission is granted to Mr Howell to rely on the skeleton argument of David Lemer of counsel dated 27 August 2020 in support of his application for permission to appeal the Tipples Order.
4. The Respondents are directed to file and serve brief written submissions (not exceeding 5 pages in length) in response to Mr Lemer's skeleton argument by 4 pm on Wednesday 23 September 2020

Reasons

1. It is common ground (and, if necessary, I direct) that Mr Howell's applications for permission to appeal against the Eady and Tipples Orders should be determined together by the same Lord or Lady Justice. Pending determination of those applications, it is appropriate to stay the orders for payment of costs which would otherwise take effect during the interim period. For the avoidance of doubt, I express no view on the question whether the stay should be extended if permission to appeal is granted.
2. I am not persuaded that there should be an interim stay of any other provisions of the two Orders, including in particular paragraph 9 of the Tipples Order (which adjourned the issue of whether it would be appropriate to make a CRO against Mr Howell to a hearing fixed for 7 September 2020). If the circumstances justify the making of a CRO, it is in the public interest that it should be made at the earliest convenient opportunity. Directions have been given for the hearing, most recently by Tipples J on 1 September 2020, and she will be well aware of the fact that Mr Howell's applications for permission to appeal the Eady and Tipples Orders have not yet been determined. If a CRO is made, its operation will be prospective only, and the pending applications for permission to appeal will still be determined on their merits.
3. Mr Howell needs permission to rely on Mr Lemer's skeleton argument, which is granted. The court will be assisted by brief written submissions in response, as directed above.

Notes:

1) Where an application (other than an application for permission to appeal) has been refused on the papers, the applicant may request that the decision be reconsidered.
2) An application for reconsideration must be filed within 7 days after the party is served with notice of the decision.
3) The reconsideration will be determined by the same or another judge on paper without an oral hearing; except that the judge determining the reconsideration on paper may direct that the reconsideration be determined at an oral hearing, and must so direct if the judge is of the opinion that the reconsideration cannot be fairly determined on paper without an oral hearing: see CPR 52.24.

Date: 2 September 2020

Case Number: A2 **2020/1067 and 2020/1223**

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2/2020/1223**

HOWELL –v– EVANS & ORS

ORDER made by the Rt. Hon. Lady Justice Nicola Davies DBE

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: Refused

An order granting permission may limit the issues to be heard or be made subject to conditions

Reasons

1. Grounds 1 and 2 amount to a complaint of partiality and bias. It is right that the judge had found against the appellant in a different case in January 2020, but this is not sufficient to undermine her impartiality (*Locabail (UK) and Bayfield Properties* [2000] QB 451, at [25]). In the judgment, the phrase "nonsense" is used to represent the judge's assessment of the legal arguments of the appellant. This does not indicate animosity to the appellant. There is nothing in the transcripts of the judgment and of the hearing to indicate bias.

2. Ground 3. The appellant identifies alleged errors of law in five substantive areas: (1) standing; (2) the claim in fraud; (3) the claim in equity; (4) the finding of abuse of process; and (5) the award of costs on an indemnity basis.

3. As to (1), even if the appellant's argument as to standing was viable, this cannot be determinative given the unsustainable claims in contract. The judge's findings that: (a) the terms relied upon by the appellant did not impose the pleaded obligations upon the defendants; and (b) the appellant has no third-party rights under the defendants' respective contracts of employment, disclose no error of law.

4. As to (2), at [48]-[49] of the judgment the appellant's pleaded case and submissions contained in his skeleton argument are set out. The judge's reasons for finding that this part of the appellant's claim is bound to fail are set out at [50] and [51]. The judge's reasoning is sound.

5. As to (3), the judge made no error in finding that *Cobbe* did not assist the appellant. The appellant contends that *Cobbe* was relied upon as a basis for a claim in restitution. As to that, the judge correctly held that the fact that Mr Howell had spent his own time and money working on the election campaign in Battersea could not found a cause of action against the defendants. The pleadings disclosed no other basis for granting a restitutionary remedy.

6. As to (4), the judge's determination that the claim was an abuse of process was materially based on the finding that there were no reasonable grounds for bringing the claim. This was a finding which the judge was entitled to make. This, together with her finding that the appellant was pursuing the claim "for his own political agenda", provided a proper basis for a determination that the claim was an abuse of process.

7. As to (5), the basis for the award of costs on an indemnity basis was that the appellant had made allegations with no foundation. The judge made no error in finding that the allegations were without foundation and, therefore, no error in awarding costs on an indemnity basis.

8. This appeal has no real prospect of success. There is no other compelling reason for it to be heard. Permission to appeal is refused.

