

PO v BATES: THOUGHTS ON DRAFT NOTICE OF APPEAL OF 10.4.19

Generally

While it covers almost all the points admirably, the NA is too long, diffuse and unfocussed.

It is admittedly difficult not to be given the very long, diffuse, repetitive and unfocussed nature of the judgment, and the many interlocking issues.

Suggestions:

1. Include an introductory section, setting out as crisply as possible and in very general terms, ie very very summarily, what this case concerns (eg what the SPMC and NTC are), how the trials are divided up, what issues are raised in this trial, how we say the judge went wrong. This is simply to enable the CA to get its bearings.
2. Probably deal with the interpretation issues first. Psychologically better as familiar stuff, and may look aggressive/defensive to deal with recusal/findings of fact first. Also emphasises that we rely on normal principles to challenge the J's conclusions.
3. I had wondered if we should deal with interpretation on a clause basis rather than an issues basis – eg consideration of termination provisions or clause 12.5/12.12 comes up more than once – but given the judgment structure, we should probably stick with what we've got
4. I am not sure if errors of fact are much of a free-standing ground of appeal: a couple are just about relevant to one or two interpretation issues and a couple are relevant to the recusal application. In so far as they are not dealt with in recusal or interpretation, they are pretty marginal and should be dealt with at the end of the NA
5. Throughout the NA, keep the argument much shorter, so the NA as a whole is shorter.
6. While it may make the NA longer we should very briefly explain what an issue is when we deal with it – eg para 12: “The Judge held that the SPMC and the NTC were ‘relational contracts’, and that therefore there was an implied term of “good faith and fair dealing”, which in turn permitted him to imply a number of other terms”.

The various grounds of appeal

Common Issue 1

Definitely appealable. We should make the point that, even if this is a relational contract (whatever that is), it was wrong to imply a “good faith and fair dealing” provision. It is an innovation which should never have been invented with all due respect to Leggatt J. Contrary to principle, vague and anyway when is a contract relational – or rather when is it not relational? The three/six month notice provision in this case demonstrates the problem. Points 15(1) to (6), including (5)(a) to (d) are fine and dandy, but too detailed for this document.

Common Issue 2.

A Terms implied relationally.

Generally: Definitely appealable. Para 19 spot on.

Termination on notice. Probably worth quoting clauses, and need not say much more.

Summary termination. Surely it's enough that the ground for summary termination exists: if it doesn't then termination would be unlawful.

As to other terms: paras 24-26 yes, but shorten; and we have to deal with each one, albeit some can be dealt with together and all can be dealt with shortly. Para 26 could usefully set out v shortly (more like para 29) the various grounds of objection and say that all or most of these grounds apply to each of the specific implied terms dealt with in this section of the NA.

As to other specific terms: Implied term (m). Appeal, although (m)(ii) may be a good term if it means that the legal onus is on the PO to show that there is a shortfall, but depending on the accounting obligation of the SPM it may be that the fact is self-evident in almost all cases. I doubt (m)(i) or (iii) is justified. Shorten para 28 a lot.

Implied terms (n) and (o). Appeal. (o) probably wrong – does it apply both ways? If so, the contract could be unterminable. The points in para 29 apply generically, so presumably we could include in para 26. (n) probably wrong too. Also contrary to plain words

B. Terms implied for conventional reasons

(t) Difficult I agree. We could say we don't accept as a matter of law, but we are content to live with it – possibly on *Stirling v Maitland* grounds.

(a) Ditto

(b) Difficult as quite attractive, but computer system not there. I think if supplying a computer system which SPMs had to use, a sort of sale of goods implied term is a pretty strong contender

(n), (o), (q) and (r): (n) and (o) dealt with above. (q) and (r) more problematic. I would be inclined to say probably okay apart maybe from “good faith”.

(c) and (d). Probably appeal (d) but probably not appeal (c).

Common Issue 3

Appealable I don't terribly like general declarations of this sort. It should be sufficient to say that all powers and discretions can only be exercised for the purpose for which they are granted. No need for good faith.

Common Issues 12 and 13

Appealable, but the Judge could well be right on these issues. First, the mere description of the role of agent is something of a throw-away, and ultimately the nature of the relationship is ultimately a question of law not party-labelling – see *Street v Mountford*. Nonetheless, agency might well be the right analysis: the business remains that of the PO and the SPMs are not employees: unless independent contractors, why are they not agents? But, even if they are agents, there may be force in the point that the parties have spelt out the extent of the duty to account etc, and the normal fiduciary duty is displaced. (Mirrors some of our objections to the J's other implied terms). There is an argument to be had here, if we want to raise it.

The points in paras 50-54 are different. We should maintain them if they affect the outcome on the Common Issue 12 and/or 13, but otherwise they simply provide a little bit of arguable support for saying he should be recused and/or for saying reverse them because of effect on future trials. They should be much shorter

Common Issue 8

Liability for SPM error

Rather a dry issue. I suspect that the legal onus lies on the PO to show that there is a loss and that it is due to negligence, carelessness or error, but on the facts, the existence of loss and the presumption of cause will get PO home in most cases.

Paras 59-63: the comments on paras 50-54 apply

Liability for assistants: Not easy. Judge's view could be right, but arguable. Perfectly proper point to appeal on.

Common Issue 9

I am not entirely clear what point we want determined

Common Issue 16

Definitely appealable on both the SPMC and the NTC. The Judge was in my view wrong to say not less than three months opens the door to discretion (para 894 of judgment).

Common Issue 15

I agree with what is said in paras 78-83 of the draft notice: Judge right about repudiatory breaches, but wrong about good faith: either there are good grounds – ie repudiatory breaches – or there are not.

Common Issues 17 and 18

Appealable. The finding that *Autoclenz* applies is made in the alternative, but if PO succeeds on its appeal re notice (and I think it will) this becomes relevant. I think the Judge was wrong on this too. *Autoclenz* was a finding of fact case, and an unusual one at that: the Judge's basis for his conclusion is rather different, and, while not incoherent, wrong in my view.

Common Issue 14

Appealable. I think the words are plain and there is little room for any implied terms. It is a right but to say it isn't a discretion doesn't take things much further. I am a bit puzzled by the implication of the word "legitimate" before "interests". I suppose that the illegitimate interests are excluded, but what does it mean? PO was right in para 86(3) concession: that is probably all that is needed. I doubt the further implied term re the PO not being in breach is correct.

Common Issues 5 and 6

All appealable, although the Judge's conclusion that certain clauses were onerous and unusual may be correct, but the point in each case is arguable, although I think the PO's case is strong on termination (para 100 of NA) and pretty strong on withholding payments (para 99 of NA) and claiming reimbursement (para 101 of NA).

Common Issues 7, 19 and 20

UCTA arguments are frequently difficult, and the PO's case is well arguable on issue whether UCTA applies as the Judge held it did (para 103 of NA); it may well do

On the specific clauses, even if UCTA applies, the PO has a reasonable case generally, and a powerful one on termination (para 112 NA) and a pretty powerful one on suspension (para 108ff NA) and exclusion of damages (para 113ff).

SPMC holdings on effect of documents

Bates: Arguable at least. Does it go to any issue? Do we want it (i) to provide some assistance to out recusal application and (ii) to discharge the finding as it may affect conclusions reached in subsequent trials? Can paras 117-119 not be cut down?

Error in fact

Paras 120-140. Ditto Can't we cut this down substantially?

DEN

12 April 2019