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BATES V. PO

NOTE

Basis of an appeal

1. The first point to make is that we will need to be clear as to what parts of the Judgment we can (and will) live with- and those which we wish to challenge. We must be disciplined and identify the particular (main) points – rather than falling into the (obvious) trap of seeking to appeal everything. The Court of Appeal only has limited patience and appetite. There is a danger if we throw everything in – then we will leave with very little.

2. Permission to appeal is required and must be based on demonstrating that there is a "reasonable prospect" of showing an error of law. Put very simply, such error can either be:
   (a) In the construction of a document or application of a principle of law.
   (b) A finding made following a serious procedural irregularity.
   (c) A finding of fact which was not open to the Judge (ie. close to perverse) and which should not have been made. This is very much harder than an appeal under (a) – and is discouraged by the Court of Appeal as it requires extensive and time consuming study of transcripts of evidence.

3. Permission to appeal must be obtained either from the Judge or from the Court of Appeal (in the notice of appeal). The Judge is unlikely to grant permission. There is an outside possibility that he could grant permission on the "relational contract" point. But it is very unlikely given the tone of the Judgment. We

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will not be in a position to seek permission by next Friday/following Monday (in all likelihood) as we would like to have the opportunity to properly prepare draft/ grounds of appeal to put in front of him– but will probably need to appear before him subsequently on a Friday during the Horizon trial.

4. Generally the Court of Appeal considers permission to appeal applications on the papers alone – without a hearing. But it can order a hearing if it considers it necessary. It is therefore important to ensure the paper application is as strong as possible as there is no *right* to an oral hearing. The appeal could be rejected on the papers alone and then that is the end of the appeal. Given the issues and nature of this case I think it likely that the Court of Appeal would order a hearing.

5. Notice of appeal (to the Court of Appeal) must be filed within 21 days of the hand down of the Judgment – unless extended. The Judge has already indicated that he is minded to extend this time period.

6. Optimal timing – is as soon as possible. But it is important that time is taken to do the job properly, to (a) interest the Court of Appeal in what has gone wrong here, and obtain permission from them; (b) appeal the right points in the right way. We should give ourselves at least a month from hand down of the judgment to do a proper job on this - ideally longer as most of the team are going to be involved in the Horizon trial during this period. An appeal requires both grounds of appeal and the skeleton argument in support. This is a very significant task and an important one. There is a lot of material to be picked through.

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Prevent judgment being handed down/stayed pending an appeal

7. There is no possibility in this case of preventing hand down of the Judgment.

8. As to a "stay", there is no "act" PO have been ordered to do under this judgment which is capable of being stayed. The Court has (or should have) declared the legal nature and effects of two species of contract and the relationship arising out of that. There is nothing to stay.

9. We should ask the Judge at the handing down to order that Trial 3 be stayed in the event that permission to appeal is granted by the Court of Appeal. I say this because that trial is applying the results of the Common Issues trial –which will be under appeal. If he refuses (which he has indicated he is likely to do) we will appeal that ruling to the Court of Appeal at the same time as the other matters.

Target/merits of appeal

10. I consider that the appeal should definitely have two main limbs - which I will expand upon below:

(1) His errors in construing the SPMC and NTC contracts, the terms to be implied into them, and the relationship that arose as a result- together with the issues on onerous/unusual and UCTA. That is the straightforward "standard" appeal.

(2) The gross procedural unfairness exhibited by his making findings of fact on unnecessary matters based on partial information and, the use of such and other findings of fact which he fed into (1).

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11. I consider that Post Office should also carefully consider whether the conduct of this judge in this matter under (2) is so serious such that a reasonable independent observer would think that he is biased (whether or not he is) – and should therefore seek his removal as "Managing Judge" of this GLO. There is a very high threshold to justify such an application. This is undoubtedly the nuclear option – but this Judgment is very bad indeed. The way he has conducted himself in this matter in my view is unjudicial and is unprecedented.