Information for or directions to the parties

Mediation: Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)?

Pilot categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

If yes, is there any reason not to refer to CAMS mediation under the pilot?

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation?

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)

b) any expedition

By the Court

Signed:

Date: 14 May 2021

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –

a) the Court considers that the appeal would have a real prospect of success; or

b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **A2/2020/1223**

DATED 14TH MAY 2021
IN THE COURT OF APPEAL

ORDER

Copies to:
APPLICANT IN PERSON

Greendwoods Grm
DX 95
London/Chancery Lane
Ref: NS/THE118/347

Lower Court Ref: QB-2020-002055

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2/2020/1599/A**

HOWELL –v– EVANS & ORS

ORDER made by the Rt. Hon. Lady Justice Nicola Davies DBE

On consideration of an application to reopen an application or appeal, previously refused or dismissed

Decision: Refused

Reasons

1. There is nothing in Parts 7-11 of the order of Tipples J date stamped 31 July 2020 which provide any grounds for extending time to appeal against the order of Tipples J dated 21 January 2020.
2. The reasoning in the order dated 14 May 2021 will not refer to every document or argument submitted and relied upon by the applicant. Given the volume of documentation filed by the applicant, such a course would be unrealistic. There is nothing in this further application to undermine the reasoning nor the refusal of permission contained in the order of 14 May 2021.

HER MAJESTY'S E & W COURT OF APPEAL

Note: Where the application is refused the decision of the judge is final and the application cannot be renewed to an oral hearing - see rule 52.30(7) and *Taylor v Lawrence [2002] EWCA Civ 90*

By the Court

Signed:
Date: 18 August 2021

DATED 18TH AUGUST 2021
IN THE COURT OF APPEAL

ORDER

Copies to:

Mark Howell
15 Sidford House
Cosser Street
SE1 7DD

Greenwoods Grm
Dx 95
London/Chancery Lane
Ref: NS/THE118/347

Mchale & Co Solicitors
19-21 High Street
Altrincham
WA14 1QP
Ref: LIP/PJF/STEWART

Lower Court Ref: QB-2020-002055

PTA Template 269F1 - OCT16 - Re-open

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2/2020/1223 B**

HOWELL –v– EVANS & ORS

CA-2020-000690-B

ORDER made by the Rt. Hon. Lord Justice Warby

On consideration of an application to reopen an application or appeal, previously refused or dismissed

Decision:

Application refused and certified as abusive and totally without merit (TWM).

Reasons

Litigation history

1. On 12 June 2020, the applicant brought proceedings against David Evans (as a representative of the Labour Party) and Ian McNicol (Baron McNicol of West Kilbride, formerly General Secretary of the Party). He alleged that the defendants, meaning them personally or other unidentified Labour Party members, acted dishonestly in a way that sabotaged the Party's chances of winning the 2017 General Election. He alleged breach of contract, breach of fiduciary duty, an equitable right to a restitutionary remedy, and fraud.

2. On 31 July 2020, Tipples J, DBE struck out all these claims, certified them as TWM, and ordered the applicant to pay the respondents' costs on the indemnity basis. The Judge held that the applicant had failed to identify any basis on which he had standing to sue the respondents. The claim was an abuse of process. The applicant was using the litigation to pursue what appeared to be his political agenda against the second defendant. The Judge directed a hearing to consider making a Civil Restraint Order (CRO) against the applicant. On 11 September 2020, she did make a General Civil Restraint Order (GCRO) against him, and gave brief reasons for doing so. On 16 October 2020, Tipples J handed down her reserved judgment giving reasons for granting the GCRO [2020] EWHC 2729 (QB).

3. Tipples J refused permission to appeal (PTA) against her decision of 31 July 2020. The application for PTA was renewed to this court, but refused by Nicola Davies LJ on 14 May 2021. The applicant sought to reopen that decision pursuant to CPR 52.30. That application was refused by Nicola Davies LJ by order dated 18 August 2021. By notice dated 27 September 2021, the applicant now makes a second application to re-open his application to this court for PTA against the decision of Tipples J.

Principles

4. The applicant has no right of appeal against the order of Nicola Davies LJ dated 18 August 2021, nor any right to renew it orally: CPR 52.30(7). Nor can a second application on the same grounds be permissible, in the absence of a material change of circumstances: see *Thevarajah v Riordan* [2015] UKSC 78, [2016] 1 WLR 76, esp at [24]. A second application on different grounds, which could have been advanced before, is liable to be dismissed as re-litigation abuse under the principle established by *Henderson v Henderson* [1843] 3 Hare 100, 67 ER 313, which applies equally to interlocutory proceedings: see *Koza Ltd v Koza Altin Isletmeleri AS* [2021] EWCA Civ 1018, [2021] 1 WR 170.

