

Rationality, Reasonableness and Abuse: The law on the exercise of contractual discretion following *Braganza v BP Shipping*

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1. Contracts often confer a right on one of the parties to exercise some form of discretion which affects the obligations of one or other of the parties under the contract. There are countless varieties of such terms. Typically the party with the discretion (A) has a choice between alternatives which favour him and those which favour the other party (B), and is thus subject to a potential conflict of interest. It is not uncommon for B to be unhappy about the decision taken by A, especially where the decision favours A at the expense of B.
2. The question which the courts have had to grapple with is when and in what circumstances they can interfere with the decision taken by A. The issue raised in the recent Supreme Court decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17 is the manner in which “**reasonableness**” is required of the decision-maker, and the extent to which this follows the concept of reasonableness in the decision-making processes of government and other public or administrative bodies.

The position prior to *Braganza*

3. There have been many similar, if not identical, formulations of the test of the circumstances in which the court can intervene to overturn the decision made by A.
4. *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397 concerned a decision by a ship-owner to refuse to allow its chartered ship to proceed to a particular port on the grounds that it was unsafe in accordance with a contractual term allowing it to make such a decision. Leggatt LJ stated that the analogy between the exercise of judicial control of administrative action (i.e. judicial review) must be applied with caution to the assessment of the exercise of a contractual discretion, and explained:

*“The essential question is always whether the relevant power has been **abused**. Where A and B contract with each other to confer a discretion upon A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must*

*the discretion be exercised **honestly** and in **good faith**, but, having regard to the provisions of the contract by which it is conferred, it must **not** be exercised **arbitrarily, capriciously or unreasonably.**"*

5. The Court of Appeal upheld the judge's decision that the owner had acted unreasonably in the sense that there was no material on which a reasonable owner could reasonably have exercised the discretion in the way that he had done.
6. In *Paragon Finance plc v Nash* [2002] 1 WLR 685 the court considered the power of a mortgage lender to set interest rates under a variable rate mortgage. Dyson LJ held that it was an implied term of the loan agreement "*that the rates of interest would not be set **dishonestly, for an improper purpose, capriciously or arbitrarily***". He also considered that there was an implied term that "*a lender will not exercise his discretion in a way that **no reasonable lender, acting reasonably, would do***".
7. In *Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116, a case concerning the contractual right of one bank to value certain assets, Rix LJ summarised these and other authorities as showing that:

*"a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of **honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality**. The concern is that the discretion should not be abused.*

***Reasonableness** and **unreasonableness** are also concepts deployed in this context, but only in a sense analogous to **Wednesbury unreasonableness**, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. ... pursuant to the **Wednesbury** rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself.*

*... For the sake of convenience and clarity I will therefore use the expression "**rationality**" instead of **Wednesbury**-type reasonableness, and confine "reasonableness" to the situation where the arbiter on entirely objective criteria is the court itself."*

8. By substituting rationality for reasonableness, the court was echoing Lord Diplock's summary in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 of the grounds for judicial review:

*"By '**irrationality**' I mean what can by now be succinctly referred to as '**Wednesbury unreasonableness**'... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

9. A similar explanation of rationality was made by Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17:

"Rationality is not the same as reasonableness. Reasonableness is an **external, objective standard** applied to the outcome of a person's thoughts or intentions... A test of rationality, by comparison, applies a **minimum objective standard to the relevant person's mental processes**. It imports a requirement of good faith, a requirement that there should be some **logical connection between the evidence and the ostensible reasons for the decision**, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

10. But, as Baroness Hale pointed out in *Braganza v BP Shipping Ltd* [2015] UKSC 17, these various references to *Wednesbury* reasonableness (or unreasonableness) were not precise renditions of the test of the reasonableness of administrative decisions adopted by Lord Green MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233-234. His test had two limbs:

"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.

Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

11. As Baroness Hale explained:

*"The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former."*

12. The issue in *Braganza* was whether the first limb of the *Wednesbury* test applied to contractual discretions as well as the second limb, or whether only the second limb applied. All the members of the Supreme Court agreed that the first limb applied, as well as the second. Otherwise, as Baroness Hale explained, the court would be concentrating on the outcome and not the rationality of the decision-making process. *"Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker."*
13. However, despite this agreement about the test, the Justices disagreed about the result of the application of the test.