Procedural irregularity appeal

12. I consider that there are good grounds to launch an appeal on the basis of gross procedural irregularity.

13. Take for instance the way he criticizes the evidence of Angela – mainly because she did not cover all the topics he would have liked (see: para.544). But that was because – as she made clear- she was advised it was irrelevant (which it was). As to this:

(1) We had virtually no responsive evidence on the irrelevant evidence they introduced. He knew this and repeatedly comments (adversely) on our lack of evidence.

(2) We told him repeatedly that that material was irrelevant AND that we could not fairly respond.

(3) At trial Claimants did not seek to justify the legal admissibility of most of the material. There was a very obvious risk they were trying to skew his perspective.

(4) There was no good reason for him to comment at all – and he was specifically warned of the risk of so doing (see: para

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35) –given his role in future litigation. He did not have to make any findings on it for the purposes of resolving any of the issues – applying the law in the way he says he was doing.

14. In that context, the decision to comment at all demonstrates hostility (or would be perceived by an independent observer as doing so). It would seem to be an attempt to chasten Post Office – and that must involve an assumption that Post Office will lose on the relevant issues.

15. The softer way to get in the subject of procedural irregularity – and his possible recusal – is to concentrate on the extent to which he has over-reached himself and made findings or indicated a particular stance in relation to questions that will need to be determined in the future. And has done so without hearing all the relevant evidence from both sides. As such he has placed himself in a positon whereby he can no longer be an independent tribunal. In this way – we can make the Court of Appeal more comfortable with the possible suggestion of the Judges removal as the Managing Judge without seeking to castigate him unduly for all his other potentially bad behaviour– which they will be very unlikely to do.

16. At one point he criticizes all Post Office's witnesses for thinking there is nothing wrong with the Horizon system (para.545). Unless it is unreliable this comment makes no sense. He is criticizing PO witnesses for having a view which might be correct – depending on the decisions he makes in subsequent stages.

17. There are many examples of this type of behaviour sprinkled throughout the judgement. By way of example:

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(1) Making of GLO "opposed by Post Office" (para.12) – notable "Post Office did not seek to appeal" making of the GLO- this is untrue and he has been told this before and actually been sent the relevant correspondence evidencing this.
(2) Post Office style of giving evidence: glide away from pertinent questions (para.375).
(3) Makes no findings BUT PO attitude could be perceived as "threatening, oppressive ….." (para. 517 and 519).
(4) Post Office appears determined to fight every issue, make resolution of this intractable dispute as difficult and expensive as it can" – a rant, untrue, and no particulars or examples given.
(5) "Post office *edifice* would collapse" (para.123). This suggests general pre-judgment by him.
(6) Excessive secrecy – redacting names on emails: (para.560(1)) – when PO received them in this form. "I do not consider that they can be a sensible or rational explanation for any of them…" Importantly, he is making independent inferences, not based on the Claimants' submissions, and on which Post Office has had no opportunity to comment.
(7) Finding all the facts in para.569 which were not necessary and which he did not apply. Including findings on Horizon (see:eg. Fact 34) – which he expressly said he was not going to make. See also (para.819) on this.
(8) Impose draconian effect upon SPM's – behave with "impunity and oppressively" (para.722). And para.222 (oppressive behaviour).
(9) PO answer to nobody but themselves and wield power with impunity (para. 524 and 724)

18. These are not just findings in the case that he should not be making because they are not relevant to the findings that he is making. They are also indications of his attitude to PO –

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which will be applied as Managing Judge going forward. They are very extreme comments – and completely unjustified.

19. Someone needs to be tasked with identifying them all. We will then be in a better position to advise on whether seeking to remove him is the right way to go. It is certainly a dramatic option of last resort. I have never had occasion in 25 years of practice to even consider doing so. There is a very high threshold to pass and the Court of Appeal would need to be persuaded this was not just a disappointed litigant seeking to take it out on a Judge with whom they disagreed. The other side will obviously object and say that all his knowledge/ familiarity with the case makes it essential he remains the Managing Judge.