5. Here, no change of circumstances is alleged. The present application could only succeed if the applicant was able to show that all three of the criteria specified in CPR 52.30 are met in respect of the decision of Nicola Davies LJ dated 18 August 2021. In other words, that (a) reopening that decision is "necessary … in order to avoid real injustice"; (b) "the circumstances are exceptional and make it appropriate to reopen the appeal"; and (c) "there is no alternative effective remedy".

6. To satisfy these requirements there must be "a powerful probability that a significant injustice has already occurred": *R (Wingfield) v Canterbury CC* [2020] EWCA Civ 1588, [2021] 1 WLR 2863 [61(2)]. The paradigm case is "fraud or bias or where the judge read the wrong papers": ibid [61(3)]. Successful applications under CPR 52.30 are "truly exceptional": *Municipio de Mariana v BHP Group plc* [2021] EWCA Civ 1156 [111]. The category of cases in which a decision under CPR 52.30 must itself be re-

opened must be considerably smaller.

7. This case is plainly not within that category. No grounds have been identified for finding that there is a "powerful probability [of] significant injustice."

The first application to re-open

8. The basis advanced for the initial application to re-open in this case was that this case "*fits into the paradigm identified … in* Wingfield*"* as there were grounds for suspecting that Nicola Davies LJ may not have read all the papers submitted: see the Note of Counsel (Mr Lemer) dated 21 June 2021 at paras 4 & 15. Counsel said then (at para 15) that this was "*not a case which will give rise to abusive repeated applications to re-open, since a relatively simple inquiry of the court file should establish whether the applicant's concerns are borne out*." The court was therefore being asked to re-open on the basis of an oversight on the first occasion.

9. Two additional sections of the Core Bundle were referred to: sections 2B and 7A, both dated 27 August 2020. Section 2B was a "supplement" to the appellant's notice and grounds of appeal. Section 7A was a note on the transcript of the proceedings on 30.8.20, which also incorporated "Amendments to appeal" and an application for an extension of time to appeal against the order of Tipples J dated 21 January 2020 in the case of *Howell v Hayward*. Permission for the amendments had not been granted. (There was a prospective application for permission to amend in section 10(c) of the Appellant's notice, but never any formal application to make the amendments dated 27 August 2020. Contrary to the applicant's assertions, the order of Henderson LJ dated 2 September 2020 plainly did not amount to a grant of permission to amend).

10. On the face of the papers, Nicola Davies LJ's decision of 18 August 2021 addressed all the matters raised by the application to reopen. It dismissed the application to extend time for appealing: para 1. And para 2 made clear that the brevity of her original reasons did not mean the Judge had not considered all the points submitted to her, and that the material referred to in the application to re-open did not alter her decision.

The present application

11. On this second application, there is no allegation that when dealing with the first application the Judge failed to read the right papers, nor is there any allegation of fraud. In para 2 of his current application notice the applicant does express "concern" that Nicola Davies LJ "may be uncomfortable with the political implications of the claim", but this amounts to nothing more than a complaint about the outcome coupled with allegations of a possible breach of public duty coupled with a possible political motive. None of this is particularised or made good, or made arguable, by the contents of the supporting witness statement. On the face of it, the applicant is suggesting that the brevity of the Judge's reasoning provides reasonable grounds to suspect corruption. That is clearly untenable.

12. What is left are complaints about the decision of 14 May 2021 to refuse PTA "*as set out in my appellant's notice issued on 4 August 2020*". There are allegations of insufficient reasons, errors of law, and some errors of fact. These are not points that can properly be raised on a second application to re-open. They are matters that either were raised, or could have been but were not raised, on the initial CPR 52.30 application, so the attempt to raise them on this second application is an abuse. In other words, this is precisely the kind of abusive application that Mr Lemer said would not be brought.

The adequacy of the reasons for refusing PTA

13. For good measure, and in the light of the overarching allegation of a "corrupted judicial process", I shall address the challenge to the May decision nonetheless. I am satisfied that although the applicant's criticisms are developed over many pages, they fail to make out a case that the requirements of CPR 52.30 are met in respect of the original decision to refuse PTA.

14. The applicant places his various complaints under the umbrella criticism that Nicola Davies LJ "has not properly dealt with my grounds of appeal" (Application Notice para (1)). His case is, essentially, that there has been a "failure to grapple" with his grounds and arguments – a term that was seemingly first used in *Wingfield* [66]*,* and referred to extensively in *Municipio de Mariana.* Some care is needed in relation to this issue.