***Braganza*: the facts**

14. Mr Braganza was the chief engineer on BP's oil tanker, British Unity. Between 01:00 and 07:00 on 11 May 2009, whilst the ship was in the North Atlantic, he disappeared and was never seen again. It is presumed that he drowned.

15. Mr Braganza's employment contract with BP provided for his widow to receive benefits on his death, but subject to the following proviso:

*" compensation for death, accidental injury or illness shall not be payable if, **in the opinion of the company or its insurers**, the death, accidental injury or illness resulted from amongst other things, the officer's wilful act, default or misconduct whether at sea or ashore"*.
16. If, in the opinion of BP or its insurers, Mr Braganza had committed suicide, no death benefits would be payable to his widow.
17. BP set up an inquiry "to investigate the relevant circumstances leading up to the loss of Mr Braganza, identify if possible the root causes of the incident and identify any changes required to the BP Shipping safety management system". The inquiry was extensive, and concluded that the only possible scenarios for Mr Braganza's disappearance were suicide and an accidental fall from the ship. The inquiry identified certain "bullet points which suggested suicide", including:
 - 17.1. Mr Braganza's behaviour on the voyage had been different from previous voyages, in particular in relation to record-keeping;
 - 17.2. Mr Braganza had received emails from his wife which suggested that he was worried about something, such as *"I really cannot figure out what has shaken you out so much that you seem to be so afraid of life"*;
 - 17.3. Mr Braganza was unhappy about the mechanical state of the ship;
 - 17.4. Mr Braganza was disappointed that a promised bonus had been withdrawn.
18. The report went through various drafts. The first had not mentioned suicide. The final version, after consultation with BP's legal team, concluded: *" Having regard for all the evidence the investigation team considers the most likely scenario to be that the chief engineer jumped overboard intentionally and therefore took his own life"*.
19. The report was forwarded to Mr Sullivan, the BP manager entrusted with making the decision. On the basis of the report, and without making any inquiries of his own, he concluded that Mr Braganza had committed suicide, and that his widow was not entitled to the contractual death benefits.
20. Mrs Braganza brought a claim in contract for death benefits totalling c\$230,000. She also brought a claim in tort for negligence for more than \$1,000,000. BP produced a supplemental report from the investigation team, responding to her criticisms of their first report. They pointed out that the weather conditions had been reasonably good at the time of Mr Braganza's disappearance, and that it was extremely unlikely that Mr Braganza could have fallen off the ship accidentally in these circumstances. They stood by their conclusion that suicide was the most probable explanation for Mr Braganza's death.
21. At first instance, Teare J rejected the claim in negligence (on the grounds that there had been no breach of duty – this was not appealed). He also held that the evidence was not sufficiently cogent to prove that the death had been suicide. However, he allowed the contractual claim. It was common ground that BP had to prove that its decision was "reasonable" in a *Wednesbury* sense. (The onus was on BP because the contractual clause

was an exclusion clause). The investigation team had not directed themselves that "*before making a finding of suicide there should be **cogent** evidence commensurate with or proportionate to the seriousness of a finding of suicide*". They had failed to take into account the real possibility that Mr Braganza had gone out on deck in order to check the weather to see whether it was safe to carry out work planned for the following day. Thus they had not been properly directed in law and had failed to take into account a relevant matter when forming their opinion. Their decision was therefore unreasonable.

22. The Court of Appeal overturned Teare J's decision. Longmore LJ considered that it could not be the law that a non-lawyer such as Mr Sullivan had to give himself directions about (for example) the cogency of evidence before forming his opinion. It would be impossible for him to give himself such a direction without taking legal advice of a kind which cannot have been contemplated by the requirements of the death benefit clause. If there had been a failure by the investigation team to consider whether there was a work-related reason for Mr Braganza to be on deck, that did not render BP's decision opinion unreasonable in the absence of a mechanism explaining how Mr Braganza could accidentally have fallen overboard. The conclusion of suicide was a reasonable one in all the circumstances.