20. The fact that he is the Managing Judge in a GLO and so is due to hear *future* trials is a special and odd feature of this case. In a normal one off case, a Judge can, in effect, sound off as much as he likes. Here – this behaviour and these comments may well indicate at the very least an appearance of bias. As noted above, by concentrating on the fact that he has made adverse findings which he should not have made in this trial on the evidence before him – should be the main focus- as the Court of Appeal will be more comfortable with that.

21. The problem with making such an application is obvious – particularly if it does not succeed. And it would appear that the normal procedure is to first make the application to the Judge to recuse himself (as recently occurred in the British Airways' Air Cargo case; although the Court of Appeal has suggested it would be better, if possible, for another judge to hear a recusal application, in practice that largely lies within the discretion of the original judge: El Farargy [2007] EWCA Civ 1149). And then appeal that when he refuses. With all that that entails.

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22. That said, if we get before the Court of Appeal and they are interested (and shocked) by the procedural irregularity points – then if we have *not* made the application to remove him – they have very few options other than to return the case to him. The prospect of appearing back before the Judge following a successful appeal against his judgement (including for serious procedural irregularity) seems to me to be sub-optimal.

23. It might even be worth instructing separate Counsel to consider this point on recusal – as having been so involved in this it is difficult to be truly objective. And this is not a normal situation. Also, given the Horizon trial is about to begin tomorrow any such application would need to be heard after that case had concluded – but not necessarily before he had handed down judgment.

24. But *whether or not* we mount an application to remove him – we should appeal against factual findings he has made on the basis of procedural irregularity. These facts will need to be chosen with care- but will include factual findings made against PO witnesses where possible.

25. Our position would likely be that a re-trial (which is a theoretical possibility) is not necessary. Otherwise our approach will be very unattractive. Our position would be that the Court of Appeal can determine what the law is – and all these facts he has found are (largely irrelevant). As to those adverse findings of fact – we would ask that they be quashed. This would leave the findings of fact on the individual Claimant and what documents they received etc. We would need to decide if we could live with them – in the individual cases. I think it would be difficult to attack them.

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26. It would be a good idea if someone could prepare a table of all the adverse factual findings he has made – and analyse the precise procedural unfairness and the evidence we could and would have brought to bear on the issue if we had known that this was the course he was going to take.

Standard Appeal

27. The standard appeal raises a very large number of issues. Two opening general points:

(1) there is no reasoning in the Judgment or authority or point raised by the Judge or the Claimants that persuade me that the legal analysis provided to Post Office in our Opinion is wrong.

(2) Although he denies it, it is clear that the Judge has made a significant error identified by the Court of Appeal in *Bou Allan* – namely to decide questions of implication (and in this case construction) based on what happened post contract. That is what the huge weight of evidence and adverse findings go to. The law clearly provides that he must judge the matter as at the date of contracting. But it is clear that he did not. This is something that we warned him about constantly. It is a huge error. His attempt at justification (at para.568) is in my view weak.

28. Given the early stage (and haste) with which this Note is being provided I am not going to deal with each of the very many issues we might want to appeal – but will deal with the main issues by way of the main themes and only briefly. I consider that PO have reasonable prospects of success (where indicated) on the matters set out below:

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(1) Incorporation: We are stuck with his factual findings about who received what bit of paper and when they did so - as this relates to the contractual documents. These are findings of fact that it will difficult to sensibly challenge. That said, the Bates non-receipt of contract is tempting to appeal simply because his reasoning shows how biased he is.