15. A judge dealing with an application for permission to appeal is not obliged to address individually and in detail each and every one of the points advanced by a litigant. The degree of detail required depends on

the circumstances. The principles are rehearsed in *Municipio de Mariana* at [54-56]. In the same case, at [113-114], the Court emphasised the importance of the grounds of appeal, and the need for these to be "short, succinct … clear and concise". It is the grounds of appeal with which the judge should deal. The grounds of appeal in this case are not short and succinct, clear or concise but diffuse, discursive, and argumentative. The paperwork submitted in support of the application was not and is not in compliance with CPR PD52C para 14 and 27(1)-(3). Indeed, it is grossly excessive. To behave in this way and then complain that not every point has been sufficiently addressed is unwarranted.

16. In this case, all the applicant's three original grounds of appeal were sufficiently addressed and sufficient reasons were given:-

(1) Actual or apparent bias by Tipples J and

(2) "procedural irregularities". The reasons given by Nicola Davies LJ at 1 of the 14 May order addressed these two grounds of appeal together, and did so briefly but sufficiently. She did not specifically address each strand of the argument, but she did specifically address some of them, and she dismissed compendiously the bias argument, having regard to "the transcripts of the judgment and of the hearing".

(3) "Errors of law". The original grounds of appeal devoted 20 paragraphs to allegations of error of law. Nicola Davies LJ discharged the duty identified in *Municipio de Mariana,* to analyse the main points, of which she identified five. She devoted a paragraph of reasoning to each of the main points. Her reasoning is succinct but it is clear, cogent and sufficient. The applicant's witness statement, however, lengthy, has identified no reasonable grounds for complaint about them.

Note: Where the application is refused the decision of the judge is final and the application cannot be renewed to an oral hearing - see rule 52.30(7) and *Taylor v Lawrence [2002] EWCA Civ 90*

Signed:
Date: 20 December 2021

IN THE COURT OF APPEAL, CIVIL DIVISION **A2/2020/1223**

ON APPEAL FROM TIPPLES J IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION

BETWEEN:

MARK HOWELL **Appellant**

-and-

DAVID EVANS (sued as a representative of all members of the Labour Party except the Claimant and the Second Defendant) **1st Respondent**

Iain McNicol **2nd Respondent**

SKELETON ARGUMENT
IN SUPPORT OF THE APPLICATION FOR PERMISSION TO APPEAL

INTRODUCTION

1. The Appellant has, thus far, acted in person. This skeleton argument, drafted by counsel, seeks to address, with specificity, the legal flaws in Tipples J's judgment (Ground 3). The Appellant's allegations as to the Judge's conduct are addressed under grounds 1 and 2 at paragraphs 1-34 of the Grounds of Appeal. This skeleton argument will not provide further detailed submissions relating to that aspect of the appeal.

SUBMISSIONS

Grounds 1 and 2

2. With regard, in particular, to paragraphs 15 and 25 of the grounds, the Court is reminded of the proper approach in considering potential partiality and bias, as set out in *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451:

    a. *"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial"* Paragraph 21

3. Further at paragraph 25:

    a. *"…By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with*

any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

Ground 3 – Errors of Law

4. At paragraphs 35-53 the Appellant sets out the basis for his contention that Tipples J erred in law in striking out his claim. It has been submitted, in summary, that:

    a. Tipples J was wrong to conclude that the Appellant had no standing to bring the claim against the Respondents (paragraphs 38-43 grounds);
    b. Tipples J was wrong to conclude that the Appellant's case represented an abuse of process (paragraphs 48-49 grounds);
    c. Tipples J was wrong to conclude that an allegation of criminal fraud had been advanced (paragraph 50 grounds);

d. Tipples J erred in proceeding on the basis that the Appellant sought to pursue a claim on the basis of a promissory estoppel, as opposed to on the basis of a unilateral binding promise, supported by consideration (paragraph 52 grounds);
e. Tipples J erred in awarding costs on an indemnity basis (paragraphs 54-55 grounds).

5. This skeleton argument addresses, in detail, the standing issue and equitable arguments, abuse of process, as well as the matter of indemnity costs.

6. To the extent to which it may be suggested that the Appellant's Further Particulars of Claim do not set out the contended contractual analysis, set out below expressly, and/or with sufficient clarity, Tipples J was under an obligation to consider whether any such defects could have been cured by amendment before striking out claims, *Soo Kim Youg* [2011] EWHC 1781 (QB). In failing to do so the Judge erred in law.