23. Baroness Hale (with whom Lord Kerr agreed) explained that the case raised:

"two inter-linked questions of principle, one general and one particular. The particular issue is the proper approach of a contractual fact-finder who is considering whether a person may have committed suicide. Does the fact-finder have to bear in mind the need for cogent evidence before forming the opinion that a person has committed suicide?"

The general issue is what it means to say that the decision of a contractual fact-finder must be a reasonable one."

24. After emphasising that it is not for the courts to rewrite the parties' bargain and pointing out the conflict of interest to which the decision-maker is typically subject, she observed:

*"There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority. In neither case is the court the primary decision-maker. The primary decision-maker is the contracting party or the public authority. It is right, therefore, that the standard of review generally adopted by the courts to the decisions of a contracting party should be no more demanding than the standard of review adopted in the judicial review of administrative action. **The question is whether it should be any less demanding.***

20. The decided cases reveal an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context. But at the same time they have struggled to articulate precisely what the difference might be."

25. Baroness Hale considered that the same high standards of decision-making ought not to be expected of a contractual decision-maker as would be expected of the modern state, but concluded that it was "*unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action*".

26. After explaining that the need for cogent evidence did not mean that a different standard of proof was required, but merely that the more improbable the occurrence of the fact in issue the stronger the evidence needed to be to prove that fact, she held that, in an employment context where the employer owed the employee an implied duty of trust and confidence, there was a duty on the employer to take account of the need for cogent evidence to support a finding of suicide. Employers could reasonably be expected to inform themselves of the principles which were relevant to the decisions which they had to make, including issues of law.
27. In this case Mr Sullivan should not simply have accepted the investigation team's conclusion that suicide was the most likely explanation. The investigation had not been carried out for the purposes of his decision (but to see whether BP's systems needed to be improved). His task was different, and he should have asked himself whether the evidence was sufficiently cogent to overcome the inherent improbability that Mr Braganza had committed suicide.
28. In her view, the evidence was not sufficiently cogent. *"... there were no positive indications of suicide. There was no suicide note, no evidence of suicidal thoughts (apart perhaps from his wife's reference six weeks earlier to his seeming so afraid of life), no evidence of overwhelming personal or financial pressures of the sort which would be likely to lead a mature professional man to take his own life, no evidence of psychiatric problems or a depressive personality. The "bullet points" are at most straws in the wind. The two most significant are the e-mails and the record-keeping deficiencies. The cogency of the e-mails from Mrs Braganza is much diminished by the failure to ask her about them. The team's failure to do so is completely understandable, given the task which had been set for them. But the employer's failure to do so is much less understandable. Nor do the record-keeping deficiencies appear to have been explored in any depth"*.
29. Mr Sullivan had also failed to take into account the fact that (a) there was a work-related reason for Mr Braganza to be on deck (to check the weather) and (b) the fact that he was a Roman Catholic made it even more improbable that he would have taken his own life as he would have regarded it as a mortal sin to do so.
30. Even though Mr Sullivan's decision had not been arbitrary, capricious or perverse, it had been unreasonable in a *Wednesbury* sense because it had been formed without taking relevant matters into account.
31. Lord Hodge agreed with Baroness Hale, and referred to the paucity and the insubstantial nature of the evidence from which BP inferred that Mr Braganza had committed suicide. Suicide was inherently improbable for various reasons, including the lack of a suicide note, Mr Braganza's demeanour prior to his disappearance, and his religious faith. In *"reviewing at least some contractual discretionary decisions"* the court should take both limbs of the *Wednesbury* test into account, including those in an employment context.
32. Lord Hodge pointed out that in some situations, such as the award of a discretionary bonus, *"the employee is entitled to a bona fide and rational exercise by the employer of its discretion. The courts are charged with enforcing that entitlement but there is little scope for intensive scrutiny of the decision-making process. The courts are in a much better position to review the good faith and rationality of the decision-making process where the issue is whether or not a state of fact existed"*. He therefore appears to have been

suggesting that different tests could apply to different contractual situations (even within the same contract).