(2) Clause 12 12 of SPMC: Burden of proof: He is wrong as a matter of construction of that clause. This is a matter I would appeal on. He (deliberately ?) misstates/misunderstands our argument that the loss or deficiency covered by the clause must first be demonstrated by PO as regards potential bugs in Horizon. Paragraph 674 shows that he is confusing the proper meaning of the clause on the one hand, and how he saw it potentially operating on the other. He is thoroughly confused. An allied and crucial point is his construction of the word "loss" meaning real loss and requiring Post Office on the face of it to be able to demonstrate a "real loss" to be able to recover (para.687) and not to be able to rely on the Branch Trading Statement to demonstrate this. However this point is unclear and needs clarification by him when handing down judgment –see: e.g.paras. 842 and 853. This point also inter-leaves with the implied term (m) – dealing with the steps necessary by PO before it can enforce a debt. What is not clear, and needs clarifying – is the inter-relationship between say a "clean" BTS and a later claim by a SPM that it should have contained various amendments/changes. What is the role, if any, of his meaning of "loss" and of the procedure set out in implied term (m) in such a situation ? This is obviously crucial.

(3) Clause 4.1: Construction: He should have construed this as involving (implicitly) a fault based system: akin to clause 12

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12. Given that he has implied clause 12 12 into the NTC query whether this is a satisfactory outcome – or whether we would appeal this? Note that he has not implied the second part of the clause dealing with assistants (para.1103) - query whether the SPM would be vicariously liable for their acts given that he employs them? We have reasonable prospects of success on the construction of this clause. He construed it narrowly so he could then (cynically) strike it down as unreasonable under UCTA.

(4) Termination on notice clauses - both SPMC and NTC: "not less than" wording is relatively standard and does not mean it is a discretion and must be exercised in good faith etc. We have a strong argument on this – and this has wider application in the law of contract. The Court of Appeal can be expected to be very interested in this.

(5) Implied term of good faith/fair dealing: we have a reasonable prospect of success in persuading the Court of Appeal that this is not a "relational contract" – and even if it was, the terms implied on the back of that (both the good faith/fair dealing) and the many "incidents" of that implied term are not "necessary" – particularly given the Agreed Implied terms – which he all but ignored (and indeed dismissed, oddly, as on a 'pleading point'. This is astonishing). Again – the Court of Appeal can be expected to be very interested in how far the judge appears to have taken this concept.

(6) Implied terms based on necessity alone: we have a reasonable prospect of success on each of the terms he implies on this basis, that is, (a) to (d), (m) (n),(o)(q)(r)(t) and (u). I agree that implied term (m) is particularly onerous and difficult to justify.

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(7) Finding that the Branch Trading Statement is not subject to the normal rules of agency is difficult to justify – and we have a reasonable prospect of appeal on this point. It is not clear to me what the Judge's position on this is as he only deals with a BTS in a period where the SPM *has* notified a dispute. It was and remains our position that a SPM cannot be "bound" by a BTS *in relation to entries that he disputed at the time of submitting* such BTS (although the Judgment does not record this). What of the position of a BTS for a period where there is no such dispute – and then in the litigation they try and re-open it? That was, and is, obviously an important example. As noted above, we need his urgent clarification on the BTS and how, in his view it operates with the SPMC and NTC.

(8) Onerous and unusual: I do not think that the notice provisions or the exclusion of compensation for "loss of office" are "onerous and unusual" – and I think we have reasonable prospects of persuading the Court of Appeal of this.

(9) For the NTC: I think we have good arguments that signing the NTC and being told to take legal advice were sufficient. I would expect the Court of Appeal to agree. The SPMC turns on individual facts - as to what "notice" they were given.

(10) UCTA: I consider that we have good arguments that UCTA does not apply to this contract – and also that clause 4.1 is not unreasonable within the meaning of the Act. The judge's attempt to distinguish the relevant authorities was weak. I reach a similar view about the termination provisions considered at paragraph 1107.

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(11) Regarding suspension and depriving SPM of payment – we conceded an implied term which the Judge seems to have ignored when considering UCTA?

DCQC 10/3/19