Standing

7. The issue of standing is addressed at paragraphs 44-47 of Tipples J's judgment. In concluding that the Appellant had no standing, the Judge concluded:

a. *"The trouble is that nowhere in the Further Particulars of Claim does the Claimant allege any rule or any power in the rules which affects him as a member and which the Defendants have breached which could give rise to any sort of complaint that this court might have jurisdiction to hear. I agree with the points made by Ms. Crasnow; this is not a case where the Claimant, as a member of the Labour Party, actually has any standing to bring a claim against the Defendants."*

8. Having concluded that the Appellant had no standing, and that such a finding was determinative of the Appellant's claims, the Judge proceeded to consider the detail of the claims advanced by the Appellant.

9. It is not apparent, from the reasoning set out at paragraphs 45-46, how the Judge was able to conclude that the Appellant had no standing without a more detailed

exposition of the various heads of claim. For the purposes of the Appellant's appeal, the Judge's conclusions on standing and the Claimant's contractual and fiduciary claims will be addressed together.

10. The Appellant's central assertions, as set out, in particular, at paragraph 24 of the Further Particulars of Claim ("FPOC"), were that the 2nd Respondent:

    a. Sought the victory of rival parties in vulnerable seats, rather than the victory of the Labour Party (LP)
    b. In doing so, secretly employed party funds, the time of paid party staff, and the use of buildings and facilities.

11. At paragraph 25 FPOC, the Appellant identified those actions as breaching constitutional rule I 3 (Chapter 1.I.3), which provides that:

    a. *'The Party shall bring together members and supporters who share its values to develop policies, make communities stronger through collective action and support, and promote the election of Labour Party representatives at all levels of the democratic process'.*

12. It is the Appellant's case, on a proper analysis of the FPOC, that:

    a. The 1st Respondent, as a representative party, is liable for the actions of the 2nd Respondent (acting as the 1st Respondent's agent), and thereby liable to the Appellant for the 2nd Respondent's actions;
    b. The 2nd Respondent is liable, directly, to the Appellant for his actions.

13. Tipples J addressed those claims in the following manner.

14. As regards the claim against the 2nd Respondent:

    a. Whilst one member of an unincorporated association is party to a contract with all other members of the association, a rule in the contract of association is not to be treated as intended to have direct contractual effect between one member

and another, so as to give rise to a claim for damages by way of compensation for its breach, unless either there is a sufficiently clear expression of that intention in the rule, or it is necessary that it have direct contractual effect between the members in order to give effect to the rule (paragraphs 58-59 judgment)

b. The LP rules, and in particular chapter 1.I.3, do not, and cannot, have direct contractual effect between the Appellant and any other member, such as the 2nd Respondent (paragraph 60-62 judgment)

c. The Appellant is not entitled to a declaration that the Respondent(s) have acted in breach of contract, since the whole purpose of his claim is to make them personally liable in damages (paragraph 64 judgment)

15. As regards the claim against the 1st Respondent:

a. The claim that the 1st Respondent breached rule I3 is not valid, as the 1st Respondent cannot be personally liable for a breach of contract by another individual member under the terms of the rules (paragraph 83 judgment);

b. The claim that the 1st Respondent is liable to the Appellant for his failure to enforce his contract of employment with the 2nd Respondent, in respect of their fiduciary duties, is flawed since:

i. The Appellant had not identified any basis on which fiduciary duties were owed;
ii. The Appellant was not, pursuant to s.6(3)(a) Contracts (Rights of Third Parties) Act 1999, able to rely on third party rights arising from the 2nd Respondent's failure to perform his employment contract (paragraph 84 judgment)

16. Six points are made.

17. *First*, the jurisprudential foundation for the contention that individual members of an unincorporated association do not, other than in a specific set of circumstances, owe contractual duties to one another, is limited to the unreported first instance decision of *Anderton & Rowland (a firm) v David Rowland* (unreported) (1998).

18. The judgment in *Anderton* is premised on the observation (see citation at paragraph 59 judgment) that:

    a. *The rules of associations such as the Guild and of other kinds of members' clubs are primarily intended to provide for the organisation of the association and relations between the member and the association, that is to say between the member and the body of members apart from the member…"*

19. That starting point runs contrary to the accepted legal position that an unincorporated association has no legal personality and that members have contracted with one another, on a multilateral basis, rather than with a separate party/body (such as the body of members apart from the individual member).

20. In light of the absence of guideline authority on this important issue it is contended that it would be appropriate for permission to appeal to be granted on this point alone.