33. Lord Neuberger (with whom Lord Wilson agreed) disagreed with the majority over the result. He recited the facts in more detail, pointing out that there had been a number of emails from Mrs Braganza to her husband which referred to him being unhappy and stressed, mentioning criticism which Mr Braganza had received about work which he had done, and referring to evidence given by Mrs Braganza at trial about the money worries to which her husband had been subject.
34. He noted that BP's second report had addressed issues raised by Mrs Braganza over the first report. It had stated that the weather on the night in question had been relatively good for the mid Atlantic, and hence it was unlikely that Mr Braganza would have been washed overboard. Mr Braganza had been a safety-conscious individual, unlikely to take a risk which might have resulted in him falling overboard. He was unlikely to have gone on deck to consider the state of the weather because that assessment would have been made from the bridge by another officer. The safety standards on board had been impressive; *" it would be extremely unlikely that a person could trip, slip or fall in such a manner so as to fall overboard while carrying out normal shipboard duties and in the weather conditions which were known to prevail at that time."*
35. Lord Neuberger did not see that BP's duties as decision-maker were affected by the duties of trust and confidence in the employment contract. These added nothing to the to carry out the investigation with honesty, good faith, and genuineness and to avoid arbitrariness, capriciousness, perversity and irrationality.
36. He pointed out that the court was performing a reviewing function, not an originating fact-finding function. It should be cautious about interfering with the findings of fact of the decision-maker in the same way that an appellate court should be cautious about interfering with findings of fact made by a trial judge.
37. Lord Neuberger considered that BP had *" appointed a team of experienced people from different disciplines specifically to form a view as to how Mr Braganza had died, the team carried out what appears to have been a very thorough investigation .. and produced a full and meticulous report in which they expressed themselves in moderate and considered terms, and in which they concluded that, while Mr Braganza could have suffered an accident, that was very unlikely, and that the probable cause of his death was suicide... They then carefully reconsidered that conclusion following a request from Mrs Braganza and, sadly for her, confirmed it in a further carefully considered report"*. It had been reasonable for Mr Sullivan *" to consider the first report and adopt its conclusions, and, when the first report was challenged, to readdress the matter and to consider the second report and adopt its conclusions"*.
38. He identified seven grounds on which Mr Sullivan's decision had been impugned:
 - " (a) It was inappropriate for Mr Sullivan simply to rely on the reports, as they were prepared for a different purpose.*
 - (b) A finding that a person committed suicide amounts to an inherently improbable, serious or damaging conclusion which required more cogent evidence than was available.*

(c) Mr Braganza exhibited no signs that he was depressed or had suicidal intentions during the 24 or 36 hours prior to his death.

(d) The consequence of Mr Sullivan concluding that Mr Braganza's death was caused by suicide was so severe, namely, the loss of a death in service benefit, that it was not justified on the evidence.

(e) Mr Sullivan ought at least have directed himself as to the inherent unlikelihood of Mr Braganza having committed suicide.

(f) The investigation team, and therefore Mr Sullivan, failed to take into account the fact that Mr Braganza had good reason to go on deck in the early morning.

(g) Mr Sullivan's failure to ask Mrs Braganza about the e-mails impugned his opinion."

39. He considered and dismissed these various criticisms. It had been reasonable for Mr Sullivan to rely on the investigation reports because they had been carefully prepared. They had not been prepared for a different purpose because the cause of Mr Braganza's death was at the heart of their investigations. Although Mr Sullivan was not entitled unthinkingly to adopt the view of the team, once he was satisfied that the team had conducted a very thorough investigation, and had carefully considered all the evidence and had reached a conclusion with which he considered that he agreed, it would be little short of absurd to hold that he was nonetheless obliged in law to carry out his own separate investigation.
40. This was a case where there was a combination of reasons which were sufficiently cogent to justify Mr Sullivan's opinion, based on the two reports, that Mr Braganza had taken the unusual and tragic course of committing suicide. First, this was a case where it was clear that Mr Braganza had died at sea, and the only two plausible possible causes were accident or suicide. It was not a case where the issue was whether an unlikely event occurred; the issue was how an unlikely event, which undoubtedly had occurred, had actually been caused. Second, there was evidence of Mr Braganza being depressed and stressed. Third, the only alternative to suicide, an accident, was very unlikely for reasons which the investigation team had explained.
41. The fact that Mr Braganza had not showed obvious symptoms of depression in the hours before his disappearance did not mean that he had not committed suicide. The fact that his suicide would have serious consequences for his wife in relation to the death benefit was merely a factor to be taken into account in weighing the probability that he had committed suicide.
42. In circumstances where suicide was the more likely of the only two explanations available, *"it would, in my view, involve setting an unrealistically, and therefore an undesirably, high standard on investigators or writers of reports, whose investigations and reports are intended to have legal effect, to hold that the investigator or writer had to mention in terms that suicide was inherently unlikely"*.
43. Lord Neuberger concluded:
"it is not fairly open to a court to decide that the conclusion reached by the team in the first and second reports, and therefore the opinion formed by Mr Sullivan, fell foul of the test laid down by Rix LJ in [Socimer]. In my view, neither the conclusion reached by the

team nor the consequential opinion formed by Mr Sullivan can be characterised as “arbitrar[y], capricious, pervers[e] [or] irrational”, to use Rix LJ’s words... The two reports are .. impressive both in the extent of the investigations on which they were based and the care with which they were compiled, and the conclusion they reached was carefully and rationally explained, and Mr Sullivan cannot be criticised for relying on them.”

Discussion

44. It is remarkable that the most senior judges in the land should have reached such different conclusions when applying an agreed to test to relatively straightforward facts. It is difficult to escape the conclusion that the majority (a) were influenced by the effect of the decision on Mrs Braganza, and (b) were intent on substituting their own conclusion on the facts for that of BP. What they seem to be saying is that if they, as judges, had been asked to decide whether Mr Braganza had killed himself, they would have approached that question by referring to the need for cogent evidence to prove an improbable fact. BP were at fault in failing to approach these issues in the way that the court would have done.
45. They were only able to achieve this result by relying on the first limb of the *Wednesbury* test, and by including within that limb the requirement that BP should have taken into account a legal test, i.e. cogency of evidence. That seems incredibly artificial and unrealistic. In the innumerable circumstances in which contractual discretions are exercised, it cannot be realistic to expect the decision-maker to adopt such a legalistic approach. It would almost defeat the purpose of having a contractual discretion, and so it might be said to be re-writing the parties’ bargain.
46. It was accepted by all of the judges that the decision of BP was made honestly and in good faith, and was neither irrational, nor perverse, nor capricious. It was also not suggested that it was a decision which no reasonable person in the position of BP could reasonably have come to. It seems remarkable that BP’s decision could be dismantled by the court on the basis that it had failed to take account of an intangible legal principle, when it had evidently taken account of the material facts and had arrived at a rational conclusion.
47. The fact that two of the JSCs (and the three members of the Court of Appeal) found that BP’s decision-making process had been appropriate and that its decision on the basis of its investigations had been reasonable demonstrates that, at the very least, there was a range of reasonable opinions about what conclusion BP should have come to. That in itself is a reason why the Supreme Court should not have interfered with BP’s decision. Could BP really be said to have abused its decision-making discretion? It is notable that the majority of the Supreme Court chose to ignore the evidence that the possibility of Mr Braganza falling overboard by accident was very unlikely, and that BP’s investigation team had taken this into account.
48. As far as wider principles are concerned, *Braganza* signals a clear move on the part of the courts towards adopting both limbs of the *Wednesbury* test when considering decisions made in exercise of a contractual discretion. This invites closer scrutiny of the decision-making process because the party in question will have to prove that it took all relevant matters into account, and its decision may be knocked down if it is shown that it took account of an irrelevant matter – even if the decision which it made was a reasonable one.