21. *Second*, even if the *Anderton* approach were to be adopted, that would not preclude the Appellant from advancing a contractual claim against one or other of the Respondents, in any event. The proper contractual analysis would be as follows:

    a. Whilst the *Anderton* approach precludes an individual member-individual member claim, it does not preclude a contractual claim by a member against the remaining members of the party, with the 1st Respondent as a representative defendant. That is the orthodox means of advancing such a challenge and was the way in which the claim was advanced in *Foster v McNicol* [2016] EWHC 1966. To the extent to which Tipples J appears (see paragraph 83 judgment) to consider the Appellant to be pursuing the 1st Respondent personally (as opposed to in a representative capacity) such an

approach is plainly flawed and expressly contrary to the manner in which the 1st Respondent has been named as a party to proceedings.

b. It is recognised that where the alleged wrongful act was committed by an agent of the association, on behalf of its members, the proposed Claimant may be unable to recover from his fellow members, since their contractual responsibility would be no greater than his own[1]. This argument was advanced by the Respondents at paragraphs 24-25 and 57 of their strike out skeleton argument, with reliance upon *Bonsor v Musicians Union* [1956] AC 104. The argument is premised upon the agent, in this instance the 2nd Respondent, acting as an agent for all members of the LP, including the Appellant.

c. In order to establish such an argument it would be necessary for the Respondents to demonstrate that the 2nd Respondent was really acting on behalf of the Appellant in his alleged actions to promote the victory of rival parties to the LP, in circumstances where the Appellant, conversely, was actively seeking victory of LP candidates exclusively. No such finding has been made by Tipples J in the present case. In the absence of such a finding the Appellant would not be precluded from his contractual claim against the 1st Respondent in relation to the actions undertaken by the 2nd Respondent as its agent;

d. In the event that it were concluded that the 2nd Respondent was acting as an agent for all members of the party, including the Appellant, that agency relationship would provide the basis of the Appellant to claim directly against the 2nd Respondent, either on a contractual basis, or on the basis of the 2nd Respondent's fiduciary duties which arise as a result of the principal-agency relationship.

22. *Third*, Tipples J, at paragraphs 81-82 judgment, rejected the Appellant's contention that the 2nd Defendant owed fiduciary duties to him on the basis that the FPOC failed

[1] See Chitty on Contracts 33rd Ed at para 10-071

to identify a legal basis on which such duties could be owed. It is submitted that such a conclusion is flawed since:

a. As noted above, and as was addressed extensively in the Respondents' strike out skeleton argument (see paragraphs 49-55), on a proper construction of the claim, the 2nd Defendant can be construed as acting as an agent for the LP (and thereby the Appellant). It is the agency relationship that provides the foundation for the claimed fiduciary duties;
b. Further, to the agency relationship, the Appellant placed expressed reliance upon the *good faith* requirements of Chapter 2, clause II Rule 7, which provided that:

    i. *"Members have the right to dignity and respect, and to be treated fairly by the Labour Party. Party officers at every level shall exercise their powers in good faith and use their best endeavours to ensure procedural fairness for members."*

23. *Fourth,* Tipples J rejected the Appellant's claim to an entitlement to a declaration on the basis that, *"The whole purpose of the Claimant's claims in contract against the Defendants is to make them personally liable in damages in respect of alleged breaches of the rules of the Labour Party."* (paragraph 64 judgment).

24. The Court's role in making declarations to protect contractual rights in the context of unincorporated associations is well-established, *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 341-342. Whilst it is correct that the Appellant's FPOC seek damages, they separately and expressly seek declaration of contractual breach in relation to rule I 3. It is contended that it was not lawfully open to the Judge to reject the Appellant's claim for a declaration on the basis that he had also advanced a claim for damages, which she had concluded was misconceived.

25. *Fifth,* Tipples J's consideration of the express contractual terms relied upon by the Claimant (see paragraphs 71-74 judgment), insofar as the conclusions reached are said to be inconsistent with the Claimant's claim, was flawed.

26. In particular, as regards *"constitutional rule I3"* Tipples J concluded:

    a. *"It does not oblige either of the Defendants to undertake a particular course of action and it cannot create a freestanding contractual right to each and every member to have elected particular candidates or candidates in particular constituencies"*

27. The Claimant's claim plainly does not require the existence of a freestanding contractual right for particular candidates to be selected or elected in particular constituencies. In concluding, implicitly, that the absence of such a contractual right undermined the Claimant's claims in contract, the Judge erred.

28. *Sixth,* Tipples J's consideration of the claimed implied terms is erroneously limited to the conclusion that *"The Claimant relies on those terms in order to allege that the Second Defendant breached the implied terms or duties in his contract of employment with the Labour Party which deprived the Claimant of his third-party rights."* (paragraph 76 judgment). Tipples J fails to consider whether the alleged implied contractual terms were in existence, were engaged and/or breached in light of the contractual analysis set out above.

Equity

29. The Judge addressed the Appellant's arguments in equity at paragraphs 52-54 judgment, noting the Appellant's reliance upon Lord Scott's speech in *Cobbe v Yeoman's Row Management* [2001] WLR 1752, at paragraph 3(v). In concluding that that aspect of the Appellant's claim did not give rise to a cause of action against the Respondent's Tipples J's material reasoning was limited to:

    a. *"The fact that someone has spent their own time and money in the way explained by the Claimant does not give rise to any sort of cause of action against the Defendants. It is a hopeless point*" Paragraph 53 judgment
    b. *"In any event, in doing their best to understand the Claimant's pleaded case the Defendants submit that a non-contractual promise of the type alleged in*

the Further Particulars of Claim could only sound in equity by way of doctrines of estoppel, especially promissory estoppel. I agree. It is trite law that the doctrine of promissory estoppel cannot be used to found a cause of action: it is a shield, not a sword." Paragraph 54 judgment

30. It is contended that Tipples J's treatment of the Appellant's equitable claim is flawed since:
    a. In concluding that the Appellant's argument was *nonsensical,* Tipples J failed to engage with, or 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 in the circumstances of the present claim;
    b. That failure is exemplified by the Judge's acceptance of the Respondents' submissions relating to promissory estoppel. The judgment in *Cobbe* made it clear that the Appellant's proposed cause of action was expressly not a form of promissory estoppel, and that it could be used to found a cause of action leading to the granting of a restitutionary remedy. (see paragraphs 3, 4 and 43-44 *Cobbe).*

Abuse of Process

31. Tipples J conclusion on abuse of process is set out at paragraph 92 judgment. In reaching the conclusion that the Appellant's claim constituted an abuse of process, justifying strike out, the Judge relied upon:
    a. The fact that the Claimant's claims did not raise any cause of action known to law;
    b. With reliance upon what was said about the claim on the Claimant's fundraising page, a finding that the Claimant was pursuing the claim for his own political agenda.

32. Three points are made.

33. *First,* the Judge's conclusion on abuse of process was materially based upon her finding that the Appellant had failed to establish any reasonable grounds for bringing the claim (CPR 3.4(2)(a)). Those matters are addressed above. Accordingly, if the

Appellant succeeds in that aspect of his appeal, the Judge's conclusions as to abuse of process will be materially undermined.

34. *Second,* the mere conclusion that the Appellant had political motivations for pursuing his claims against the Respondent is not, without more, sufficient to justify the striking out of his claim. There will be many claims in relation to which, whilst properly founded in law, Claimants have other motivations. The *Foster v McNicol* [2016] EWHC 1966 (QB) case is but one example of such a case. It is notable that no authority is cited in support of the approach taken by Tipples J. Further still, as noted in *Wallis v Valentine* [2002] EWCA Civ 1034, in which the court approved the dicta of Simon Brown LJ in *Broxton v McClelland* [1995] EMLR 485, the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse.

35. *Third,* insofar as reliance is placed upon the Appellant seeking remedies which were not open to the Court to order, the correct and lawful approach would have been to strike out those aspects of the claim, rather than the claim in its entirety.

Costs on an indemnity basis

36. At paragraph 107, having heard further submissions from the parties, the Judge ordered the Claimant to pay the Defendant's costs on an indemnity basis, primarily because the allegations advanced had no foundation. In the event that the Appellant succeeds in demonstrating that his contractual claims, properly analysed, do establish reasonable grounds for bringing the claims, the order for costs on an indemnity basis should fall away.

CONCLUSION

37. In light of the matters set out above, permission to appeal to the Court of Appeal is sought.

David Lemer

Doughty Street Chambers

27th August 2020

IN THE COURT OF APPEAL, CIVIL DIVISION **A2/2020/1223**

ON APPEAL FROM TIPPLES J IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION

BETWEEN:

MARK HOWELL **Appellant**

-and-

DAVID EVANS (sued as a representative of all members of the Labour Party except the Claimant and the Second Defendant) **1st Respondent**

Iain McNicol **2nd Respondent**

NOTE ON APPELLANT'S APPLICATION TO RE-OPEN APPEAL

Introduction

1. This short note is drafted to assist the Court in determining the Appellant's 17th May 2021 application to re-open his appeal, following the refusal of permission by Davies LJ on 14th May 2021.