Subsequent decisions

***Watson v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm)**

49. This case concerned an option agreement under which the Claimants were given the option to purchase shares in the Defendant company. The option provided that it might only be exercised with the consent of a majority of the board of directors of the Defendant. The agreement was silent about the factors which the board was take into account in deciding whether to consent to the exercise of the option.
50. The Claimants sought to exercise the option. The board of the Defendant voted not to consent to the exercise of the option. The Claimants issued a claim for specific performance.
51. After rejecting an argument that the option was not an option, HHJ Waksman QC held that the veto available to the board "*must constitute a discretionary power subject to implied limits on the part of Watchfinder*". He regarded it as now well-established that the power was such to implied limitations on the exercised of the discretion which he labelled "**the Braganza Duty**" and which he helpfully summarised as follows:

"The fulfilment of that duty will entail a proper process for the decision in question including taking into account the material points and not taking into account irrelevant considerations. It would also entail not reaching an outcome which was outside what any reasonable decision-maker could decide, regardless of the process adopted.

103. As noted in Braganza, however, the duty does not mean that the Court can substitute what it thinks would have been a reasonable decision. Further it may well not be appropriate to apply to contractual decision-makers the same high standards of decision-making as are expected of the modern state."
52. In that case the "**target**" of the duty "*in the sense of what the decision-maker is meant to be considering when deciding whether or not to exercise [the discretion]*" was not clear from the agreement. He therefore had to decide, as a matter of construction, what the target had been. He found that the target had been whether the Claimants had made a real or significant contribution to the progress or growth of the Defendant between the date of the grant of the option and the date of its exercise.
53. Having made that finding, he had little difficulty in concluding that the directors had not fulfilled the Braganza Duty. They had not appreciated that they had any such duty, and had believed that they had an absolute right of veto. There was no evidence that they had exercised any discretion, let alone taking consideration of material factors, such as what contribution, if any, the Claimants had made to the growth of the Defendant.
54. The judgment suggests that, in order to demonstrate that they had fulfilled the Braganza Duty, there would have needed to be evidence that the board had considered the factors material to the exercise of their discretion. Such evidence would probably have had to include board minutes and/or witness evidence from the various directors, the implication being that the burden would have been on the Defendant to prove that it had complied with the Braganza Duty. On the facts of the case, it may well have been appropriate for the Defendant to bear that burden because the discretion was exclusionary in nature. However, if the question is whether the decision-maker took all material factors into

account in the exercise of its discretion, then it appears that he may bear the burden in all cases in which his decision is called into question.

55. To put it in crude terms, it is not enough for the decision-maker to show that he did nothing wrong; he must show that he arrived at his decision by the correct route.

BHL v Leumi ABL Ltd [2017] EWHC 1871 (QB)

56. Judge Waksman adopted the same approach in *BHL v Leumi*, a case in which the contract allowed the Defendant finance company to charge the Claimant a fee of up to 15% of the amount of debts collected by the Defendant for the Claimant. The Defendant duly charged the full 15%. The judge determined that the “target” was the estimated cost and expense of collecting the debts. The discretion was subject to the Braganza Duty.
57. The judge found that the Defendant had not exercised any kind of discretion: it had simply charged the maximum fee of 15%. Moreover, there had been no attempt to calculate what the cost and expense of collecting the debts would be. The decision to charge 15% was wholly arbitrary and irrational, and failed to take into account important relevant factors.
58. Having arrived at that decision, the judge then carried out the exercise of determining what an appropriate fee would have been, had the correct decision-making exercise been carried out. He concluded that it was 4%. The fees paid to the Defendant under the fee of 15% had been paid under a mistake of law, and it was ordered to re-pay the overcharged fees to the Claimant.

Hills v Niksun Inc [2016] EWCA Civ 115

59. This was a claim against the Defendant employer about the exercise of its contractual discretion concerning the split of a bonus between various of its teams. The Court of Appeal agreed that the discretion had to be exercised in accordance with the principles set out in *Braganza*. Of particular note is its decision that, once the Claimant had established a prima facie case that the decision was “unreasonable”, the burden shifted to the Defendant to prove that it had been “reasonable” (par Vos LJ):

“The claimant, Mr Hills, had the burden of proof, but once he demonstrated that there were grounds for thinking that Niksun’s decision was not reasonable (as he did here by pleading and relying on Mr Denton- Powell’s evidence), the evidential burden shifted to Niksun to show that its decision was reasonable. That is not precisely what Baroness Hale said, since the point as to burden of proof was conceded in Braganza, but it is, in practice, consistent with it.”

60. The court concluded that the Defendant’s decision had not been reasonable on the face of it, but also noted that *“the absence of any evidence as to the way the decision was taken is problematic for Niksun. The decision might have been taken rationally and it might not. The judge could not decide that the decision was taken rationally unless he at least knew what was actually taken into account...”*

... the judge would, I think, have been justified in saying that the absence of evidence from Niksun as to the decision-making process meant that he could not assume that the decision was a rational one. Niksun had certainly not discharged its evidential burden of showing it was...”

Conclusion

61. It appears that cases involving the exercise of contractual discretions will now be decided by application of the two limbs of the *Wednesbury* test, as explained in *Braganza*. In practice, if the person challenging the decision can cast doubt on the reasonableness (or rationality) of the decision, the burden is likely to shift to the decision-maker to prove that he acted rationally. To achieve this, he will have to show that he operated a reasoned decision-making process in which he turned his mind to the material considerations.
62. How far this duty extends is very unclear, but it seems likely that the courts will approach it by considering the seriousness of the outcome of the decision for those affected by the decision.
63. It is also unclear whether the court will be persuaded that the burden shifts to the decision-maker to prove that he arrived at his decision rationally if the outcome is not obviously unreasonable but he cannot explain how he arrived at his decision. It may be that *Braganza* should not be taken as providing any guidance on this point, because there was no dispute that the burden of proof lay with BP (because the discretion served to exclude BP's liability to pay the death benefit to Mrs Braganza). However, it seems likely, as subsequent cases have shown, that the courts will treat *Braganza* as signalling that the decision-maker must prove that his decision was rational even if the outcome was not obviously unreasonable.
64. BP did give evidence of its decision-making process. The process was not irrational; the outcome was not unreasonable. It is difficult to escape the conclusion that the attack made by the majority of the Supreme Court on BP's decision was driven by its dissatisfaction with the decision made by BP. Would (or should) it have made any difference if Mr Sullivan had stated in terms that he had taken into account the need for cogent evidence of suicide, and had then gone on to reach the same decision? Would the Supreme Court have taken issue with BP's decision-making process if it had been satisfied with BP's decision? Surely not. The decision appears to signal a willingness by the court to use artificial devices to attack the decision-making process to allow it to substitute its own opinion of the right outcome, even if the outcome of the original decision was not unreasonable.
65. If *Braganza* is taken to establish that there is some burden on the claimant to show that the outcome of the original decision was unreasonable, the decision of the majority of the Supreme Court in *Braganza* is troubling because there the "finding" of suicide was not obviously unreasonable. It was one of two possible explanations for Mr Braganza's disappearance, and it was not inherently unreasonable. It was arguably (at least) the more plausible of the two explanations.
66. On that basis, it appears that the threshold for casting doubt on the reasonableness of BP's decision would be very low – Mrs Braganza would simply have to show that there was another reasonable explanation for her husband's death – or, perhaps implicit in judgments of the majority, that BP would automatically have to prove the reasonableness of its decision, including the rationality of its decision-making process, because of the severity of the consequences of its decision for Mrs Braganza, and regardless of the plausibility of the explanation of suicide.

67. Once the burden had passed to BP to prove the rationality of its decision and it had failed to satisfy the court that it had complied with the first limb of the *Wednesbury* test, BP ceased to be entitled to make any decision about Mr Braganza's disappearance, and the court became entitled to take on the role of fact-finder and to impose its own "reasonable" decision. Although this approach may have been justified in *Braganza* because the parties agreed with such an approach, *Braganza* may encourage the court to interfere in the decisions of contractual decision-makers and to impose its own decision whenever it disagrees with the original decision. As *Braganza* illustrates, it will often be possible to find some factor which the decision-maker did not expressly take into account and which can be used to impugn his decision, opening the door for the court to force its way in.
68. Accordingly, *Braganza* offers opportunities for parties to attack decisions made by other contractual parties. For decision-makers, *Braganza* indicates the need to draft contractual discretions as tightly as possible, and to provide evidence of a rational decision-making process whenever a discretion is exercised.

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