Legal Framework

2. It is recognised that the Court's jurisdiction to re-open a final appeal should only be exercised exceptionally. The relevant requirements are set out at CPR 52.30 which provides, materially, that the Court will not reopen a final determination of any appeal (which includes an application for permission to appeal (CPR 52.30(2)) unless:

    a. It is necessary to do so in order to avoid real injustice;
    b. The circumstances are exceptional and make it appropriate to reopen the appeal; and
    c. There is no alternative effective remedy.

3. The Court recently considered the jurisdiction in the case of *Wingfield v Canterbury City Council and Redrow Homes* [2020] EWCA Civ 1588, in an attempt to re-state the applicable principles. The following propositions can be derived from the judgment:

    a. Finality in litigation is a general rule of high public importance. It would subvert the arrangements that have been put in place if unsuccessful litigants could revive the same arguments repeatedly and without limit, thereby prolonging proceedings and delaying a certain and final outcome.
    b. The final determination of an appeal, including a refusal of permission to appeal, will not be re-opened unless the circumstances are exceptional.
    c. There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy.
    d. The paradigm case is fraud or bias or where the judge has read the wrong papers.
    e. Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality.

Application to the present case

4. The Appellant's application is premised upon the concern / contention that in considering and determining the permission to appeal application, Davies LJ was not aware of the contents of Parts 2B and 7A of the core bundle.

5. Part 7A is a *'consequential note*', produced following receipt of the transcript of the hearing, which:

    a. Identifies those passages of the transcript which provide support for the appeal.
    b. Seeks to amend the appeal to include an application for *"an extension of time to issue an appellant notice against the order of* [Tipples J] *of 21st January* [2020]*."*

6. Part 2B consists of an annex to the appellant's notice which contained a large number of amendments to the grounds of appeal, as well as making reference to an application for an extension of time to appeal against the order of Tipples J, dated 21st January 2020, in the case of Howell v Hayward, appeal reference QA-2019-000300.

7. It is recognised that the present appeal involved a large volume of documentation, but it is not apparent from the refusal of permission that Davies LJ did have sight of the aforementioned documents, particularly since:

8. *Firstly*, the reasoning of the refusal of permission is expressed in summary form.

9. *Secondly*, the Appellant's extension of time application (whether meritorious or not) is not referred to at all.

10. *Thirdly*, paragraph 3 of the refusal of permission concludes that, even if the Appellant's arguments as to standing were viable, the contractual claims were unsustainable since the Judge made no error of law in concluding that:

    a. The terms relied upon by the appellant did not impose the pleaded obligations on the defendants
    b. The Appellant had no third-party rights under the defendant's respective contracts of employment.

11. As regards point (a), Tipples J's conclusions were materially premised upon the conclusion that the Appellant had been seeking to make the Defendants personally liable for alleged breaches of the rules of the Labour Party (see paragraph 64 judgment). The Appellant's amendments to the grounds of appeal within Part 2B had expressly addressed that point, stating:

    a. *"The judge wrongly stated (at 64): 'The whole purpose of the Claimant's claims in contract against the Defendants is to make them personally liable in damages in respect of alleged breaches of the rules of the Labour Party.' Rather than that it is, on the contrary, a representative claim against the party, except where it is expressly stated to be against the second defendant*

for reasons equally expressly stated. It is the judge who has 'missed the point', and the arguments referred to at paragraph 63 of the judgment have been unreasonably dismissed."

12. Davies LJ's refusal of permission, without reference to the Appellant's attempt to address Tipples J's rejection of his contractual claim, lends support to the suggestion that the relevant additional documents were not before her.

13. As regards point (b), the Appellant, again, amended his grounds of appeal in Part 2B. The amendment stated, as follows:

a. *"The judge (at 74) misstates Rule Ch 2 II 7 as being limited only to disciplinary matters when it unconditionally and without limitation states 'Party officers at every level shall exercise their powers in good faith'. The powers the second defendant uses in bad faith are pleaded at 24 of the particulars, which gives rise to a breach of the contract between the second defendant and the first defendant, to which the claimant is a third party. With reference to Section 1 of the 1999 Act, far from not intending the term to be enforceable as part of the Members' Charter it is clearly intended to confer a benefit on me."*

14. The refusal of permission did not expressly address the argument advanced by the Appellant, again supporting the possibility that the Davies LJ did not have all of the relevant papers when determining the application for permission to appeal.

15. Whilst plainly the CPR 52.30 jurisdiction is an exceptional one, the present case, in which material relevant papers do not appear to have been before the Judge, fits into the paradigm identified by the Court of Appeal in ***Wingfield.*** Further, this is not a case which will give rise to abusive repeated applications to re-open, since a relatively simple inquiry of the Court file should establish whether the Appellant's concerns are borne out.

David Lemer

Doughty Street Chambers

21st June 2021